STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1214

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 2, 1996

Mr. Duncan T. Osborne
[redacted]

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. Osborne:

I have received your letter of December 4. You have sought an advisory opinion "as a prelude to bringing a lawsuit" concerning the propriety of a denial of access to records by the Division of Alcoholic Beverage Control ("the Division").

By way of background, in September, you sent requests for records concerning four licensed establishments in New York City to the Division. The records sought include inspection reports and records relating to inspections by the Division, as well as any other records maintained by the Division pertaining to those establishments. The Division denied access to the records in their entirety for a variety of reasons, which will be reviewed in the ensuing commentary.

While it is possible that some aspects of the records sought might properly have been withheld, it is unlikely in my view that a blanket denial of access was appropriate or justifiable. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, I point out that the introductory language of §87(2) refers to the ability of an agency to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. From my perspective, the phrase quoted in the preceding sentence indicates a recognition on the part of the drafters of the statute that there may be situations in which a single record or report includes both information that must be disclosed and information that may be withheld. That phrase in my opinion also imposes an obligation upon an agency to review records sought in their entirety to determine which portions, if any, may properly be withheld. If, as

the result of such review, it is determined that portions of the records fall within one or more of the grounds for denial, those aspects of the records may be deleted, but the remainder must be disclosed.

The denial of your requests refers repeatedly to "complaints, police referrals, inspection/investigation reports and all investigative materials related thereto."

It is assumed that the term "complaints" pertains to complaints made by members of the public concerning the establishments in question. 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" pursuant to §87(2)(b). 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 pertaining to the complainant may be deleted. The remainder of the complaint, however, would in my opinion be available, unless a different ground for denial could properly be asserted.

Section 87(2)(e) is cited throughout the denial, and 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."

The language quoted above provides agencies to withhold records or portions of records to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise by means of disclosure. As suggested earlier, records must be reviewed to determine the extent to which the grounds for denial might apply. While some or most of the records at issue might have been compiled for law enforcement purposes, if my understanding of their contents is accurate, the blanket denial of access was overbroad. If an inspection report indicates, for example, that certain violations were found, my assumption is that the proprietor of an establishment is so informed so that deficiencies can be corrected or perhaps to indicate the basis of a fine or penalty. When that kind of finding is made, none of the harmful effects of disclosure described in §87(2)(e) would arise, and there would likely be no basis for withholding under that or any other ground for denial. Further, often the harmful effects of disclosure may essentially disappear due to the passage of time or the occurrence of an event. If, for example, a crime is being investigated, and a journalist such as yourself or a member of the public requests records identifying suspects or witnesses or perhaps indicating the course of an investigation, it is likely that disclosure would interfere with the investigation and that the records could be withheld. Nevertheless, when arrests are made, it is likely that the same records would become accessible, at least in part, because disclosure would no longer interfere with the investigation; the investigation would have ended.

As in the case of the deletion of identifying details regarding complainants, names or other information identifiable to confidential sources or witnesses might justifiably be withheld. Other portions of records containing that information, however, might be accessible.

In a decision rendered by the Court of Appeals, the State's highest court, that focused on §87(2)(e)(iv), it was 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" [47 NY 2d 568, 572 (1979)].

Under the circumstances, disclosure of the records sought might result in the correction rather than the continuation of alleged violations, if indeed violations have occurred.

Section 87(2)(g) was also cited in the denial, and I believe that it is relevant to an analysis of rights of access, particularly because it might have been misconstrued. 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 the denial refers to inter-agency or intra-agency materials that are not "statistical or factual tabulations of data." As indicated above, however, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data."

Further, as in the case of provisions discussed 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.

In another aspect of the response, it was stated that:

> "You have been denied access to any information pertaining to the above captioned licensee which is inaccessible to the licensee under the provisions of the Personal Protection Law.
>
> "Where an agency maintains information pertaining to a particular data subject, and where such information is inaccessible to the data subject under the Personal Privacy Protection Law, a request under the Freedom of Information Law for the public disclosure of such information must be denied as an unwarranted invasion of the data subject's personal privacy."

The preceding statement in my opinion represents a misinterpretation of law. One aspect of the Personal Privacy Protection Law pertains to an individual's general right to obtain state agency records pertaining to himself or herself. Rights conferred by that statute upon individuals do not apply to certain categories of records, such as so-called "public safety agency records" [see §95(7)]. The quoted phrase is defined in §92(8) to include records of "any agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities..." and the like. The Personal Privacy Protection Law, however, is separate from the Freedom of Information Law. While an individual may not have rights of access under the former to public safety agency records, he or she may nonetheless have rights under the latter. By means of example, an inmate has no rights to records under the Personal Privacy Protection Law pertaining to his or her incarceration from the Department of Correctional Services because any such records would constitute public safety agency records Notwithstanding the absence of rights under that statute, numerous records would be

available to the inmate about himself or herself under the Freedom of Information Law (i.e., records of departmental actions regarding confinement and release, etc.). In short, therefore, even though an individual may not have rights under the Personal Privacy Protection Law, he or she, and even the public generally, may enjoy rights of access under the Freedom of Information Law.

In a somewhat related vein, it is assumed that the records sought pertain in great measure to business entities or persons acting in a business capacity. I note in this regard that there are several judicial decisions, both New York State and federal, which pertain to records about individuals in their business or professional capacities, rather than their personal capacities. One decision involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". Further, the court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed, for the data related to professional licensees acting in the performance of professional activities. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury

> explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

Insofar as the records sought might include personal financial information or a social security number, I believe that those kinds of items could be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy. On the other hand, to the extent that the records pertain to individuals acting in their business capacities, it is unlikely in my view that the privacy provisions in the Freedom of Information Law or the Personal Privacy Protection Law would serve as a means of denying access.

Lastly, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to obviate the necessity of engaging in litigation, copies of this opinion will be forwarded to Division officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Maris C. Hart, Deputy Commissioner
Adrian C. Hunte, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9216

162 Washington Avenue, Albany, New York 12231
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January 3, 1996

Mr. Jeffrey H. Greenfield
[redacted]

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. Greenfield:

I have received your letter of December 6. You have asked whether the Baldwin Fire District is required to disclose the names of the Board of Fire Commissioners under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

A fire district is a public corporation [see General Construction Law, §66, and Town Law, §174(7)]. Consequently, I believe that a fire district is required to comply with the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, there is no conceivable basis for withholding the names of the members of the Board.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9217

162 Washington Avenue, Albany, New York 12231
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January 3, 1996

Mrs. Helen Wistrom
[redacted]

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 Ms. Wistrom:

I have received your letter of November 30, which reached this office on December 7. You have raised a series of questions concerning access to records of the Auburn City School District and the functions, powers and duties of its Board of Education.

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. This office has neither the authority nor the expertise to offer guidance concerning the general or specific powers or duties of boards of education. While the following comments will be restricted to issues involving access to records, it is suggested that additional information may be found in the Education Law at a public library or by reviewing the Board's policies, rules and procedures, all of which would be public and must be consistent with law.

First, since you indicated that you are not the parent of a school age child but that you are a taxpayer, it is noted initially that when records are accessible under the Freedom of Information Law, they must be made equally available to any person, irrespective of one's status or interest. In short, as a member of the public, you enjoy 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 opinion, the kinds of records in which you are interested, such as statistics reflective of students' reading scores, minutes of meetings, and resolutions and policies adopted by the Board, would

be available, for none of the grounds for withholding records would apply.

Third, a possible issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. Under that standard, a request should include sufficient detail to enable the staff of an agency to locate and identify the records of interest. While it is clear that minutes of meetings are available, I have no knowledge as to whether the minutes in question are in some way indexed by subject matter, for example, or otherwise. It is noted that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." That person has the duty of coordinating the agency's response to requests, and requests should be directed to him or her. In addition, the regulations require that the records access officer assist the applicant in identifying the records sought, if necessary.

Enclosed is a copy of "Your Right to Know", which describes the provisions of both the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.
cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9218

162 Washington Avenue, Albany, New York 12231
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January 3, 1996

Mr. Anthony Logallo
90-B-1210
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 information presented in your correspondence.

Dear Mr. Logallo:

I have received your letter of November 26, which reached this office on December 8. You have asked whether "'bank books' held by a bank...would have to be released 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 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 Law generally pertains to records maintained by entities of state and local government; it does not apply to records maintained by a private person or entity, such as a bank.

The opinion to which you referred involved a bank book held by a town involving a municipality's account. That situation is clearly distinguishable from that involving records maintained by a bank.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9219

162 Washington Avenue, Albany, New York 12231
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January 3, 1996

Ms. Christi 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 information presented in your correspondence.

Dear Ms. Cook:

As you are aware, your letter of November 21 addressed to the Attorney General was forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the New York Freedom of Information Law.

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

Since the records in which you are interested pertain to an adoption, the first ground for denial, §87(2)(a), is relevant. That provision relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which states in part that "adoption records shall be sealed and secret" and may be disclosed only upon the order of a court.

On the basis of your comments, it appears that you were convicted of a crime in relation to the matter. If that is so, court records pertaining to the criminal proceeding, including transcripts of testimony given during such proceeding, should be available to you from the clerk of the court in which the proceeding was conducted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9220

162 Washington Avenue, Albany, New York 12231
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January 4, 1996

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 information presented in your correspondence.

Dear Mr. Sluys:

I have received your letter of November 29, which reached this office on December 8.

Attached to your letter is correspondence from the New City Library in which the Director wrote that "providing salary information by employee name is contrary to our personnel policy." You have questioned the validity of his contention.

In this regard, I offer the following comments.

First, the Freedom of Information Law applies to agency records, 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."

Based on the foregoing, the Freedom of Information Law applies to entities of state and local government. If a library is a governmental entity, I believe that it would be required to comply with the Freedom of Information Law. Based on the materials that you forwarded, it is assumed that the New City Library is a governmental entity and, therefore, an "agency" subject to the Freedom of Information Law.

Second, in terms of the duty of 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 note that 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, again, 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 based on a policy or rule, without more, would not in my view serve to enable an agency to withhold a record.

Third, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not in possession or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

However, 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 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, a copy of this opinion will be forwarded to the Library Director.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frederick S. Giordano, Library Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9221

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

January 4, 1996

Mr. Tyrone Holton
95-A-3200
Clinton Correctional Facility Main
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 information presented in your correspondence.

Dear Mr. Holton:

I have received your letter, which reached this office on December 11. You have raised questions concerning access to and the disclosure of mental health records.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential, except under circumstances prescribed by that statute.

A different statute, §33.16 of the Mental Hygiene Law, pertains specifically to access to mental health records by the subjects of the records. Under that statute, a client or patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health units that operate within state correctional institutions, so-called "satellite units", are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to Mr. Charles Giglio, Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, New York 12229. I point out that under §33.16, there are certain limitations on rights of access.

With respect to copies of mental health records and the fees that can be charged, §33.16(b)(6) of the Mental Hygiene Law states that:

> "The facility may impose a reasonable charge for all inspections and copies, not exceeding the costs incurred by such provider. However, the reasonable charge for paper copies shall not exceed seventy-five cents per page. A qualified person [i.e., the subject of the records] shall not be denied access to the clinical record solely because of inability to pay."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9222

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

January 4, 1996

Hon. Bette Szesny
Councilwoman
[redacted]

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 Councilwoman Szesny:

I have received your letter of December 7 and the material attached to it. You have sought information and assistance in your efforts in gaining access to financial information concerning the Town of Schuyler from Dorothy Luther, the Town Supervisor.

Having reviewed the correspondence, the issue appears to involve the extent to which the information sought exists. In several instances, you requested information reflective of "totals" on a "year-to-date" basis.

In this regard, 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 records do not exist that contain the information sought, Town officials would not be obliged to prepare new records on your behalf.

It is emphasized, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record"

subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen 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, 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 the information that you seek cannot be retrieved or extracted without significant reprogramming, the Town would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

However, often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. In my view, if electronic information can be extracted or generated with reasonable effort, an agency should in my view do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Dorothy Luther, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9223

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

January 4, 1996

Mr. Steve Wormuth
[redacted]

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, unless otherwise indicated.

Dear Mr. Wormuth:

I have received your letter of December 7 in which you complained with respect to a denial of access to records by the Division of State Police.

As I understand the matter based on your correspondence and the material sent to me by the Division as required by §89(4)(a) of the Freedom of Information Law in conjunction with your appeal, it involves a request for policies or procedure manuals pertaining to stolen vehicles. Both the request and the appeal were denied on the ground that disclosure "would endanger the life and safety" of Division employees.

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 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 §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

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. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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 records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of

officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

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, since you referred in your letter to a request for a "master list of documents", it is assumed that the request pertains to the list required to be prepared pursuant to §87(3)(c) of the Freedom of Information Law. 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis A. De Francesco
Hanford C. Thomas

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9224

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

January 4, 1996

Mr. Wilson Patterson
349-95-23580
16-00 Hazen Street
E. Elmhurst, NY 11370

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

Dear Mr. Patterson:

I have received your letter of November 30, which reached this office on December 11. You have raised a series of questions concerning a request for records directed to the New York City Police Department.

In an effort to respond to your questions, 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 Department is Janet Lennon, Deputy Commissioner, Legal 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 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 of police officers' "performance records" in the context of the information provided in your letter.

Lastly, with respect to rules and regulations or similar records concerning police conduct, although I am unfamiliar with the contents of any such records, it is likely that three of the grounds for denial would be pertinent to an analysis of rights of access.

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. It would appear that rules and regulations would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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 records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, 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:jm

cc: Lt. Joseph Cannata, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-188
FOIL-AO-9225

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

January 4, 1996

Mr. Benjamin Stephens, Jr.
83-B-0072
Gouverneur Correctional Facility
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642

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

Dear Mr. Stephens:

I have received your letter of December 18 addressed to Secretary of State Treadwell. Please note that your correspondence did not reach the Department of State until December 27 and that, as indicated above, the staff is authorized to respond on behalf of the Committee and its members.

In brief, you complained that an appeal transmitted to Anthony J. Annucci, Deputy Commissioner and Counsel to the Department of Correctional Services on November 2 pursuant to the Privacy and the Freedom of Information Law, had not been determined. Consequently, you have sought an advisory opinion "indicating what action should be taken in order to require" Mr. Annucci to comply with law.

I note initially that in your letter to the Secretary and throughout the correspondence attached to it, you referred to the Privacy Act and your rights under the Act. In this regard, the Privacy Act is a federal statute that pertains to records maintained by federal agencies; it does not apply to records maintained by New York State governmental entities. Further, the State counterpart, the Personal Privacy Protection Law, would be similarly inapplicable. Although §95(1) of that statute generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional

> services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, while the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

The Freedom of Information Law, however, does apply. With respect to the right to appeal a denial of access to records, as you may be aware, §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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that 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)].

It is emphasized that my intent is not to encourage litigation; on the contrary, a copy of this opinion will be sent to Mr. Annucci in an effort to resolve the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9226

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

January 5, 1996

Ms. Mary Addams
[redacted]

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 Ms. Addams:

I have received your letter of December 7. As in the case of your earlier correspondence, the matter pertains to your unsuccessful efforts in gaining access to records from the Village of Seneca Falls and its Water Department. Notwithstanding the advice and interpretation offered in an opinion rendered on November 8, copies of which were sent to Village officials, you have received no further response.

You have sought assistance and asked how you can proceed. In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. While it is our hope that opinions issued by this office, such as the opinion of November 8, are educational and persuasive, they are not binding. The Committee is not empowered to enforce the law or compel an agency to disclose records.

Second, because your request has not been answered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests for records. 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)].

Once again, in an attempt to encourage compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Seneca Falls
Marianne R. Piscitelli, Village Clerk
Jeffrey K. Warrick, Water and Sewer Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9227

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

January 5, 1996

Mr. Lenny Durio
86-A-9029
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

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

Dear Mr. Durio:

I have received your letter of December 11 and the correspondence attached to it. You have complained that the New York City Police Department has failed to comply with the Freedom of Information Law by continually delaying responses to requests for records. The correspondence indicates, for example, that a determination to grant or deny a request received on May 22 would be made on or about August 22. As of the date of your letter to this office, however, it appears that no determination was made.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but

fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 made to the Department is Janet Lennon, Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Joseph Cannata, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9228

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

January 5, 1996

Mr. Ernest Dunham
94-B-0574
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Dunham:

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

According to the correspondence, you requested an "Attorney's Visitation Sheet" indicating visits between you and your attorney at the Monroe County Jail during a period of approximately a year and a half beginning in November of 1993. In response, you were informed that no such record is maintained. It is your view that such a record is required to be maintained by a local correctional facility pursuant to §7008.5 of the regulations promulgated by the State Commission of Correction. That provision states in relevant part that properly identified persons may visit prisoners and that:

> "Each visitor shall be required to enter in a facility visitor's log:
> (1) his name;
> (2) his address;
> (3) the date;
> (4) the time of entry;
> (5) the name of the prisoner or prisoners to be visited; and
> (6) the time of exit."

Based on the foregoing, you have asked that this office "intervene and conduct [an] inquiry" into the claim that the record sought does not exist. If the record has not been maintained, you contend that such failure "violates not only the law itself, but also [your] rights under the freedom of information law to access to information."

In this regard, the Committee has neither the resources nor the authority to conduct an investigation concerning the existence of a record. That issue does not pertain directly to compliance with the Freedom of Information Law; rather, it deals with compliance with regulations promulgated by the Commission of Correction. Consequently, if indeed a visitor's log is not maintained, it is suggested that you contact the Commission to encourage that entity to seek to enforce its regulations.

It is possible, too, that your request was considered narrowly and literally. Instead of referring to the record in question as the "Attorney's Visitation Sheet", for there may be no record so characterized, it is suggested that you renew your request and refer to §7008.5 of the Commission's regulations and the visitor's log required to be maintained pursuant to that provision.

Assuming that visitor's log is maintained, I believe that it would be subject to rights of access conferred by 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 §87(2)(a) through (i) of the Law.

If a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found 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 a visitor's log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert J. Squires

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9229

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

January 5, 1996

Mr. Edgar Quinones
93-A-8644
P.O. Box 500
Elmira, NY 14902

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

Dear Mr. Quinones:

I have received your letter of December 8. You have asked that this office investigate a failure on the part of your attorney to respond to your request made under the Freedom of Information Law for your case file.

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 is applicable to records maintained by entities of state and local government in New York; it does not apply to a private attorney or a law firm.

In short, because the Freedom of Information does not appear to govern rights of access to the records in question, I do not believe that I can be of assistance in the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9230

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

January 8, 1996

Mr. Anthony Veraldi
[redacted]

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. Veraldi:

I have received your letter of December 11, which reached this office on December 18. You have sought advice in relation to a request directed under the Freedom of Information Law to the Mount Sinai Union Free School District.

You requested records pertaining to the reimbursement of a member of the Board of Education for expenses incurred relative to conferences, meetings, seminars and the like during her term of office. In addition, you sought minutes of meetings in which the President of Board addressed the community concerning airline tickets in the names of his wife and sons for which he received reimbursement. In response to the request, you were informed that it was "not sufficiently specific."

In this regard, I offer the following comments.

First, by way of background, I note that the Freedom of Information Law as initially enacted required that an applicant seek "identifiable" records. That standard resulted in difficulty and a series of "catch-22's" when applicants could not name records of interest or identify them with particularity. However, since 1978, §89(3) of the revised Freedom of Information Law has merely required that an applicant "reasonably describe" the records sought. Further, the Court of Appeals, the State's highest court, has held 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 NY2d 245 (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.

Insofar as the records sought can be located based on the terms of your request, even though you have not requested "specific" records, I believe that your request would have met the standard of "reasonably describing" records envisioned by §89(3).

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 opinion, only one of the grounds for denial is pertinent to an analysis of rights of access to the kinds of records that you requested. While that provision might permit certain aspects of the records in question to be withheld, I believe that the remainder must be disclosed.

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 subject to a variety of interpretations, the courts have provided direction through their review of challenges to agencies' denials of access. In brief, 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, it has been held 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 the context of the records at issue, I believe that they are clearly relevant to the performance of the official duties of Board members. Consequently, with the exception of personal details, they must in my view be disclosed. Examples of the kinds of personal details that could be deleted prior to disclosure of the remainder of the records would be such items as home addresses, social security numbers and personal credit card numbers.

Lastly, in conjunction with the preceding remarks concerning access to records, I direct you to a statement concerning the intent and utility of the Freedom of Information Law, the Court of Appeals, the State's highest court, 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, I believe that the need to enable the public to make informed choices and provide a mechanism for exposing waste or abuse can be balanced against the possible

infringement upon the privacy of present or former public officers or employees in a manner consistent with the preceding commentary.

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 of Schools.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. Peter Paciolla, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9231

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

January 8, 1996

Mr. Dale J. Manchester
Deputy Town Attorney
Town of Concord
Town Hall
Springville, NY 14141-0368

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. Manchester:

I have received your letter of December 18. In your capacity as Deputy Town Attorney for the Town of Concord, you questioned the Town's responsibilities in relation to a recent request made under the Freedom of Information Law. The request, which is quite extensive, pertains to an accident that occurred in the Town.

Having reviewed the request, a copy of which is attached to your letter, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if, for example, there are no records indicating Town budget allocations and expenses relating to the maintenance of a particular road, the Town would not be obligated to prepare new records or computations on behalf of an applicant.

Similarly, I do not believe that an agency is required to engage in legal research or make legal judgments or interpretations in an effort to provide requested records. For instance, one aspect of the request involves "all relevant Town of Concord Code sections regarding 'written notice' of defect as a condition precedent to maintenance of negligence causes of action against the Town of Concord." Choosing which provisions of a code or local law might be "relevant" likely involves the making of legal interpretations. In my view, an agency is not obliged to make such judgments in attempting to respond to requests for records. As you suggested, the applicant could examine the Town Code in its entirety and select those portions of it that he considers to be pertinent.

Second, a primary issue in my view involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information 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.

Some of the records sought might be easy to locate. However, depending upon the manner in which the Town maintains its records, others may be difficult to locate. If records relating to maintenance and upkeep are kept by means of the street names on which work was done, a filing system of that nature would likely enable Town officials to locate them. On the other hand, if those records are maintained in the chronological order of work performed, it might be necessary to review all maintenance or work records in order to retrieve the records. In that event, particularly if the records are extensive, it is unlikely that the request would have met the standard of reasonably describing the records sought.

Third, insofar as the request pertains to existing records that are reasonably described, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Potentially relevant to the matter is a decision rendered 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.

Of possible significance under the circumstances 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 §3101 of the Civil Practice Law and Rules (CPLR).

As you are aware, §3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary, or perhaps filed with a court. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a

law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

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)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary or filed with a court, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

It would appear that the remaining records falling within the scope of the request, subject to the conditions described earlier in this opinion, would be available in great measure, for none of the grounds for denial would appear to be applicable.

I hope 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 9232

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

January 8, 1996

Mr. Francis Castagna
[redacted]

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. Castagna:

I have received your letter of December 12. You have complained that an agency of Suffolk County, apparently the Police Department, has failed to respond to your request for a record. Moreover, although you indicated that you were informed that you could fax your request to the Department, you were later told that such a request would not be accepted.

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 a related vein, I do not believe that an agency can require that a request be made in or 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 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.

Second, there are no judicial decisions of which I am aware that deal with the use of fax transmissions to request records under the Freedom of Information Law. Absent a judicial determination to the contrary and assuming that such a request is directed to the appropriate person, i.e., the records access officer, I am unaware of any basis for refusing to accept a request made by means of a fax transmission.

Lastly, in my view, a claim that the agency can refuse to accept a request made by fax based on §2103 of the Civil Practice Law and Rules would be misplaced. That provision deals with the service of papers in a legal proceeding; it does not pertain or refer to a request made to a governmental entity under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Captain Vincent Fitzgerald, Senior Records Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9233

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

January 8, 1996

Mr. Patrick Mitchell
92-A-5576
Bare Hill Corr. Facility
Caller Box #20 - Cady Road
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 information presented in your correspondence.

Dear Mr. Mitchell:

I have received your letter of December 12. You indicated that requests for records sent to the New York City Police Department have not been answered, and you sought assistance in the matter.

In this regard, I offer the following comments.

First, since you did not identify the person to whom your request was directed, it is noted that 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 responses to requests, and requests should be sent to that person. While I believe that any employee of the Police Department who received your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, if your request was not made to the records access officer, it is suggested that a new request be sent to him as follows: Lt. Joseph Cannata, Records Access Officer, New York City Police Department, Room 110 C, One Police Plaza, New York, NY 10038.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record

> available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 Police Department is Janet Lennon, Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Lt. Joseph Cannata

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9234

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

January 8, 1996

Mr. Jamal Clark
94-A-3425
Attica Corr. Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Clark:

As you are aware, a copy of your letter addressed to the District Attorney of New York County sent to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. Your correspondence pertains to a request for "sentencing minutes."

In this regard, I offer the following comments.

First, if I understand your request correctly, the best source of the records in question would be the clerk of the court in which you were sentenced. It is noted that the courts and court records are not subject to the Freedom of Information Law. However, court records are often available pursuant to other statutes (see e.g., Judiciary Law, §255). Therefore, it suggested that you direct your request to the clerk of the appropriate court.

Second, if your request to the Office of the District Attorney involves the contents of a pre-sentence report, that agency could not in my view disclose such records. 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 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 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 9235

162 Washington Avenue, Albany, New York 12231
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January 9, 1996

Mr. Kenneth B. Hawks
[redacted]

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. Hawks:

I have received your letter of December 18 and the correspondence attached to it. You have raised a variety of questions and asked that I "provide...the rationale under which they [the DEC] have placed [your] application for electrical and telephone services to [your] camp on indefinite hold."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not part of the DEC, and I have no special knowledge or insight relative to applications for the kinds of services to which you referred. Nevertheless, in an effort to offer perspective on the matter, I offer the following comments.

First, 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 agency officials 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, insofar as the information sought does not exist in the form of a record or records, the DEC would not be obliged to prepare new records or explanations of its actions (or perhaps its failure to do so) on your behalf.

Similarly, I do not believe that an agency is required to engage in legal research or make legal judgments or interpretations in an effort to provide requested records. For instance, one

aspect of the request involves "pertinent, applicable laws, statutes, rules or regulations that specifically cover the approval/disapproval of both electric and telephone service within the Adirondack Park." Choosing which provisions of law might be "pertinent" or "applicable" likely involves the making of legal interpretations. In my view, an agency is not obliged to make such judgments in attempting to respond to requests for records.

In the future, rather than seeking to elicit information, it is suggested that you seek existing records. Enclosed is a copy of an explanatory brochure concerning the Freedom of Information Law that includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Robert Bathrick
Kenneth R. Hamm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2552
FOIL-AO- 9236

162 Washington Avenue, Albany, New York 12231
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January 9, 1996

Mr. Robert E. Croissant
[redacted]

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. Croissant:

As you are aware, I have received your letter of December 19 and the materials attached to it.

You have requested an advisory opinion concerning your efforts to gain access to minutes of meetings of the Woodstock Public Access Cable Committee and the Town of Woodstock. Your inquiry was precipitated by action taken by the Committee to suspend your TV programming time during an executive session. Although minutes of some meetings have been made available, others have not yet been disclosed. Further, when you sought minutes of executive sessions, particularly the session in which action was taken pertaining to you, you were informed that those minutes consist of "privileged information." You also indicated that the members of the Committee "never mention at any of the public meetings their reasons for going into executive session."

In this regard, I offer the following comments.

First, based upon the "Plan for the Operation of the Woodstock Public Access Station", it is clear that the Woodstock Public Access Committee is a public body required to comply with the Open Meetings Law and that its records are subject to the Freedom of Information Law. In brief, the five members of the Committee are appointed by the Town Board, and the Chair of the Committee and the Station Manager are also appointed by the Town Board. Moreover, the Plan specifies that the Committee is obligated to conduct its meetings "under the requirements of the open meetings law..."

Second, in my view, the extent to which executive sessions under the circumstances described in the correspondence could justifiably have been held is questionable. As a general matter, the Open Meetings Law is based upon a presumption of openness. Meetings of public bodies must be conducted in public, except to

the extent that an executive session may be held in accordance with paragraphs (a) through (h) of §105(1) of the Law. Section 105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only, provided, however, that no action by formal vote shall be taken to appropriate public moneys..."

Based on the foregoing, a public body must indicate, during an open meeting, by means of a motion, the subject or subjects it intends to consider in private. Further, a public body cannot enter into an executive session to discuss the subject of its choice; on the contrary, the grounds for entry into executive session are specified and limited.

The only basis for entry into executive session that might have applied, §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 or corporation..."

On the basis of the materials that you provided, it is unclear whether any of the subjects described in §105(1)(f) were discussed. Only to the extent that the language of that provision applied could an executive session have properly been withheld. Any other aspect of the discussion in my view should have occurred during an open meeting.

Third, §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, minutes of open meetings must be prepared and made available within two weeks, and 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 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.

With regard to a record of how each member voted, I direct your attention to §87(3)(a) of the Freedom of Information Law. That provision states 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 municipal committee [see §86(3)], 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), I believe that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

I point out that in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)].

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be sent to the Committee, the Town Supervisor and the Town Clerk.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Woodstock Public Access Committee
Hon. John Mower, Town Supervisor
Hon. Kathy Anderson, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1899
FOIL-AO-9237

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 9, 1996

Dr. Leland C. Marsh
Dr. James L. Seago, Jr.
SUNY College at Oswego
Oswego, NY 13126

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 Drs. Marsh and Seago:

Your memorandum of November 9 transmitted to the Attorney General and the Acting President of SUNY College at Oswego ("the College") has been transmitted to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice pertaining to the Personal Privacy Protection and Freedom of Information Laws.

You complained that documents have been disseminated that include the names and social security numbers of employees of the College, and that they can and have been viewed by staff members, students, and others. Neither you nor other employees provided authorization to release your social security numbers. In addition, you wrote that "broad dissemination of [y]our social security numbers as public documents available to the public is now normal practice for this institution."

In my opinion, based on the following analysis, the College cannot publicly disclose its employees' social security numbers without their consent.

Two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Because of the language of those statutes, they must be construed together and in relation to one another.

By way of background, the Freedom of Information Law includes within its coverage 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.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §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 that statute, 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)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

From my perspective, based on judicial interpretations, public disclosure of a social security number, absent the consent of a data subject, constitutes an unwarranted invasion of personal privacy. One element of a series of decisions is the finding that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that those individuals are required to be more accountable than others. The courts have determined that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee 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 items relating to public officers or employees are irrelevant to the performance of their 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, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Seelig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

Because the State University is a state agency subject to the Personal Privacy Protection Law, I believe that it and the College, as a component of the University, are precluded from releasing records to the public the disclosure of which would constitute an unwarranted invasion of personal privacy. Pertinent to the matter is a decision cited earlier, Seelig v. Sielaff, supra. In Seelig, the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government. Specifically, it was found that:

> "The injunctive relief granted by the IAS Court was based upon Public Officers Law §92 (1), part of this State's Personal Privacy Protection Law. That law by its own terms excepts the judiciary, the State Legislature, and 'any unit of local government' from its purview. Consequently, the relief granted against the respondents was improper" (id., 299).

While a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy, a state agency subject to the Personal Privacy Protection Law would be prohibited from so doing.

In sum, I do not believe that a state agency, such as the College, can validly disseminate the social security numbers of its employees (or others, such as students) to the public, without the consent of the subjects of those items, for the Personal Privacy Protection Law essentially forbids such disclosure.

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the Acting President of the College.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Stanley, Acting President, SUNY College at Oswego
Hon. Dennis C. Vacco, Attorney General
Kenneth Roldan, Assistant Attorney General
Carolyn Pasley, SUNY Associate Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9238

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 9, 1996

Mr. Michael Jenkins
92-R-7295
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. Jenkins:

I received today your letter in which you appealed a denial of access to records by the New York City Department of Correction.

In this regard, 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 otherwise compel an agency to grant or deny access to records.

The provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

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

For your information, the person designated to determine appeals at the Department of Correction is its general counsel, Ernesto Marrero.

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-9239

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

January 10, 1996

Mr. David Mounier
92-A-5164
Orleans Correctional Facility
35-31 Gaines Basin Road
Box 436
Albion, NY 14411

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

Dear Mr. Mounier:

I have received your letter of December 21 addressed to the Chairman of the Committee and the materials attached to it. As indicated above, the staff of the Committee is authorized to respond on its behalf.

You have sought assistance in obtaining records from the Division of Parole. You allege that the records in question have been used against you in administrative proceedings but were never made available to you. The records consist of memoranda transmitted between the Division of Parole and the Department of Correctional Services or relate to your supervision status.

In this regard, I offer the following comments.

First, if indeed records were submitted into evidence or introduced as exhibits in administrative proceedings during which you or your representative were present, it would appear that any such records should be made available to you.

Second, however, insofar as the records were not so used or submitted, I believe that they would fall within the provision to which the denial of your request alluded, §87(2)(g) of the Freedom of Information Law. 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.

The provision cited above permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 might have dealt with the kinds of records in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain

> predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Huntzinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9240

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

January 10, 1996

Ms. Ruth E.A. 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 information presented in your correspondence.

Dear Ms. Davis:

I have received your letter and the materials attached to it, which reached this office on December 26.

The matter pertains to your request for an investigator's report concerning a particular individual as a potential candidate for the position of superintendent of the Peru Central School District. In short, you were informed that no such record exists. If that is so, in my view, the Freedom of Information Law would not be applicable. That statute pertains to existing records, and §89(3) provides in part that an agency is not required to create or prepare a record in response to a request.

At the end of your letter, as I understand it, it appears that you suggested that the public should have the ability to know of the amount expended on the investigation. From my perspective, existing records reflective of the expenditure of public money must generally be disclosed. The Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, books of account, and other records pertaining to expenditures of public monies are typically available, for none of the grounds for denial would be applicable. In some instances, however, those kinds of records might include personal information the disclosure of which would constitute an unwarranted invasion of personal privacy [see §87(2)(b)]. In that event, those portions of the records might justifiably be deleted, but the remainder should nonetheless be disclosed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Armstrong

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9241

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

January 10, 1996

Mr. Bruce L. Hoffman
94-B-2822
Mohawk Correctional Facility
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 information presented in your correspondence.

Dear Mr. Hoffman:

I have received your letter of December 21 in which you raised questions in relation to a request made under the Freedom of Information Law for "log entries and excerpts from 911 communications" to the Warren County Sheriff's Office. In response to the request, you were informed that the records sought are retained for a period of ninety days and that they no longer exist.

You have raised the following three questions in relation to the matter:

> "1) Is there or is there not a State [Federal] Law that commands the retaining of 911 communications received which relate to criminal matters and particularly is such communications lead to the commencement of criminal proceedings?
>
> 2) If so what is the law's cite?
>
> 3) If upon the appeal of the denial, the appeal is also denied. How may I compel the release of the information?"

In this regard, the only law of which I am aware that pertains specifically to the retention and disposal of a county sheriff's records is §57.25 of the Arts and Cultural Affairs Law, which is part of the "Local Government Records Law." That statute 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" 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.

While I am unfamiliar with the applicable retention schedule, you can ascertain the retention period by obtaining the schedule or pertinent portion thereof from the State Archives and Records Administration, which is part of the State Education Department.

If indeed the records have been destroyed, there may be no way to compel the disclosure of what no longer exists. It is noted 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 or prepare a record on behalf of an applicant.

Lastly, if Warren County maintains an "E-911" or "enhanced" emergency telecommunications system, I believe that the kinds of records in which you are interested would be beyond the scope of rights conferred by the Freedom of Information Law. As a general

matter, 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.

Relevant in the context of your inquiry is the initial ground for denial, §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(5) of the County Law, which states that:

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

I hope that 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

cc: Warren County Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9242

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

January 10, 1996

Mr. Noble H. Abif
88-A-3526
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 information presented in your correspondence.

Dear Mr. Abif:

I have received your letter of December 19 in which you sought guidance concerning a request made under the Freedom of Information Law for records of the Office of the Queens County District Attorney. You indicated that a request was made on December 1, but that as of the date of your letter to this office, you had received no response.

In this regard, the Freedom of Information Law provides direction concerning the time 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 Steven Chananie, whose address is the same as that of the records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9243

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

January 10, 1996

Mr. William Lopez
91-A-3630
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. Lopez:

I have received your letter of December 20 in which you sought guidance concerning the use of the Freedom of Information Law to obtain grand jury minutes.

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 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.

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-9544

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

January 11, 1996

Mr. Jamel Clark
94-A-3425 (BE-12)
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Clark:

I have received your letter of January 6 in which you appealed a denial of access to records by the Office of the New Your County District Attorney.

In this regard, 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 otherwise compel an agency to grant or deny access to records.

The provision in the Freedom of Information Law pertaining to the right to appeal, §89(4)(a), states in relevant part that:

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

For your information, I believe that the person designated to determine appeals at the Office of the District Attorney is Gary Galperin.

Further, as indicated in my letter to you of January 8, it is likely that the clerk of the court in which you were sentenced would be the best source of the records sought.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9745

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

January 11, 1996

Mr. John Montgomery
90-C-0692
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Montgomery:

I have received your letter of December 18, which reached this office on December 27.

You have sought the "intervention" of this office in relation to a request for records directed to Monroe County. The records in question are described as memoranda transmitted between a member of the District Attorney's staff and the District Attorney consisting of "information, suspicions, fact and circumstances" supporting a belief that certain City of Rochester police officers engaged in illegal activities. You indicated that the memoranda, which were prepared between January of 1988 and January of 1990, were used in a federal investigation that led to indictments, and that in August of 1991, they were disclosed to reporters for the Rochester Democrat & Chronicle. In response to your request, you were informed, in your words, that they "were not in the custody of the Records Access Officer, or so he was advised by the said District Attorney." You have alleged that the records are being withheld because they would support your pending litigation.

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 is not empowered to compel an agency to grant or deny access to records or otherwise comply with that statute. Nevertheless, I offer the following comments.

First, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on

request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Second, when requested materials exist as records and can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 the records had not been previously disclosed to the public, it would appear that several grounds for denial would be relevant in ascertaining rights of access. In that circumstance, it is likely that the records or perhaps portions of them might be withheld under §87(2)(b) as an unwarranted invasion of the privacy of those alleged to have engaged in wrongdoing, under §87(2)(e)(iii) pertaining to records compiled for law enforcement purposes the release of which would disclose confidential information relating to a criminal investigation, and under §87(2)(g), for the records consist of intra-agency materials reflective, at least in part, of "suspicions" or conjecture, rather than facts.

However, if the same records were disclosed to the news media, I believe that the ability to withhold the records would essentially have been waived. It has been held that an inadvertent disclosure of records that ordinarily could have been withheld does not create a right of access [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]; nevertheless, if the disclosure to the news media was not inadvertent but purposeful, any member of the public in my view would have rights of access to the records. Similarly, 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. Although the records at issue may not have been disclosed in the context of a public

judicial proceeding, their disclosure to the news media would in my view have same practical effect and the same conclusion with regard to a current request. 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, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Mackey
John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9246

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

January 11, 1996

Mr. Phil McIntyre
[redacted]

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, unless otherwise indicated.

Dear Mr. McIntyre:

As you are aware, I have received your recent letter and the materials attached to it. You have questioned the propriety of responses to your requests for records by the Panama Central School District.

One of the requests relates to an expenditure of approximately $1500 for Polaroid film, and you asked to inspect the photographs taken with Polaroid cameras. Although the form containing the response to the request denied access on the ground that the District is "not to required to maintain said documents", you informed me by phone that you were informed that the records are maintained but that they cannot be disclosed due to considerations of privacy.

In this regard, while somewhat ancillary to the matter, §57.25 of the Cultural Affairs Law authorizes school districts to dispose of records in accordance with minimum retention periods developed pursuant to rules promulgated by the Commissioner of Education, and it is possible that the photographs in question could properly have been disposed of destroyed. Nevertheless, so long as they exist, I believe that they are subject to rights conferred by the Freedom of Information Law. That statute pertains to agency records 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."

Based on the foregoing, any photographs maintained by the District would constitute "records" that fall within the coverage of the Freedom of Information Law, even though the District may not be required to continue to keep them.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 nature of any photographs that might be maintained by the District. However, of likely significance 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 Educational Rights and Privacy Act (FERPA). In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public and many private educational institutions. The focal points of the Act involve rights of access to education records by parents of minor students and the protection of privacy of students. It provides, in general, that any "education record", a term that is broadly defined, that is personally identifiable to a particular student is available to the parents of a student; concurrently, education records are confidential with respect to others, unless the parents of students waive their right to confidentiality. Consequently, photographs that could identify students, unless they deal with a public matter (i.e., a school play or concert, a basketball game, yearbook pictures, etc.), must be withheld absent consent to disclose by the parents of the students.

Other requests were approved. However, the District indicated that the records would not be made available until March 15 in one instance, April 19 in two others, and not until May 1 with respect to the remaining request. You have asked whether those delays in disclosure are "unreasonably long."

In conjunction with the foregoing, 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..."

Based upon the language quoted above, 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 governmental unit, I would conjecture that in most instances, agencies are able to locate and disclose records more quickly. 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, if 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.

Of potential significance is whether each request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information 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.

I am unaware of the methods by which the records in question are kept or filed. If, for example, certain of the records can be located only by reviewing voluminous papers or files individually to attempt to find those requested, the request in that instance might not meet the standard of reasonably describing the records. On the other hand, notwithstanding the volume of a request, if all within a certain category records are kept in a single location and can be readily retrieved, the request would, according to the decision cited earlier, meet that standard. In that case, delays in disclosure for a period of months would in my view represent a failure to comply with the Freedom of Information Law.

Lastly, as stated by the Court of Appeals in a discussion of the scope and intent of the Freedom of Information Law:

> "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 v. Kimball, 50 NY 2d 575, 579 (1980)].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the District must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

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:jm

cc: Board of Education
Robert E. Zimmerman, Superintendent of Schools
John Ireland, Records Management Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2554
FOIL-AO- 9247

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

January 12, 1996

Mr. George A. Mayes
[redacted]

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. Mayes:

I have received your letter of December 30 and the materials attached to it.

According to the correspondence, the Town of Warrensburg and a group of doctors known as the Hudson Headwaters Health Network (HHHN) entered into an agreement in 1992, and you have raised two questions in relation to the terms of the agreement.

One element of the agreement requires the establishment of a Health Advisory Committee by the Town Board. According to the agreement, the primary function of the Advisory Committee involves providing "the Town Board with recommendations regarding the scope and delivery of health services to the community." You have asked whether the Advisory Committee is subject to the Open Meetings Law.

In this regard, I offer the following comments.

As you are aware, the Open Meetings Law pertains 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."

Judicial decisions indicate generally that advisory bodies, 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 Health Advisory Committee would not constitute a public body subject to the Open Meetings Law.

You have also asked whether reports prepared by the HHHN that must be provided to the Advisory Committee constitute Town records subject to the Freedom of Information Law. Section IV.a. of the agreement states in relevant part that:

> "HHHN shall provide the Advisory Committee with a quarterly report as to the financial condition of the program including an operating statement indicating all operating revenues and expenditures for the quarter."

In my opinion, those reports are Town records that fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) 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."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In its consideration of the issue, the Court determined that the State University clearly is an "agency" that is required to comply with the Freedom of Information Law [see definition of "agency", §86(3)]. In this instance, it is equally clear that the Town is an agency for purposes of that statute. Further, the Court described

the relationship between the Auxiliary Service Corporation (ASC) and the University and concluded that records maintained by the ASC for the University were subject to the Freedom of Information Law. Specifically, the Court wrote as follows:

> "In order to fulfill its educational mission, SUNY must provide certain auxiliary services to its campus community. As set forth unequivocally in ASC's bylaws, the function of ASC is to supply these essential services--including the campus bookstore--for SUNY. ASC's acts in discharging this delegated duty, then, are performed on SUNY's behalf.
>
> "Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a governmental agency. In other words, the booklist information is 'kept' or 'held' by ASC 'for an agency' (Public Officers Law § 86[4]). Thus, the information falls within the unambiguous definition of the term 'records' under FOIL.
>
> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]}. Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their natural and most obvious meaning in interpreting 'records' under FOIL]."

From my perspective, the situation that you described is somewhat analogous to that before the Court. In this instance, the Advisory Committee receives records from a party to an agreement, HHHN, for the benefit of the Town. As such, the reports are kept by the Advisory Committee for an agency, the Town of Warrensburg. Therefore, I believe that they are Town records.

The foregoing is not intended to suggest that the reports must of necessity be disclosed in their entirety. Rather, it is my view that the reports constitute records that fall within the scope of rights of access conferred by the Freedom of Information Law. In brief, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9248

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 12, 1996

Mr. Walter Greening
[redacted]

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

Dear Mr. Greening:

I have received your letter of December 29 in which you raised a series of questions concerning an agency's responsibilities under the Freedom of Information Law. Having reviewed the opinion addressed to you on December 26, I believe that most of the questions were answered, either directly or implicitly, in that response.

A point not clearly made, however, is that an agency's records access officer is not required to be present or participate personally with respect to every facet of dealing with a request made under the Freedom of Information Law.

In my opinion, the initial responsibility to deal with requests is borne by an agency's records access officer, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests. As such, the records access officer may designate staff to carry out functions associated with the implementation of the Freedom of Information Law.

Section 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."

Finally, it is reiterated that the notion of reasonableness is pertinent. For instance, in your final question, you asked whether a school can deny access to records that have been located and retrieved "because school was delayed due to snow, and the Records Access Officer is extremely busy." If the opening of school is two hours late, if some members of staff are late or absent, and if staff is required to perform increased, different or unusual

functions, it would be reasonable, in my view, to expect that some activities routinely performed might be delayed or even cancelled or postponed. While I am not suggesting that making records available should be cancelled, there may, depending upon the circumstances, be understandable reasons for delay.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Beverly L. Ouderkirk, Superintendent of Schools
Susan P. Reichardt, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9249

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 12, 1996

Mr. William Almodovar
85-B-1821
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. Almodovar:

I have received your recent letter, as well as the materials attached to it. You have raised questions concerning the exhaustion of administrative remedies under the Freedom of Information Law, a denial of access to computer codes and your contention that an agency is responsible for "reasonably describing the withheld information."

In this regard, although there is little case law concerning the exhaustion of administrative remedies in the kind of situation that you described, 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 point out that the lower court in Floyd determined that the records should have been disclosed by virtue of the agency's failure to respond, but that the Appellate Division modified that aspect of the decision. While the Appellate Division confirmed that a failure to respond to an appeal within the statutory time constitutes a constructive denial of access, thereby resulting in the exhaustion of one's administrative remedies and the right to initiate an Article 78 proceeding, it was also found that such failure did not automatically require that the agency disclose the requested records. Specifically, in rejecting the Supreme Court's automatic grant of access, the Appellate Division found that:

> "We think this is too rigid an interpretation of the statute. As a textual matter, if the effect of failure to comply were as Special Term interpreted it, it would have been more appropriate for the statute to say that if (A) the agency did not furnish the explanation in writing then (B) the agency must provide access to the material sought. Instead, however, the statute is phrased in the alternative form of requiring the agency within seven days to do either (A) or (B). As a textual matter there would appear to be no particular reason to say that failure to do either (A) or (B) would require the agency to do (B) rather than (A), which is the choice Special Term made.
>
> "More important, as a policy matter, we do not think the statute should be interpreted so rigidly to require the result directed by Special Term. We recognize the importance of

> prompt response by the agency to the request for information. Such responsiveness and accountability are the very point of FOIL. But the same statute also expresses the public policy that some kinds of material should be exempt from disclosure. Both policies must be considered. To say that even the slightest default in timely explanation destroys the exemption seems to us too draconian. We think the seven-day limitation should be read as directory rather than mandatory, and that the consequence of failure by the agency to comply with the seven-day limitation is that the applicant will be deemed to have exhausted his administrative remedies and will be entitled to seek his judicial remedy" (id., 87 AD 2d 388, 390).

I note that at the time of the decision, the statutory time for responding to an appeal was seven days; it is now ten business days.

Next, as you are aware, §87(2)(i) permits an agency to deny access to "computer access codes." In my view, there is a distinction between computer codes and computer access codes. The former might merely serve as a non-verbal indication of items of information. The latter, on the other hand, is used to gain access to information stored in a computer. In my view, the intent of §87(2)(i) is to enable an agency to withhold computer access codes that would enable individuals to gain unauthorized access to data stored within a computer. If the items in question are indeed computer access codes as described in the preceding sentence, I believe that a denial of access would be justified.

Lastly, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public

> Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Horowitz, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9250

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 12, 1996

Mr. James 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 information presented in your correspondence.

Dear Mr. Higgins:

I have received your correspondence of January 3. You complained that agencies in your vicinity have failed to respond to your requests for records in a timely fashion.

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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 my opinion, the initial responsibility to deal with requests is borne by an agency's records access officer, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests.

Section 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."

Lastly, §1401.9 of the regulations states in relevant part that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation... The name, title, business address and business telephone number of the designated records access officer."

From my perspective, the provision quoted above indicates an intent to enable the public to contact the records access officer directly and to ensure that the records access officer's name and phone number should be readily available.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to that officials that you identified and the Wyoming County Health Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Don Williams
Tom Fendick
Linda Hoffmeister
Records Access Officer, Wyoming County Health Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2555
FOIL-AO 9251

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 12, 1996

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 information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of December 29 and the materials attached to it. You have sought my views concerning two issues that relate to the New York City Board of Education.

The first pertains to meetings of the Board in which members of the public are given an opportunity to express their views. You referred to regulations adopted by the Board relating to those meetings, and one aspect of the regulations states that: "[D]iscussion and charges relating to the competence or personal conduct of individuals will be ruled out of order at these meetings. The Board of Education cannot permit public 'trials by accusation.'" You wrote, however, that Counsel to the Board asked you not to mention the names of people identified in a written statement that you sought to make, and you questioned the propriety of precluding you from reading records, including names within them, when the records have been disclosed under the Freedom of Information Law.

In this regard, by authorizing the public to speak at meetings, I believe that the Board has, in the context of your inquiry, adopted a practice that is not required by law. 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, 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/or 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 (see e.g., 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.

The issue in this instance, in my view, is whether the Board's regulation or perhaps the means by which it is implemented, is reasonable. It appears that the Board's practice is based on provisions of the Freedom of Information and Open Meetings Laws that are intended to enable governmental entities to protect personal privacy. In the case of the former, §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Section 105(1)(f) of the Open Meetings Law authorizes 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..."

From my perspective, not every record that identifies an individual would, if disclosed, result in an unwarranted invasion of personal privacy. Similarly, even though a discussion by a public body might include names, that alone would not necessarily justify the holding of an executive session.

I would agree that an accusation concerning the conduct of a teacher, for example, represents the kind of situation in which a public body could reasonably preclude identification of the teacher in a statement offered at a meeting of that body. In that case, I believe that the identity of a teacher who is the subject of an unsubstantiated allegation or charge could be withheld under the Freedom of Information Law or be a proper subject for consideration in executive session. Nevertheless, if a teacher is the subject of a final determination indicating that he or she engaged in misconduct (i.e., under §3020-a of the Education Law), the determination would be a matter of public record, even though the person is named in the record. Because the record is public and

because such a determination is not an accusation but rather is a finding, it would be unreasonable in my view to prohibit a public reading of that record, including the name of the subject of the determination. In other circumstances as well, a name coupled with other information may be public, and a prohibition of the utterance of the name would, in my opinion, be unreasonable. For instance, the names of all public employees, their titles and their salaries are matters of public record. I cannot envision how precluding speakers from identifying employees with their titles or salaries could be justified.

In short, it is not the name that is critical; rather, I believe that it is the name when used in conjunction with other information that should serve as the standard for permitting or perhaps prohibiting the identification of individuals during open meetings.

The second area of inquiry pertains to requests that were denied by Susan Jonides Deedy, Counsel to the Chancellor.

One request involved "All final investigative reports and statements of finding that were issued by Ed Stancik's Office, and that are physically located at 110 Livingston Street." You were informed that the records "do not exist in any one central location" and "are not maintained in a fashion that enables us to release them pursuant to your FOIL request." In short, for reasons described in previous correspondence, it appears that your request would not have "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law.

The remaining request involved "litigation file cabinet 'tags'" used by individual attorneys at the Board of Education. Ms. Deedy wrote that the tags "are considered internal notations that are confidential." You contend that Ms. Deedy did not cite any statutory exemption to support her contention that the material is 'confidential.'"

I am not familiar with the notations that appear on the tags. Nevertheless, there are several grounds for denial that may be relevant, depending on the content of the notations.

In the context of the duties of an attorney employed by the Board, it is possible that the tags identify students and that the names of students would be confidential pursuant to the Family Educational Rights and Privacy Act and, therefore, §87(2)(a) of the Freedom of Information Law. Similarly, the tags could identify employees who are the subjects of disciplinary proceedings or other matters the disclosure of which would constitute an unwarranted invasion of personal privacy deniable under §87(2)(b). The tags could reflect values or opinions, i.e., by characterizing the contents of files as "important" or "unimportant", "winnable" or "unwinnable." Those kinds of notations could in my view be withheld as intra-agency material under §87(2)(g).

I refer, too, to a recent decision that might be pertinent involving access records relating to payments by a municipality to a law firm for services rendered. It was contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "...in order to uphold respondent's denial of the FOIL request, the Court would be compelled to conclude that the descriptive material, set forth in the law firm's monthly bills, is uniquely the product of the professional skills of respondent's outside counsel. The Court fails to see how the preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, can be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 [Sup. Ct. Kings Ct. 1984]). Therefore, the Court concludes that the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "However, the Court is aware that, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court).

The extent to which the preceding commentary may be relevant to the materials at issue is unknown to me, and rights of access would likely be dependent on the content of those materials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Tucker
Bruce K. Gelbard
Susan Jonides Deedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 190
FOIL-AO 9252

162 Washington Avenue, Albany, New York 12231
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January 12, 1996

[redacted]
P.O. Box 247
Ogdensburg, NY 13669

<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 information presented in your correspondence.</u>

Dear [redacted]:

I have received your letter of December 26. You wrote that you were bitten by an inmate who is HIV positive and want to know how you can ascertain "through his medical records if he is HIV positive and how [you] go about bring[ing] criminal charges against him."

In this regard, the Committee on Open Government is authorized to provide advice concerning access to records. Consequently, I cannot advise with respect to the means by which you might initiate criminal charges.

With respect to access to records, I do not believe that you would have the right to gain access to medical records pertaining to a person other than yourself. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 is §87(2)(b), which states that an agency may withhold records the disclosure of which would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) includes 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..."

Also relevant in my view is the Personal Privacy Protection Law. In brief, that statute forbids a state agency from disclosing personal information about an individual, except under circumstances specified in §96(1) of that statute. In my view, none of the exceptions that would permit disclosure would be applicable to a request that you might make for the records in question. I note, too, that §89(2-a) of the Freedom of Information Law indicates that that statute does not permit disclosure constituting an unwarranted invasion of personal privacy when the disclosure would be prohibited under §96 of the Personal Privacy Protection Law.

I hope that the foregoing serves to enhance your understanding of the matter and 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-9253

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

January 16, 1996

Mr. Carlton Jones, Sr.
93-A-7703 SHU- B19
Mohawk Correctional Facility
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 information presented in your correspondence.

Dear Mr. Jones:

I have received your letter, which reached this office on January 5. You have sought assistance regarding the rules and regulations that state employees must follow.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain records generally, and I do not have copies of any of the records of your interest. Nevertheless, I offer the following comments.

First, the rules and regulations applicable to state employees will differ from one agency to the next and from one employee or title to the next. In a correctional facility, for example, the rules applicable to correction officers will likely differ from those who work in medical positions.

Second, with respect to the source of such records, it is suggested that a request be made to the agency that maintains the records in which you are interested. 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. I note that regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a correctional facility may be directed to the facility superintendent.

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 §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial may be relevant to your inquiry.

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. It would appear that the records would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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

> 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 which you may be interested, 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 §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 officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records of your interest 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9254

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 16, 1996

Mr. Yury Yusov
94-A-8551
Fishkill Correctional Facility
P.O. 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 information presented in your correspondence.

Dear Mr. Yusov:

I have received your letter of December 17 in which you complained that the New York City Police Department and the Office of the Kings County District Attorney failed to comply with the Freedom of Information Law by delaying responses to requests for records. The correspondence indicates, for example, that a determination to grant or deny a request made on August 10 to the Police Department would be made on or about November 24. As of the date of your letter to this office, however, it appears that no determination was made.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied.

Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 made to the Police Department is Janet Lennon, Deputy Commissioner, Legal Matters. The person so designated by the District Attorney is Melanie Marmer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Joseph Cannata, Records Access Officer
C. Sandler, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9355

162 Washington Avenue, Albany, New York 12231
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January 16, 1996

Mr. Bernard J. Zolnowski
[redacted]

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. Zolnowski:

I have received your letter of January 3 in which you requested an opinion concerning two issues relating to access to records.

First, you wrote that City Council members are "destroying documents and files before leaving office." In this regard, the Freedom of Information Law governs public rights of access to records. More relevant in my view is the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

With respect to the retention and disposal of records, §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 on 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.

The second issue involves a demand by a county agency that fees for copies of records prepared pursuant to the Freedom of Information Law be paid by certified check. You added that "no check has ever bounced or been dishonored and other branches of County government have accepted personal checks with no problems." There is nothing in the Freedom of Information Law that pertains specifically to the means by which fees for copies should be paid. In the only decision of which I am aware, which, I note, involved Erie County, it was found that the County Board of Elections "failed to provide a reasonable and rationale basis to justify their policy of requiring payment of fees for copying of records in the form of only bank checks or money orders", and it was ordered that the agency be required to accept payment in United States currency as well [Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984]. The court did not refer to payment by personal check, and that does not appear to have been at issue.

It is suggested that you review the rules and regulations promulgated by the County pursuant to the Freedom of Information

Law, for they may address the matter. If there is no statement on the subject offered in the regulations, I believe that the direction provided by the court in Reese offers appropriate guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Corporation Counsel, City of Buffalo
County Attorney, Erie County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9256

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

January 18, 1996

Mr. Anthony J. Logallo
90-B-1210
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 information presented in your correspondence.

Dear Mr. Logallo:

I have received your letter of January 3. You have sought an advisory opinion concerning the propriety of a "flat rate fee" of twenty dollars established by the Department of Correctional Services for a copy of its master index.

In this regard, as you may be aware, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy when making copies of records available. Therefore, if the master index consists of fewer than eighty pages, the Department would be charging more than twenty-five cents per photocopy, and the flat rate fee would, in my view, be inappropriate. On the other hand, if the master index consists of eighty pages or more, I believe that the flat rate fee would be proper and that it might essentially represent a discounted fee if the document is greater than eighty pages long.

It is noted that records accessible under the Freedom of Information Law are available for inspection and copying, and that no fee may be charged for the inspection of records. Further, if after inspecting the master list, for example, you find that you want copies of fewer than eighty pages, I believe that the Department would be required to make copies of those pages at a rate of not more than twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wayne L. Strock
Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-9556
FOIL-AO-9257

162 Washington Avenue, Albany, New York 12231
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January 18, 1996

Mr. Ira Hersch
[redacted]

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. Hersch:

I have received your letter of December 20, which, for reasons unknown, did not reach this office until January 5.

The issue that you raised is whether the Baruch College Committee on Academic Standing of the School of Business is required to comply with the Open Meetings Law. According to your letter and the form attached to it, the Committee has the authority to make binding determinations.

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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."

Judicial decisions indicate generally that advisory bodies having no power to take final action fall outside the scope of the Open Meetings Law. As stated in those decisions: "it has long been held that the mere giving of advice, even about governmental matters is not itself a 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)]. In this instance, the entity in question does not appear to be advisory; again, it appears to have the ability render determinations. If that is so, I believe that it would constitute a public body subject to the Open Meetings Law.

Second, it is noted initially that there are two vehicles that may authorize a public body to discuss public business in private. One involves entry into an 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, and the 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.

As I understand the matter, it is unlikely that there would have been a basis for conducting an executive session. The only ground for entry into executive session that appears to relate to the issue, §105(1)(f), authorizes a public body to conduct such a 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."

The language quoted above pertains to a variety of topics as they relate to a "particular person." However, it does not appear that the subjects described in §105(1)(f) relate to the subject considered by the Committee.

The other vehicle for excluding the public from a meeting involves "exemptions." Section 108 of the Open Meetings Law contains three exemptions. When an exemption applies, the Open

Meetings Law does not, and the requirements that would operate with respect to executive sessions are not in effect. Stated differently, to discuss a matter exempted from the Open Meetings Law, a public body need not follow the procedure imposed by §105(1) that relates to entry into an executive session. Further, although executive sessions may be held only for particular purposes, there is no such limitation that relates to matters that are exempt from the coverage of the Open Meetings Law.

Of possible relevance to the matter is §108(1) of the Open Meetings Law, which exempts from the coverage of that statute "judicial or quasi-judicial proceedings..." From my perspective, it is often difficult to determine exactly when public bodies are involved in a quasi-judicial proceeding, or where a line of demarcation may be drawn between what may be characterized as quasi-judicial, quasi-legislative or administrative functions. Similarly, often provisions require that public hearings be held; others permit discretion to hold a public hearing. Further, the holding of public hearings and providing an opportunity to be heard does not in my opinion render a proceeding quasi-judicial in every instance. Those requirements may be present in a variety of contexts, many of which precede legislative action.

I believe that one of the elements of a quasi-judicial proceeding is the authority to take final action. While I am unaware of any judicial decision that specifically so states, there are various decisions that infer that a quasi-judicial proceeding must result in a final determination reviewable only by a court. For instance, in a decision rendered under the Open Meetings Law, it was found that:

> "The test may be stated to be that action is judicial or quasi-judicial, when and only when, the body or officer is authorized and required to take evidence and all the parties interested are entitled to notice and a hearing, and, thus, the act of an administrative or ministerial officer becomes judicial and subject to review by certiorari only when there is an opportunity to be heard, evidence presented, and a decision had thereon" [Johnson Newspaper Corporation v. Howland, Sup. Ct., Jefferson Cty., July 27, 1982; see also City of Albany v. McMorran, 34 Misc. 2d 316 (1962)].

Another decision that described a particular body indicated that "[T]he Board is a quasi-judicial agency with authority to make decisions reviewable only in the Courts" [New York State Labor Relations Board v. Holland Laundry, 42 NYS 2d 183, 188 (1943)]. Further, in a discussion of quasi-judicial bodies and decisions pertaining to them, it was found that "[A]lthough these cases deal with differing statutes and rules and varying fact patterns they clearly recognize the need for finality in determinations of quasi-

judicial bodies..." [200 West 79th St. Co. v. Galvin, 335 NYS 2d 715, 718 (1970)].

It is my opinion that the final determination of a controversy is a condition precedent that must be present before one can reach a finding that a proceeding is quasi-judicial. Reliance upon this notion is based in part upon the definition of "quasi-judicial" appearing in Black's Law Dictionary (revised fourth edition). Black's defines "quasi-judicial" as:

> "A term applied to the action, discretion, etc., of public administrative officials, who are required to investigate facts, or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature."

Insofar as the Committee's proceedings could be characterized as quasi-judicial, the Open Meetings Law, in my view, would not apply.

Also relevant under the circumstances may be §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

Here I direct your attention to the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in funding or grant programs administered by the United States Department of Education. As such, it 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, a so-called "eligible student", similarly waives his or her right to confidentiality. The regulations promulgated under FERPA 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, disclosure of 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. Further, the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Committee discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Lastly, viewing the matter from a different perspective, insofar as CUNY, Baruch College or the Committee in question maintain records pertaining to you, it appears that you would enjoy rights of access to those records pursuant to FERPA. Therefore, even if meetings of the Committee might justifiably be closed, records maintained by the Committee pertaining to you would likely be accessible to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Committee on Academic Standing

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9258

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 18, 1996

Mr. Dale D'Amico
95-A-4203
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929-2002

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. D'Amico:

I have received your letter of January 2 and the materials attached to it. You have sought assistance in your efforts in gaining access to records of the Office of the Suffolk County District Attorney. Based on a review of the correspondence, 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 applicable 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 short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, 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.

The foregoing is not intended to suggest that records sought under the Freedom of Information Law must, of necessity, be disclosed. Although that statute is based on a presumption of access, as you may be aware, several grounds for denial appearing in §87(2) may be cited to withhold records or perhaps portions of records in proper circumstances. Upon consideration of the nature

and content of the records sought and the effects of their disclosure, one or more of the grounds for denial in §87(2) might serve to permit a denial of access.

Before reviewing the grounds for denial that may be pertinent, I point out the §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable agency staff to locate and identify the records.

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 §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, there is nothing in the Freedom of Information Law pertaining to the waiver of fees for copies of records. In a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e., as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marcia R. Lombardo, Assistant District Attorney
Derrick J. Robinson, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9259

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

January 18, 1996

Mr. Eric Evans
95-A-1077
P.O. Box 1077
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 information presented in your correspondence.

Dear Mr. Evans:

I have received your letter of January 2. In brief, you complained that the New York City Police Department has failed to respond to your request for records and the ensuing appeal 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Janet Lennon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 3557
FOIL-AO- 9260

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 19, 1996

Mr. Leslie C. Smith, Sr.
Chairman
C.C.L.P.L.D.
256 Erie Road
West Hempstead, NY 11552

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, unless otherwise indicated.

Dear Mr. Smith:

I have received your letter of January 4. You asked that I prepare an advisory opinion concerning a complaint and the allegations contained therein sent in November to Richard Mills, Commissioner of Education. A copy of that documentation was sent to this office. On behalf of the Concerned Citizens of the Lakeview Public Library District, you raised a variety of issues relating to the Open Meetings and Freedom of Information Laws.

Since you alleged that the Board of Trustees conducts executive sessions prior to its open meetings, I point out that the phrase "executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an open meeting during which the public may be excluded. As such, an executive session is not separate and distinct from a meeting, but rather is a portion of an open meeting. The Law also contains a procedure that must be accomplished during an open meeting before an executive session may be held. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

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

It has been consistently advised that a public body 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].

Moreover, a public body cannot conduct an executive session to discuss the subject of its choice. On the contrary, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be discussed during an executive session. You referred specifically to a discussion of the revision of by-laws during an executive session. In my view, that kind of issue, which involves matters of policy, would fall outside any of the grounds for entry into executive session and should have been discussed in public.

Every meeting of a public body, such as the Board of Trustees, must be preceded by notice given to the news media and to the public by means of posting. Section 104 of the Open Meetings Law provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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. If the Board intends to convene at a certain time, if only to enter into a proper executive session immediately thereafter, notice would have be given to the effect that the Board will meet at that time.

The Open Meetings Law provides direction concerning the contents of minutes and when they must be disclosed. 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."

Implicit in the Law and crucial to its thrust is the requirement that minutes, whether lengthy or brief, serve as an accurate and true representation of what occurred during a meeting.

With regard to recording of how each member voted, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], 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.

As the focus of my comments shifts to the Freedom of Information Law, it is noted at the outset 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. 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. In your request of June 30, for example, you sought answers to questions and information. While Library officials could have provided responses, so doing would have exceeded their obligations under the Freedom of Information Law. In the future, it is suggested that you seek existing 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.

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, section 4503). Therefore, while some identifying details or descriptions of services rendered found in the records sought 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.

Whether the provisions or situations described above would be relevant with respect to the particular records at issue concerning legal fees is unknown to me. In a decision dealing with payments to attorneys, Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the case 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 required.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9261

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

January 29, 1996

Mr. Ricardo A. DiRose
85-C-0773
PO 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 information presented in your correspondence.

Dear Mr. DiRose:

I have received your letter of December 21, which did not reached this office until January 10, perhaps due to an erroneous zip code. You have sought an advisory opinion concerning the propriety of a denial of access to the telephone records of the Onondaga County District Attorney.

Your request was denied because it was "vague and unspecific" and pursuant to §§87(2)(g) and (2)(e)(i) of the Freedom of Information Law. Additionally, it was stated that:

> "the phone records of this office are not 'public records' that this office is required to 'keep and maintain' as per **POL §86(4).** Therefore, as such old phone records are not required to be kept by this office, the general public does not have the general right to access this information. The same applies to you as a citizen."

In this regard, I offer the following comments.

First, it is noted at the outset 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, insofar as the Office of the District Attorney maintains telephone records, I believe that they fall within the coverage of the Freedom of Information Law, even if they could have been destroyed in accordance with the provisions of Article 57-A of the Arts and Cultural Affairs Law. If the records no longer exist, the Freedom of Information Law would not apply.

Second, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. As such, an applicant must provide sufficient detail to enable agency staff to locate the records. Your request involved "long distance phone records/bill for the date of 3/13/92". Assuming that the records sought continue to exist and can be located, it appears that your request would have reasonably described 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 §87(2)(a) through (i) of the Law. 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 County, 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 City, they would not fall within §87(2)(g), because the phone company would not be an agency.

A second ground for denial of relevance 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 City.

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, 179 AD 2d 763 (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, and in many cases 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, however, 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 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, i.e., as recipients of public assistance or persons having particular health problems or issues.

Similarly, in the case of phone bills reflective of calls made by law enforcement officials, depending upon an official's function and how an official uses a phone, there may be grounds for withholding the numbers on a bill. If a phone is frequently or routinely used in connection with criminal investigations, disclosure of numbers called could permit an applicant for the bills to ascertain the course of an investigation, identify witnesses or even confidential informants. When that is so, I believe that appropriate deletions (i.e., the numbers called) could be made on the ground that disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the lives or safety of law enforcement personnel and perhaps others who might be identified by means of a phone number appearing on a bill. In that latter situation involving the possibility of endangerment, §87(2)(f) of the Freedom of Information Law would serve as a basis for denial.

When phone bills include reference to numbers called, a person may be able to learn that he or she is the subject of an investigation and consequently may take steps to evade detection or effective law enforcement, thereby jeopardizing the safety of law enforcement personnel and others. Further, while an informant's number may not be known to the public generally, it may be recognized by the subject of an investigation. Disclosure in that case could endanger the life or safety of the informant or witness, for example.

In short, if a phone is used by law enforcement personnel to engage in criminal investigations, there would likely be valid reasons for withholding the bill or the numbers called appearing on the bill.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: James P. Maxwell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9262

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

January 29, 1996

Ms. Nancy Boag
[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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Ms. Boag:

I have received your letters of January 5 and 6, as well as related correspondence transmitted by the Department of Transportation.

In the letter of January 5, you contended that the Department, "by default", had denied your request for records and that you consider the denial to be "retaliatory." In the second letter, you wrote that you are Administrative Officer for Region 4 of the Department, and that the Department denied access to some of the records that you produced in that capacity. You added that the records are needed to prepare your defense in a proceeding in which you are involved, and you questioned the propriety of the Department's position on the matter. The records sought include "Records of Administrative Officer 1993-1995", your personal history jacket, and Region 4 and Department bulletins. Based on documentation forwarded to the Department, your personal history jacket and the bulletins that you requested have been or will be made available. The remainder of the request was denied due to a lack of clarity and pursuant to paragraphs (b) and (g) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, having discussed the matter with Department officials, it appears that the delay in response was not retaliatory in nature but rather due to changes in personnel, difficulty in locating the records, and the need for review by an attorney of the records.

Second, I note 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 staff to locate and identify the records. For reasons described in the preceding paragraph and because of the volume of the records and the breadth of the request, it is likely in my view that your request for administrative officer records encompassing a period of three years would not have the met the standard of reasonably describing the records. Due to your familiarity with the records, I would conjecture that you can provide clarification in an effort to make a more appropriate request. I note, too, that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) state that an agency's records access officer is required to ensure that agency personnel assist an applicant in identifying requested records if necessary. The "records access officer" is the person designated to coordinate the agency's response to requests.

Third, as I understand the matter, you have requested records not in your official capacity as Administrative Officer but rather as a member of the public. if that is so, I believe that the Department may consider the request as having been made by a member of the public pursuant to the Freedom of Information Law. I point out that your status as an employee of the Department, or as a party to a proceeding, does not affect your rights, positively or negatively, under the Freedom of Information Law. In a decision rendered by the Court of Appeals, the State's highest court, [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)], the issue involved 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.

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. As the records were described to me, the two grounds for denial cited by the Department are clearly pertinent to an analysis of rights of access.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." I was informed that many of the records identify persons interviewed in conjunction with the proceeding, and I believe that the Department could justifiably withhold records under §87(2)(b) to the extent that disclosure would identify those persons.

The other ground for denial, §87(2)(g), enables the Department to withhold records that:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lewis M. Gurley
James DelPrincipe
Lisa P. Reid

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9263

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

January 29, 1996

Mr. Jeffrey I. Rothstein
J.R. Investigations, Security
& Paralegal Services Inc.
2950 Ocean Avenue
Brooklyn, NY 11235

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. Rothstein:

I have received your letter of January 2 and the materials attached to it.

As I understand the matter, on behalf of a client, you requested records in August from the New York City Police Department concerning a motor vehicle accident or that verify that the accident occurred. In a response dated August 30, the request was denied. Reference was made in the denial to an arrest report sealed under §160.50 of the Criminal Procedure Law and memo book entries of the arresting officer.

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.

While the records referenced in the denial might properly have been withheld, it appears that they are separate and distinct from a motor vehicle accident report.

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

> 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, except to the extent that 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.

Further, in my opinion, when a record is requested, an agency must respond in one of three ways: it must grant access to the record, deny access in whole in part, or assert that it does not maintain the record or cannot locate it after having made a diligent search. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

In Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis

upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, I believe that the State Department of Motor Vehicles serves as a repository of all motor vehicle accident reports. As such, it may be worthwhile to seek a copy of the accident report from that agency.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Janet Lennon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 92164

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

January 29, 1996

Mr. Anthony D. Amaker
89-T-2815
Green Haven Corr. Facility
Drawer B, Rte 216
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. Amaker:

I have received your letter of December 28 in which you complained that the Department of Correctional Services has failed to respond to your request for records, as well as your ensuing appeal. Although you did not describe the records sought, 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)].

For your information, the person designated to determine appeals is Counsel to the Department, Anthony J. Annucci.

Lastly, having searched our files, it appears that a copy of the appeal of December 15 to which you referred has not been received by this office.

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 9365

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

January 29, 1996

Mr. Charles E. Wright
80-A-2724
Cayuga Corr. Facility
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 information presented in your correspondence.

Dear Mr. Wright:

I have received your letter of January 9, which reached this office on January 17. According to your letter, you wrote in February of 1995 to the Commissioner of the New York City Department of Correction and requested a "Criminal Court in take area in and out signature log book, Part AR-I, under Docket No. #821909, on April 5, 1978 and April 6, 1978". As of the date of your letter, the request had not be answered.

In this regard, I offer the following comments.

First, based on your description of the record, it is likely in my view, that it is not maintained by the Department of Correction, but rather by the court. 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 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 Freedom of Information Law does not apply to the courts or court records.

Court records are often available under other statutes (see e.g., Judiciary Law, §255), and it is suggested that you seek the record from the clerk of the appropriate court.

Second, when a record is maintained by an agency, a request should be made to the agency's "records access officer". The records access officer has the duty of coordinating the agency's response to requests. The records access officer of the Department of Correction is Mr. Thomas Antenen. If you believe that the Department maintains the records in question, a request may be directed to Mr. Antenen at the Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9266

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

January 29, 1996

Mr. Ronald L. Morris
95-R-3848
Gouverneur Corr. Facility
PO Box 480
Gouverneur, NY 13642

<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 information presented in your correspondence.</u>

Dear Mr. Morris:

I have received your letter of January 9, which reached this office on January 17.

According to your letter and the correspondence attached to it, the City of Buffalo Police Department had denied access to certain written communications among its officers pursuant to §87(2)(g) of the Freedom of Information Law, as well as a transcript of a 911 tape recording citing the County Law. You have sought assistance in obtaining the records.

In this regard, I offer the following comments.

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

In my view, communications among police officers would constitute "intra-agency" materials that fall within the scope of §87(2)(g). However, due to the structure of that provision, the contents of those materials, not merely their characterization as intra-agency materials, serve as the factors that determine the extent to which they 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 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, insofar as the materials at issue consist of factual information, for example, they must be disclosed, unless a different ground for denial can properly be asserted.

With respect to the 911 tape recording, of apparent relevance is the initial ground for denial, §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(5) of the County Law, which states that:

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

In many instances, although an agency may withhold records, it has discretionary authority to disclose the records [see e.g., Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)]. In this instance, however, I believe that the language of §308(5) is restrictive, for it specifies that the records of calls made to an E-911 system "shall not be made available", except in the circumstances provided later in that provision. Therefore, unless one of those circumstances authorizing disclosure is present, the Department, in my view, would be prohibited from disclosing the records in question.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Lt. Mark Makowski
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9267

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

January 29, 1996

Mr. Bernard J. Zolnowski, 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 information presented in your correspondence.

Dear Mr. Zolnowski:

I have received your transmittal of January 10 in which you requested an advisory opinion.

According to your correspondence, you transmitted a request under the Freedom of Information Law by fax to Erie County on November 9. On November 20, you were informed by the Second Assistant County Attorney that "In order to appropriate [sic] respond to your inquiry, I am requesting that you set forth the appropriate Public Officer [sic] Law section that you rely on for same".

In this regard, I know of no provision in the Freedom of Information Law or any judicial interpretation of that statute that suggests that an applicant must cite a particular provision within the Public Officers Law in order to justify a request for records. On the contrary, §89(3) of the Freedom of Information Law states that an applicant must merely "reasonably describe" the records sought. Therefore, I believe that any request made in writing that reasonably describes the records should meet the requirements of the statute.

Moreover, the legislative declaration that appears in §84 of the Freedom of Information Law clearly indicates that the statute is intended to diminish barriers to access, not to create them. The declaration states in relevant part that:

> "...it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible."
>
> "The people's right to know the process of governmental decision-making 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."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Kenneth D. Schoetz, County Attorney
James A.W. McLeod, Second Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9268

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

January 29, 1996

Ms. Jean A. Black
[redacted]

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 Ms. Black:

I have received your letter of January 5 and the materials attached to it. You referred specifically to a response to a request by Donald C. Peck of the Hilton Central School District.

As I understand the matter, you requested records indicating the names, titles and salaries of the District's administrators. Mr. Peck wrote on December 19, that "[y]our request is currently being processed and will either be approved or denied in approximately 45 business days" and added that "should additional time be needed, we will notify you in writing".

In my opinion, the information sought is clearly accessible to the public under the Freedom of Information Law and must be included in a record required to be maintained by the District. As such, the delay in disclosure is in my view inconsistent with the Freedom of Information Law. In this regard, I offer the following comments.

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

Second, 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. 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 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, on an ongoing basis, and made available.

Third, 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 this instance, however, because rights of access are clear, and because the information sought must be included in a record required to be maintained by law, there would appear to be no justification for the kind of delay described in response to your request.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Mr. Peck.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Donald C. Peck

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9269

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

January 29, 1996

Mr. Arthur F. Kelley
Vice. President
Douglas Manor Association, Inc.
328 Manor Road
Douglaston, NY 11363

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. Kelley:

I have received your letter of January 5 in which you sought assistance in your efforts in gaining access to records on behalf of the Douglas Manor Association from New York City.

According to your letter, the Association maintains a swimming beach, and the "New York City Health Department - DEP takes weekly samples of water both at the beach and at the swimming float". You requested reports based on the samples but indicated that you have encountered continual delays that "adds up to a 'stone wall'".

In this regard, I offer the following comments.

First, since you referred to the Health Department and the Department of Environmental Protection, I point out that they are separate entities within New York City government. Nevertheless, it is noted that 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 for records. If you have not already done so, it is suggested that you request the records in question from the records access officer or officers at the agency or agencies in possession of the 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)].

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 the records at issue fall within the scope of one of the grounds for denial, due to the structure of that provision, I believe that it requires disclosure of the records. Section 87(2)(g) states that an agency may withhold records that:

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

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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 I understand the matter, the records sought consist of statistical or factual information. If that is so, they would be accessible under §87(2)(g)(i).

In an effort to enhance compliance with the Freedom of Information Law, copies of this response will be forwarded to the official identified in your letter and the records access officers at the Departments of Health and Environmental Protection.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Allen Aigen
Patricia J. Caruso, Records Access Officer
Marie Dooley, Records Access Officer

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9270

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

January 29, 1996

Mr. Michael Kuzma
[redacted]

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. Kuzma:

I have received your letter of January 11. According to your letter, the questionnaires that you were required to complete in conjunction with the possibility of serving on a jury included the submission of your social security number. It is your view that this requirement violates the federal Privacy Act, and you asked "what action, if any, [this] office intends to take to ensure that the Commissioner of Jurors for Erie County modifies its juror questionnaires to comport with the Privacy Act of 1974."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning access to and, in part, the collection of information by entities of government in New York. The Committee is not empowered to enforce the statutes within its advisory jurisdiction or the federal Privacy Act.

Second, as you may be aware, the only aspect of the federal Privacy Act (5 USC §552a) that pertains to state and local governments involves social security numbers, and §7 of the Act states that:

> "(a)(1) [I]t shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number.
>
> (2) the provision of paragraph (a) of this subsection shall not apply with respect to --

> (A) any disclosure which is required by Federal Statute, or
>
> (B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual
>
> (b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it."

The quoted provision places limitations upon the collection and use of social security numbers by government, and unless "grandfathered in" under the Privacy Act, agencies cannot require the submission of social security numbers, except in conjunction with social security or other statutorily authorized purposes.

While this office cannot enforce the Privacy Act, in an effort to enhance compliance with law, copies of this opinion will be forwarded to the Erie County Commissioner of Jurors and the Office of Court Administration. In addition, you might want to contact the Office of Information and Privacy, U.S. Department of Justice, Washington, D.C. 20530.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mehrl F. King, Commissioner
John Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9271

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

January 29, 1996

Mr. Michael O'Connor
[redacted]

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

Dear Mr. O'Connor:

I have received your letter of January 11 in which you complained that the Town of Wappinger Justice Court has failed to provide a transcript of a proceeding in which you were involved.

In this regard, the Freedom of Information Law does not apply to the courts or court records. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

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

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

While court records are not subject to the Freedom of Information Law, those records are often available under other statutes. For example, in this instance, the court is a town justice court, and §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..." Therefore, unless a different provision prohibits

disclosure, I believe that justice court records are available pursuant to the provision cited above.

However, if no transcript exists or has been prepared, I am unaware of any provision that would require the preparation of such a record. Since I am not an expert on that subject, it is suggested that you confer with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cheryl Hart, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9372

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

January 29, 1996

Mr. Martin Hodge
86-A-8851
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 information presented in your correspondence.

Dear Mr. Hodge:

I have received your letters of January 10 addressed to William Bookman, Chairman of the Committee. As indicated above, the staff of the Committee is authorized to respond on its behalf.

You complained with respect to failures to respond to requests and claims that requested records cannot be found. In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency is required to designate one or more persons as "records access officer." That person has the duty of coordinating an agency's response to requests, and requests should be directed to that person.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the New York City Police Department is Janet Lennon, Deputy Commissioner, Legal Matters; the person so designated by the Bronx County District Attorney is Peter D. Coddington.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Janet Lennon
Peter Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9273

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

January 29, 1996

Raymond L. Philo
Chief of Police
Town of New Hartford Police Department
3 Kellogg Road
New Hartford, NY 13413-2850

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 Chief Philo:

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

You have sought assistance in relation to a request for records that you sent to the State Insurance Department on November 7. The receipt of your request was acknowledged on November 13, and you were informed that a determination would be made "within 30 days." 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied.

Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 at the Department is Paul Altruda, General Counsel.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Altruda
Salvatore Castiglione

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9274

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

January 29, 1996

Mr. William Flecha
88-T-2145 A-3-4
Groveland Corr. Facility
PO Box 46, Route 36
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 information presented in your correspondence.

Dear Mr. Flecha:

I have received your correspondence of January 16. You have complained that personnel at your facility have added material, which has since been withheld from you, after your review of and signature on certain forms.

In this regard, the Freedom of Information Law pertains to public rights of access and agencies' ability to withhold records. That statute does not govern an agency's practices or policies concerning the addition of information to records after they have been reviewed.

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.

Of relevance to the information in question 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 point out that a decision rendered in 1989 might have dealt with the kind of information in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Ms. Jones
Ms. Grosse

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9275

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

January 29, 1996

Mr. Jomo M. Williams
95-R-2797
Orleans Correctional Facility
P.O. Box 436
Albion, NY 14411

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

Dear Mr. Williams:

I have received your letter of January 9 in which you referred to requests for transcripts of judicial proceedings and stated that you "prefer access and choose to exercise [your] right by the Freedom of Information Law and no other channel if need not necessary."

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records.

I hope that the foregoing serves to clarify 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 9276

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

January 29, 1996

Mr. Kelvin Williams
95-A-0131
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Williams:

I have received your letter of January 5, which reached this office on January 12. You have raised the following question: "Are lawyers who are assigned to the 18B panel considered in an agency?"

In this regard, it is noted at the outset that §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

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

With respect to assignments under "Article 18-B", which encompasses §§722 to 722-f of the County Law, §722 states that the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

I hope that 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 9277

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

January 29, 1996

Mr. Paul Bouros
94-A-2268
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 information presented in your correspondence.

Dear Mr. Bouros:

I have received your letter of January 11 in which you sought guidance concerning access to your "juvenile arrest records."

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

Relevant in my opinion is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §784 of the Family Court Act, which states that:

> "All police records relating to the arrest and disposition of any person under this article shall be kept in files separate and apart from the arrests of adults and shall be withheld from public inspection, but such records shall be open to inspection upon good cause shown by the parent, guardian, next friend or attorney of that person upon the written order of a judge of the family court in the county in which the order was made or, if the person is subsequently convicted of a crime, of a judge of the court in which he was convicted."

Based on the foregoing, it appears that a court order obtained in accordance with §784 of the Family Court Act would be needed to obtain the records in question.

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 9278

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

January 29, 1996

Mr. Gerlando Triscari
94-B-2171
Mt. McGregor Correctional Facility
Wilton, NY 12831

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. Triscari:

I have received your undated letter, which reached this office on January 8. You wrote that you are interested in obtaining records concerning disbarment proceedings against an attorney.

In this regard, I offer the following comments.

First, I do not believe that the Freedom of Information Law governs rights of access to the records in question. 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."

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 the foregoing serves to clarify 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 9279

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

January 29, 1996

Mr. Jordan Moss
Editor-in-Chief
Norwood News
75 East 208 Street
Bronx, NY 10467

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. Moss:

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

According to your letter, the New York City School Construction Authority ("SCA") denied a recent request for records, even though essentially the same records were made available in response to a request made in August, 1994. You wrote that "[t]he documents, which include summaries of progress on various aspects of the projects and correspondence between subcontractors and the SCA, are combined in spiral-bound monthly progress reports." The request was denied on the ground that records consist of "'intra-agency materials' which are exempt from FOIL pursuant to Section 87(2)(g) of Public Officers Law."

You have sought an advisory opinion concerning the propriety of the denial.

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

Second, §87(2)(g) pertains to "inter-agency" and "intra-agency" materials. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council,

> office of other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, an agency is an entity of state or local government. Based on the definition of "agency", "inter-agency materials" would involve written communications between or among officials of two or more agencies; "intra-agency materials" would consist of communications between or among officials within an agency. When a member of the public or a private business entity communicates with government, the communication, in my view, could not be characterized as "inter-agency or intra-agency materials", for that person or entity 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 the opinion that §87(2)(g) was "not relevant because the communication sought is not between officials within an agency of the City or among officials of different agencies of the City" (Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Similarly, in rejecting a denial based upon §87(2)(g) involving correspondence between the New York City Bureau of Labor Services and private child care institutions, it was determined that those institutions "cannot satisfy the term 'agency' as defined in Public Officers Law §86(3)..."(Lowry v. Bureau of Labor Services, Supreme Court, New York County, March 9, 1984; see also Leeds v. Burns, Supreme Court, Queens County, NYLJ, July 27, 1992).

In short, if I understand the facts accurately, the records sought consist of communications between the SCA and private contractors, business entities. If that is so, §87(2)(g) would in my opinion be inapplicable as a basis for denial of access.

Lastly, even if the records could properly be characterized as intra-agency materials that fall within §87(2)(g), based on the sample records that you enclosed, I believe that they would be available in great measure, and in most instances, in their entirety. 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.

The materials that you sent consist largely of factual information. If §87(2)(g) is applicable, which does not appear to be so, SCA would be required to disclose those portions of the records consisting of statistical or factual information pursuant to §87(2)(g)(i).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Cranston
Joseph J. Giamboi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9280

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

January 29, 1996

Mr. Ronald Stanfield
93-R-2844
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Stanfield:

I have received your letter of January 9 and the correspondence attached to it. In conjunction with your attempt to acquire a copy of a search warrant, you indicated that you wrote to the Office of the Suffolk County Attorney and the District Court of Suffolk County and were advised that the Freedom of Information Law does not apply to the courts. You have asked how you might obtain the record in question. I note that the Assistant District Attorney who responded to your request indicated the file concerning the case does not include the search warrant.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 are not subject to the Freedom of Information Law.

Other statutes, however, may grant rights of access to court records (see e.g., Judiciary Law, §255) and it is suggested that a request might be directed to the clerk of the appropriate court, citing an applicable provision of law as the basis for the request.

Second, assuming that you are referring to a warrant related to your arrest, I point out that §120.80(2) of the Criminal Procedure Law states in part that:

> "[U]pon request of the defendant, the police officer must show him the warrant if he has it in his possession. The officer need not have the warrant in his possession, and, if he has not, he must show it to the defendant upon request as soon after the arrest as possible."

As such, it would appear that copies of warrants would be available to you from either the police department that made the arrest or the court in which the warrant was introduced in a proceeding.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Peter J. Newman, District Court Judge
Marcia R. Lombardo, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9281

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

January 30, 1996

Mr. Lester G. 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 information presented in your correspondence.

Dear Mr. Freundlich:

I have received your letter of January 5, as well as a variety of related correspondence.

You have sought an advisory opinion concerning your right to gain access to a record maintained by the Department of Civil Service, specifically, "a February 1995 letter from Linda Wintner, an attorney for Metropolitan Life Insurance Company to Robert Dubois, Director of its Employee Benefits Division of DCS." The letter was withheld based on a contention that it falls within the attorney-client privilege and is exempt from disclosure under §4503 of the Civil Practice Law and Rules (CPLR) and, therefore, §87(2)(a) of the Freedom of Information Law.

It is your view that any claim of privilege is waived "where the communication is between the attorney for a party to litigation and a non-party witness." Nevertheless, in sustaining a denial of your request, Counsel to the Department wrote that:

> "First, underlined at the top of the subject communication, in bold type and capitalized letters, the words **'Privileged and Confidential Attorney Work Product"** appear. Second, it was understood by both Linda Wintner and the State Department of Civil Service that the communication was for the purpose of advancing a common purpose with respect to the litigation involved, that said communication would remain confidential, and that Mr. DuBois would have to consult with Counsel's Office at the Department of Civil Service. Third, due to the subject matter of the communication, Mr. DuBois, in fact found

> it necessary to consult with Counsel's Office at the Department of Civil Service.
>
> "As a general principle of law, a confidential communication to one with a common legal interest is protected by the attorney-client privilege. Provided the clients intended the communication to be confidential, said privilege applies in instances where different clients are pooling information in pursuit of a common goal or interest.
>
> "Since at the time the communication was advanced, both Metropolitan Life Insurance Company and the State Department of Civil Service were pursuing a matter of common interest, they are, as a matter of law, entitled to be treated as one client."

In this regard, I cannot offer specific guidance because the materials do not clearly indicate then nature or parameters of the relationship between Metropolitan Life Insurance Company and the Department of Civil Service. If your contentions are accurate, I would agree with them; on the other hand, the position offered by Counsel to the Department appears to have merit if the relationship between Metropolitan Life and the Department has been accurately characterized.

In an effort to seek to resolve the matter, however, I offer the following comments.

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

Second, the only ground for denial of apparent relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, two such statutes are relevant, §4503 of the CPLR, which codifies the attorney-client privilege, and potentially, subdivisions (c) and (d) of §3101 of the CPLR. Those provisions pertain respectively to attorney work product and material prepared for litigation.

It is noted that the courts have found that records may be withheld 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)].

Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." Additionally, with respect to material prepared for litigation, §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

The provisions in question are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent in part upon a finding that the records have not been disclosed, except to a client or a person acting with, for or on behalf of a client. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to

> an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

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)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary.

Lastly, I note that in a decision involving the assertion of the attorney-client privilege as a means of withholding records sought under the Freedom of Information Law, it was 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)].

Again, without greater knowledge of the nature of the relationship of the parties to the communications, I cannot offer unequivocal advice. I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel E. Wall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9282

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

January 31, 1996

Mr. Jerry Wolkoff
[redacted]

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. Wolkoff:

I have received your letter of December 30 in which you sought assistance in your attempts to gain access to records from the Office of the New York County District Attorney pertaining to the murder of your father in 1958. In brief, you were informed that no records concerning the incident could be located, but that some of former District Attorney Frank Hogan's papers had been donated to Columbia University. The District Attorney's representatives indicated, however, that they are not obliged to acquire or search for records no longer in their custody.

In this regard, I offer the following comments.

First and perhaps most relevant, the Freedom of Information Law pertains to existing records. If indeed the Office of the District Attorney does not maintain the records sought, the Freedom of Information Law would not apply.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for

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 FOIL-AO-9283

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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January 31, 1996

Mr. Eduardo Oquendo
87-A-2354
P.O. Box 149
Attica, NY 14011-0149

Dear Mr. Oquendo:

I have received your letter of January 24 in which you appealed a denial of access to records rendered on June 22 by Joseph Cannata, Records Access Officer for the New York City Police Department.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals following denials of access to records or otherwise compel an agency to grant or deny access to records.

The provision dealing with 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."

As stated above, a person denied access has thirty days to appeal the denial. Consequently, even if your appeal had been sent to the appropriate person or agency, the time for submission of the appeal expired long ago.

For future reference, the person designated to determine appeals at the New York City Police Department is Janet Lennon, Deputy Commissioner, Legal Matters.

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 FOIL-AO-9284

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

January 31, 1996

Mr. Howard Bean
93-A-7002
Midstate Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Bean:

I have received your letter of January 27 in which you requested copies of information pertaining to the Governor's "State of the State-Address Budget and Crime Bill." You cited the federal Freedom of Information and Privacy Acts as the basis for your request and asked that fees for copies be waived.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government records in New York under the State's Freedom of Information Law. The Committee does not maintain records generally, and this office does not possess the records in which you are interested. It is suggested that you seek the records through your facility librarian. I would conjecture that so doing represents the most efficient means of acquiring the information in question.

In general, when seeking records under the Freedom of Information Law, a request should be made 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.

Lastly, I point out that the Freedom of Information and Privacy Acts apply only to federal agencies. The New York Freedom of Information Law generally governs rights of access to records maintained by entities of government in this state. Further, although the federal Freedom of Information Act includes provisions concerning the waiver of fees, there is no such provision in the New York Freedom of Information Law. Moreover, it has been held that an agency may charge its established fees for producing photocopies of records, even though a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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

FOIL-AO-9285

162 Washington Avenue, Albany, New York 12231
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January 31, 1996

Mr. Craig Liddle
[redacted]

Dear Mr. Liddle:

I have received your letter of January 22 in which you requested copies of Medicaid applications submitted by a named individual since 1990. You indicated that you are unaware of her address and telephone number.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government records in New York. The Committee does not maintain records generally, and this office does not possess the records of your interest. Further, the Committee is not empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

As a general matter, a request should be directed to the "records access officer" at the agency that maintains the records of interest. The records access officer has the duty of coordinating an agency's response to requests.

I note 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 staff to locate and identify the records. Absent information other than a name, it is unlikely in my view that a request for records pertaining to a particular individual would meet the standard of reasonably describing the records.

Lastly, although the Freedom of Information Law is based upon a presumption of access and provides broad rights of access, I believe that the kinds of records in which you are interested may be withheld from the public. One of the grounds for denial in the Freedom of Information Law pertains to records that "are specifically exempted from disclosure by state or federal statute" [§87(2)(a)]. One such statute, §136 of the Social Services Law, specifies that records identifying either applicants for or recipients of public assistance are confidential.

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-9286

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 2, 1996

Mr. Rene Tellier
Reg. No. 32515054
Box 1000
Lewisburg, PA 17837

Dear Mr. Tellier:

Your letter of last month addressed to the Secretary of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the state's Freedom of Information Law.

There is no current publication that fully describes the functions of the Department of State. However, enclosed is "Your Right to Know", which describes the state's Freedom of Information Law.

Since you asked what records are available under the Freedom of Information Law, I note that such a question, due to the structure of that statute, cannot be answered. 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. Many of the grounds for denial appear in terms of potentially harmful effects of disclosure. Therefore, records may be accessible or deniable in whole or in part depending upon their specific contents and the effects of disclosure. For instance, if a crime was recently committed and has not yet been solved, disclosure of investigative records might interfere with an investigation and, therefore, be withheld. However, after an arrest has been made, it is possible that the investigation might have ended and that the records that were initially withheld become available because the harmful effects of disclosure have essentially disappeared.

Lastly, you asked whether a ballistic expert is required to have a license, even if that person is employed by a police department. I have no knowledge regarding any such licensing requirement, and neither the Committee nor the Department of State has any function or responsibility concerning that issue. It is suggested that you might seek information on the subject from the

NYS Division of Criminal Justice Services, Bureau for Municipal Police, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9287

Committee Members

William Bookman, Chairman
Peter Delaney
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Robert Zimmerman

Executive Director

Robert J. Freeman

162 Washington Avenue, Albany, New York 12231
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February 2, 1996

Mr. Kiyoshi Sorara
Legal Affairs Department
Asahi Shimbun
5-3-2, Tsukiji, Chou-ku
Tokyo 104-11
JAPAN

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. Sorara:

I have received your letter of January 26, and I am pleased that you could attend the International Forum on the Protection of Personal Data in Omiya. I hope that we will continue to share information and knowledge.

You have raised questions concerning the publication of names of persons who have been convicted of crimes. Specifically, you referred to situations in which the name of a person who committed a crime is published, "even if that person has served his/her term in prison" and you asked whether "that is a problem" or an "invasion of privacy."

In this regard, it is noted at the outset that when the news media acquires information, it has the right to publish the information. Under the United States Constitution, there is no significant restriction upon the ability of the media to disseminate news or information, and when the news media acquires records indicating convictions, it is free to publicize those facts, regardless of when the convictions might have occurred.

The difficulty does not involve publishing what is obtained, but rather, in some cases, the ability to obtain the information. As I indicated at the Forum, the federal law may differ from state laws or interpretations. The leading case decided under the federal Freedom of Information Act, which applies only to federal agencies, is U.S. Justice Department v. Reporters Committee for Freedom of the Press [489 U.S. 749 (1989)]. The U.S. Supreme Court in that decision held that "rap sheets", criminal history records, maintained by the Federal Bureau of Investigation in a database

serving as repository of those records, were not subject to disclosure under the federal Freedom of Information Act. Its rationale was based on the conclusion that the purpose of the federal Act is to give the public the right to know of government's actions, and that since the disclosure of the personal information contained in a rap sheet revealed nothing about an agency's actions, an agency could withhold the information based on considerations of privacy. Under Reporters Committee, it would appear that records may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy, unless the record sheds light on some governmental activity. The Court also found that records of conviction maintained by the courts were available to the public from the courts. The problem is that without knowledge of the court in which a conviction occurred, it is often difficult to locate conviction records. I have consistently criticized the Court's decision. How could it logically find that a record is public when it is kept by a court, but that disclosure of the same record by a federal agency would result in an unwarranted invasion of privacy?

With respect to records of arrests and convictions in New York, the general repository of those records is the Division of Criminal Justice Services (DCJS), which maintains a centralized database including criminal history information. The functions and duties of that agency are described in Article 35 of the Executive Law, §§835 to 846. In Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989), it was held that conviction records maintained by DCJS are confidential in view of the legislative history of the statutes that govern the practices of that agency. Specifically, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute", and it was found that:

> "Both the language of the statute and the consistent history of limited access to the criminal records maintained by DCJS lead this court to conclude that an exception to the mandate of FOIL exists with respect to the disclosure sought by petitioner.
>
> "Having determined that POL, §87(2)(a) is applicable to the records sought by petitioner, this court shall not address the issue of whether a further exemption might be had pursuant to POL 87(2)(b) as an unwarranted invasion of personal privacy, or whether the records may be available from any other centralized source."

As such, although the U.S. Supreme Court found that disclosure of a conviction record would constitute an unwarranted invasion of personal privacy in construing the federal Freedom of Information Act, the only court to deal with the issue under the New York

Freedom of Information Law reached its conclusion on a different basis. Moreover, the Court inferred that the records should be available from sources other than DCJS, for it was stated that:

> "...petitioner is correct when it asserts that the transmittal of an otherwise publicly available document to a centralized facility for inclusion in a government computer bank does not *per se* render it immune from disclosure. However, the issue is not whether the records under the control of DCJS **should** be released, but rather whether the provisions of FOIL and the Executive Law, as presently constituted, mandate the result sought by petitioner.
>
> "Certainly, the Legislature has the authority to provide for public access from a centralized location. It is equally clear that, unless otherwise sealed, a conviction record is a public document. Much has been said about potential abuses, given the ease with which these records may be obtained if the petition is sustained. Such fears are not determinative however. To argue that a criminal conviction obtained in a public proceeding in an open court system suddenly should be clothed with secrecy merely because an individual doesn't have to struggle to obtain it, makes a mockery of the right of public access. To suggest that public disclosure of conviction records is available only when it is through a difficult and time-consuming search of individual courthouse files or in local police stations, when the exact same information might be freely available if housed within a centralized computer bank, would be to create an irrational burden. Resolution of the question should not be resolved by how hard it is to discover the information sought. However, as aforesaid, the issue is not whether the information should be available, but rather, whether the Division of Criminal Justice Services has been statutorily directed to guard against public disclosure, thereby exempting it from the provision of FOIL" (emphasis added by the court).

Based on the foregoing, the court determined the issue by finding that the records maintained by DCJS were exempted from disclosure by statute, not because disclosure would constitute an unwarranted invasion of personal privacy. Additionally, the court inferred that conviction records are generally available from the courts in

which proceedings resulted in convictions were conducted "or in local police stations."

In short, the central databases containing conviction information are beyond the public's rights of access under both the federal and New York State disclosure laws, but for different reasons. Under federal law, disclosure would result in an unwarranted invasion of personal privacy. Under the state law, privacy is not the issue; here, it was found that the statute pertaining to the agency that maintains the database exempts the database from public access. Nevertheless, if conviction information is acquired from another source, such as a court or a police department, the public and the news media can use, publish or disseminate the information without limitation.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9388

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 2, 1996

Mr. Jamel Clark
94-A-3425 (BE-12)
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 information presented in your correspondence.

Dear Mr. Clark:

I have received your letter of January 17. You have sought assistance in obtaining copies of your sentencing minutes and asked what the "eight specific exempt categories" in the Freedom of Information Law are.

In this regard, enclosed is a copy of that statute. The grounds for withholding records appear in paragraphs (a) through (i) of §87(2). Based on your commentary, it appears that the best and most likely source of the records in question would be the courts in which sentencing occurred. 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 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 outside the coverage of the Freedom of Information Law.

This is not to suggest that court records need not be disclosed, for other statutes may require or authorize the disclosure of such records. For instance, §255 of the Judiciary Law generally requires that the clerk of a court make available records in his possession. When that statute applies, a request should be directed to the clerk in possession of the records. Since you referred to "youthful offender status", I note that §720.35 of the Criminal Procedure Law provides as follows:

> "Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with the court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or privacy agency, other than an institution to which such youth has been committed, the division of parole and a probation department of this state that requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9289

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 2, 1996

Mr. K. Talbot
87-A-3646
Fishkill Correctional Facility
Box 1245
Beacon, NY 12508

Dear Mr. Talbott:

As you are aware, your letter of January 6 addressed to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. In brief, you complained that the Office of the State Comptroller failed to respond to your requests made under the Freedom of Information Law.

In this regard, in an effort to learn more of the matter, I contacted the Office of the State Comptroller on your behalf. That agency maintains logs that identify all who made requests both chronologically and alphabetically. I was informed that your requests were not received.

It is suggested that you resubmit your request and address it to the designated "records access officer", Mr. Jeffrey Gordon. The records access officer has the duty of coordinating the agency's response to requests.

I note that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request. Having reviewed your letter to the Attorney General, it is likely that much of the information in which you are interested may not exist in the form of a record or records. For instance, you referred to "profits earned" by Department of Correctional Services' commissaries during certain periods. State agencies do not ordinarily maintain their records in terms of "profits." You also requested records reflective of "kickbacks paid" by a particular firm to the state; I doubt that any such records exist. In short, insofar as the information that you have requested does not exist in the form of a record or records, an agency would not be obliged by the Freedom of Information Law to prepare a new record on your behalf.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2563
FOIL-AO 9290

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

February 5, 1996

Mr. Michael Lisuzzo
[redacted]

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. Lisuzzo:

I have received your letter of January 23 in which you sought clarification concerning issues relating to the process of filling a vacancy on the Shenendehowa School District Board of Education. As I understand your remarks, you are interested in gaining access to minutes or other records indicating how Board members voted in selecting a person to fill the vacancy. You wrote that the request was denied because the vote was apparently taken during an executive session, and you questioned whether "the ballots cast would be forever secret."

In this regard, I offer the following comments.

First, by way of background, as a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, meetings of public bodies must be conducted in public except to the extent that an executive session may appropriately be held. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the subjects that may properly be considered during an executive session.

In my view, the only provision that might have justified the holding of an executive session is §105(1)(f) of the Open Meetings 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..."

Under the language quoted above, it would appear that a discussion focusing on the individual candidates could validly be considered in an executive session, for it would involve a matter leading to the appointment of a particular person. Nevertheless, in the only decision of which I am aware that dealt directly with the propriety of holding an executive to discuss filling a vacancy in an elective office, the court found that there was no basis for entry into executive session. In determining that an executive session could not properly have been held, the court stated that:

> "...respondents' reliance on the portion of Section 105(1)(f) which states that a Board in executive session may discuss the 'appointment...of a particular person...' is misplaced. In this Court's opinion, given the liberality with which the law's requirements of openness are to be interpreted (Holden v. Board of Trustees of Cornell Univ., 80 AD2d 378) and given the obvious importance of protecting the voter's franchise this section should be interpreted as applying only to employees of the municipality and not to appointments to fill the unexpired terms of elected officials. Certainly, the matter of replacing elected officials, should be subject to public input and scrutiny" (Gordon v. Village of Monticello, Supreme Court, Sullivan County, January 7, 1994), modified on other grounds, 207 AD 2d 55 (1994)].

I point out that the Appellate Division affirmed the substance of the lower decision but that it did not refer to the passage quoted above. In short, while the Open Meetings Law appears to authorize an executive session to consider the relative merits of the candidates for a vacant elective position, based on the holding in Gordon, it is questionable whether an executive session could properly be held to do so.

Second, in my opinion, minutes reflective of action taken by the Board must be prepared. Section 106 of the Open Meetings Law pertains to minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

It was also noted that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. In the case of most public bodies, 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. In this instance, I believe that any action or final vote by Board should have occurred during an open meeting.

With regard to the members' votes, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a school board, a record must be prepared that indicates the manner in which each member who voted case his or her vote. Ordinarily, records of votes will appear in minutes.

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to

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

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

Further, in an Appellate Division decision, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987)].

There is only one decision of which I am aware that deals specifically with the notion of a consensus reached at a meeting of a public body. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], the issue involved access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situation that you described, when the Board reached a "consensus" reflective of its final determination of the matter, I believe that minutes that indicate the manner in which each member voted are required. I recognize that the public bodies often attempt to present themselves as being unanimous and that a ratification of a vote is often carried out in public. Nevertheless, if a unanimous ratification does not indicate how the members actually voted behind closed doors, the public may be unaware of the members' views on a given issue. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that the minutes should reflect the actual votes of the members.

In contrast, if a series of "straw votes" were taken before any candidate received a sufficient number of votes to be selected, those prior votes, none of which were final or binding, would not have to have been recorded.

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of assistance.

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 9391

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

February 5, 1996

Mr. George Rand
[redacted]

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. Rand:

I have received your letter of January 19, as well as the correspondence attached to it. You have sought advice concerning "apparent stonewalling" by the Town of Hempstead with respect to a request for records.

In this regard, I offer the following comments.

Since you referred in your request to "the provisions of the Freedom of Information Act, 5 USC 552", it is noted initially that the statute under which your request was made is a federal act that applies only to records maintained by federal agencies. A different statute, the New York Freedom of Information Law (Public Officers Law, Article 6, §§84-90) is applicable to records maintained by entities of state and local government in New York. As such, my comments will pertain to the New York rather than the federal statute.

Having reviewed your correspondence, 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. Therefore, if, for example, the Town does not maintain "a listing of all Office Services Assistants by name showing their total individual annual wage (W-2 wage) and date of employment", the Town would not be obliged to prepare such a "listing" on your behalf.

In the future, rather than seeking information, asking questions or requesting lists, unless it is clear that such lists have been prepared, it is suggested that you seek existing records containing certain information. Enclosed for your consideration is a copy of "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). I a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a

> decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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, with certain qualifications, insofar as records exist that contain the information sought, I believe that they 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 §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, §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. Similarly, I believe that records indicating public employees' dates of employment must be disclosed.

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 Town. 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 judicial 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 forwarded to the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Susan P. Jacobs, Deputy Town Attorney

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9395

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

February 5, 1996

Ms. Alice Hoffman
[redacted]

Dear Ms. Hoffman:

I have received your letter of January 17 in which you referred to my response to you of January 9. At that time, I indicated that I had insufficient information to offer meaningful advice concerning the possibility of seeking or obtaining records under the Freedom of Information Law.

Having reviewed your latest letter, I must offer the same response. The only governmental entity that is mentioned in your correspondence is the Office of the Kings County District Attorney, and that agency has informed you that it does not maintain the records in which you are interested. The other entities to which you alluded are law firms and a private attorney, which are not subject to the Freedom of Information Law.

That statute is applicable to records of an agency, 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."

Based on the foregoing, the Freedom of Information Law pertains to records maintained by entities of state or local government in New York; it does not pertain to law firms, private legal practitioners or other private persons or entities.

In short, based on the information that you have provided, I do not believe that I can offer additional assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9293

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

February 5, 1996

Mr. John Johnson
95-A-0078
Downstate Correctional Facility
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 information presented in your correspondence.

Dear Mr Johnson:

I have received your letter of January 17 in which you raised a series of issues concerning access to records.

You expressed interest in obtaining records indicating whether "a jury panel [was] available on a certain day, located in the said part/term of the court [you were] appearing in". You also want to obtain records "of certain individual court officers circumscribing the case ever worked in the Criminal Court House in the presence of an individual judge".

In this regard, the statute within the Committee's jurisdiction, the Freedom of Information Law, likely does not apply to the kinds of records described above, if such records exist. The Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

In turn, §86(1) defines the term "judiciary" to mean:

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

This is not to suggest that court records need not be disclosed, for other statutes may require the disclosure of court records (see e.g., Judiciary Law, §255). Insofar as a statute other than the Freedom of Information Law applies, it is suggested that a request be directed pursuant to that statute to the clerk of the court that maintains the records of your interest.

If attendance records pertaining to court employees are maintained by or on behalf of the Office of Court Administration, which is an "agency", any such records would be subject to the Freedom of Information Law. It is noted, however, that the Freedom of Information Law pertains to existing records and that §89(3) of that statute indicates that an agency need not create a record in response to a request. Therefore, insofar as the Office of Court Administration, for example, does not maintain the information in which you are interested, the Freedom of Information Law would not apply. If that agency does maintain records regarding attendance or assignments of employees, I believe that those records would be available [see e.g., Capital Newspapers v Burns, 109 AD 2d 92, aff'd 67 NY 2d 565 (1986)].

You questioned how you might obtain records of grievances filed against a judge or assistant district attorneys.

With respect to judges, complaints regarding judges and the discipline of judges involve the functions of the Commission on Judicial Conduct. In this regard, §45 of the Judiciary Law pertains to the Commission on Judicial Conduct and provides in relevant part that "all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the Commission shall be confidential and shall not be made available to any person". The only records of the Commission that must be disclosed are final determinations indicating a finding of misconduct on the part of a judge.

With respect to grievances against agency employees, such as assistant district attorneys, relevant 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. 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, 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.

Lastly, you asked "how to go about obtaining such information through the Freedom of Information Act without charge due to the fact that [you are an] indigent person". I point out that §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy. There is nothing in that statute that pertains to the waiver of fees. Further, in a 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)].

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 9294

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

February 5, 1996

Mr. Anthony Biscotti
Information Coordinator
ACTA Chapter, Fulton/
Montgomery Counties
42 Pulaski Street
Amsterdam, NY 12010

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. Biscotti:

I have received your letter of January 21 in which you wrote that certain officials have ignored your requests for records, and you have sought guidance on the matter.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and requests should ordinarily be transmitted 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9395

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

February 6, 1996

Mr. Willie Williams
93-A-6546 C-2-4
Woodbourne, NY 12788

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

Dear Mr. Williams:

I have received your letter of January 12, which reached this office on February 5. You have requested materials concerning criminal law and the rules that correction officers must follow.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain records generally, and I do not have copies of any of the records of your interest. Nevertheless, 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. I note that regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a correctional facility may be directed to the facility superintendent.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial may be relevant to an analysis of rights of access to rules applicable to correction officers.

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. It would appear that the records would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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).

While I am unfamiliar with the records in which you may be interested, 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 §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 officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records of your interest might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

Enclosed for your review is a copy of "Your Right to Know", which describes the Freedom of Information Law in detail.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO. 9296

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

February 7, 1996

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 information presented in your correspondence.

Dear Mr. Kane:

I have received your letter of January 22. You referred to earlier correspondence pertaining to payments made to the attorney for the Fulton County Industrial Development Agency (FCIDA). At that time, I wrote that it appeared that FCIDA attempted to honor your request and that it could not ascertain what you believed might have been withheld. It was suggested that if you could provide additional information, I might be able to offer guidance.

In this regard, you alleged that the attorney in question "has received fees for legal services for projects not revealed by him or his firm." For instance, you described a transaction in which a firm and FCIDA participated as joint mortgagors, and although the attorney did not bill FCIDA, it is your belief that he was paid by the firm for services rendered to the firm and FCIDA. It is your view that records reflective of any fees paid to FCIDA's attorney concerning projects in which FCIDA is a party are FCIDA records, and you sought my opinion on the matter.

The information that you provided represents an allegation on your part, and I do not have sufficient information to offer unequivocal guidance. However, if it is established that the attorney was paid because of his representation of FCIDA, the records of payment to him would appear to fall within the scope of the Freedom of Information Law.

As you are aware, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" broadly to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to,

reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, documents need not be in the physical possession of an agency to constitute agency records so long as they are produced, kept or filed for an agency, and the courts have so held.

For instance, in a decision with which you are familiar, it was found that records maintained by an attorney retained by an industrial development agency were subject to the Freedom of Information Law, even though an agency did not possess the records and the attorney fees were paid by applicants before the agency. The Court determined that the fees were generated in his capacity as counsel to the agency, that the agency was his client, that "he comes under the authority of the Industrial Development Agency" and that, therefore, records of payment in his possession were subject to rights of access conferred by the Freedom of Information Law (see C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Additionally, in a recent decision rendered by the Court of Appeals, the state's highest court, it was found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" (see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995).

If the situation to which you referred is analogous to those described in the judicial decisions cited above, it would appear that documentation maintained by the attorney would 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
cc: J. Paul Kolodziej
Alfred E. Stahl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9297

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(518) 474-2518
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February 7, 1996

Ms. Caren Halbfinger
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 information presented in your correspondence.

Dear Ms. Halbfinger:

I have received your letter of January 26 in which you requested an advisory opinion concerning the propriety of a denial of your request for records by the City of New Rochelle.

The record sought, a "Local Waterfront Revitalization Draft", was prepared by a committee of New Rochelle residents appointed by the Mayor. You indicated that the Draft was presented to the Mayor and the City Council in October of 1994, that it has been "under review", and that it has not yet been released to the public. The City's Deputy Corporation Counsel denied your request pursuant to "Public Officers Law §87", which "permits an agency to deny access to records or portions thereof which are inter-agency materials which are not final agency policy or determinations."

Based on the following rationale, I believe that the Draft must be disclosed. In this regard, I offer the following comments.

First, as you may be aware, 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).

Most recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" (see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). Therefore, if a document is produced for an agency, as in the case of the Draft produced by the citizens committee for the City of New Rochelle, it constitutes an

agency record, even if it is not in the physical possession of the agency.

Second, tangential to the matter but relevant to the analysis, I note that several judicial 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, the Committee that prepared the Draft does not constitute a public body subject to the Open Meetings Law because it does not perform a governmental function.

Relevant to the foregoing is §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 on the definition, an "agency" is a governmental entity performing a governmental function, such as the City of New Rochelle. The committee that prepared the Draft, however, would not be an agency; if it is not a public body for purposes of the Open Meetings Law because it does not perform a governmental function, for the same reason, it would not be an agency for purposes of the Freedom of Information Law. Again, however, the Draft would constitute an agency record, for it was produced for the City, which, unlike the committee, is an agency.

Third, if the committee is not an agency, the exception to rights of access to which the Deputy Corporation Counsel alluded, §87(2)(g), would not apply. By way of brief background, the Freedom of Information Law is based is based upon a presumption of access. Stated differently, all records 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 at issue pertains to inter-agency and intra-agency materials. 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. If my contention is accurate, that the committee is not an agency, the draft could not be characterized as inter-agency or intra-agency material, and neither §87(2)(g) nor any other exception to rights of access could justifiably be asserted to withhold the Draft.

I note that Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)] dealt with reports prepared "by outside consultants retained by agencies" (id. 133). In such cases, it was found that the records prepared by consultants should be treated as if they were prepared by agency staff and should, therefore, be considered intra-agency materials. However, based on the information provided, the committee could not, in my view, be characterized as a consultant. As the term "consultant" is ordinarily used and according to an ordinary dictionary definition of that term, a consultant is an expert or a person or firm providing professional advice or services. As I understand the composition of the committee, while it may consist of well-respected members of the community who may enjoy expertise in a variety of areas, its members are not in the business of preparing recommendations on the operation of municipal government for gain or livelihood. Further, in the context of the Xerox decision, I believe that a consultant would be person or firm "retained" for compensation by an agency to provide a service. It is my understanding that the committee serves voluntarily and without compensation. For the foregoing reasons, I do not believe that the Draft prepared by the committee could be viewed as a consultant's report or that it would fall within the scope of §87(2)(g) of the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Deputy Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christopher B. Langhart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9298

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 7, 1996

Mr. Wayne Johnson
86-A-1513
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 information presented in your correspondence.

Dear Mr. Johnson:

I have received your letter of January 19, as well as the correspondence attached to it. You have sought assistance in obtaining a "Cooperation Agreement/Immunity Agreement" allegedly involving a witness at your trial from the Office of the Bronx County District Attorney. Although you were informed the record could not be found, you contend that the Office of the District Attorney has denied access to the record and has violated your rights under Brady and Rosario.

In this regard, I offer the following comments.

First, if indeed the Office of the District Attorney does not possess the record in question, the Freedom of Information Law would not apply. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for

the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Second, even when it is clear that an agency maintains requested records, rights conferred by the Freedom of Information may be distinguished from those that a defendant may have under the discovery provisions of the Criminal Procedure Law (CPL) or the decisions to which you referred. While I am unaware of judicial decisions that have specifically considered the relationship between the Freedom of Information Law and disclosure devices applicable 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, your status as a defendant or litigant would not be relevant when seeking records under the Freedom of Information Law, nor would it affect 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.

Lastly, should the record in question exist, there may nonetheless be grounds for denying access to it. It might be contended, for example, that it could be withheld under §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute an unwarranted invasion of personal privacy, under §87(2)(e)(iii) because it was compiled for law enforcement purposes and disclosure would involve confidential information relating to a criminal investigation, or under §87(2)(f) on the ground that disclosure would endanger a person's life or safety.

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

cc: Peter Coddington
Pat Bonanno

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9299

162 Washington Avenue, Albany, New York 12231
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February 8, 1996

Mr. Peter Quinn
Energy Analyst
Long Island Progressive Coalition
Citizen Action on Long Island
90 Pennsylvania Avenue
Massapequa, NY 11758-4978

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, unless otherwise indicated.

Dear Mr. Quinn:

I have received your letter of January 24 and the correspondence attached to it. You have sought an advisory opinion concerning rights of access to certain records of the Long Island Power Authority.

In November of last year, you sought a list of the companies or persons that submitted responses to the Authority's Request for Information ("RFI"). In response, Stanley B. Klimberg, General Counsel to the Authority, disclosed the names of a dozen persons or firms that responded. He denied access to the names of the remainder of the firms that responded, stating that disclosure "would impair present or imminent contract awards, and/or cause substantial injury to the competitive positions of the subject enterprise." It is your view that disclosure of the names of some but not all of the submitters is arbitrary.

You also referred to a second request for the names of consultants retained by the Authority, "how much money each consultant company is receiving and what their billable hour charges are." As of the date of your letter to this office, you had not received a response to that 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 §87(2)(a) through (i) of the Law.

Second, typically, I believe that the names of persons or firms who respond to an agency's solicitation of bids, requests for proposals or, as in this case, requests for information, must be disclosed, so long as the deadline for the submission of bids, proposals or responses has been reached. For that reason, I contacted Mr. Klimberg to attempt to acquire additional information concerning the rationale for his response to your request. He explained that the RFI's relate to what may be groundbreaking activities in emerging new industries, and that the disclosure of the name alone of a firm that may be considering entering a new field or expanding might adversely affect its marketing ability if its plans become known to competitors. Similarly, he suggested that if competitors are able to know of a firm's interest in pursuing an opportunity in one area, that knowledge could affect public and industry perceptions in terms of the firm's efforts in seeking business in other parts of the country. In short, it is his view, based on contacts with all of those that responded, that disclosure of the names of those persons of firms in question would cause substantial injury to their competitive position under §87(2)(d) of the Freedom of Information Law. If that is so, an ancillary basis for denial, §87(2)(c), involving the impairment of the Authority's ability to engage in optimal contractual arrangements, would also likely apply.

I do not have sufficient knowledge of the industry to advise with certainty as to the accuracy of Mr. Klimberg's contentions. 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."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities that have responded to the RFI.

With respect to the substance of the matter, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical

> compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY2d ___, December 27, 1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it

pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the

> considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).
>
> "The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL."

It is noted 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, I believe that the Authority is required to disclose the names of consultants that it has retained, as well as records indicating payments to consultants. In short, I do not believe that any of the grounds for denial could be asserted to withhold those kinds of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stanley B. Klimberg, General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9300

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

February 8, 1996

Mr. Sol Pearlman
[redacted]

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. Pearlman:

I have received your letters of January 23 and January 30, as well as the materials attached to them. You have asked that I intercede on behalf of your son, who is incarcerated in New Jersey, in relation to his requests for records of the City of Buffalo Police Department.

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 enforce that statute or otherwise compel an agency to grant or deny access to records. Nevertheless, based on the contents of the correspondence, I offer the following comments.

As I view the matter, it appears that there may be a misinterpretation or an absence of clear communication between your son and the Police Department. In his letter to you of January 25, your son indicated that his letter to the Department of November 12 "best describes" the information in which he is interested. However, Lt. Makowski of the Department appears to have responded to his requests only as they relate to records pertaining to a particular vehicle that was seized. In his letter of November 12, your son requested:

> "...specific State and Municipal Law(s), Ordinance(s), Regulation(s), and applicable Statute(s) which govern the following:
>
> a) In regards to the Buffalo P.D.'s confiscation, seizure and forfeiture of my automobile (see annexed descriptive request), should your agency have relied on other than State or Municipal guidelines, policy

> procedure, federal statute(s), federal regulation(s), or any other device(s), e.g. seizure transfer contract(s) with the federal government, please, provide a copy of each.
>
> b) Provide any other procedural devices used to lawfully divest me of the subject property (auto).
>
> c) Provide a copy of the Buffalo P.D. and Federal Government contract(s) specific instructions as to seizure and relinquishment of seized property. This demand includes each descriptive device detailing division of asset-forfeiture profits and materials."

In conjunction with the foregoing, I offer the following comments.

First, in my view, the Freedom of Information Law pertains to requests for agency records. Some aspects of the passage quoted above involve requests for what may essentially be legal interpretations. For instance, a request for laws that govern or relate to certain activities might involve judgments concerning the applicability of laws to those activities. If an agency in taking action cites or refers to particular provisions of law, rules or policy as the basis for its action (i.e., references to charges under particular sections of the Penal Law), I believe that it would be required to disclose those provisions on request. However, if such a request involves legal research, interpretation, judgment or perhaps conjecture, the Freedom of Information Law would not, in my opinion, require an agency to engage in that kind of exercise.

Second, insofar as your request involves existing records maintained by the Police Department that are reasonably described and can be located based on the terms of your request, I believe that the Department is obliged to comply with the Freedom of Information Law. As indicated above, that statute pertains to agency records, and §86(4) 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, any documentation maintained by the Department, irrespective of its origin or function, would constitute a "record" that falls within the coverage of the statute.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 the records sought, I cannot offer specific guidance. However, several grounds for denial may be relevant to an analysis of rights of access.

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. Insofar as the records sought consist of laws, procedures, instructions to staff that affect the public or an agency's policy, I believe that they would be available, unless a different basis for denial could be asserted.

Although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, depending upon the contents of those materials, it does not appear that §87(2)(g) could be cited to withhold communications between a City agency and a federal agency. Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee,

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

The language quoted above indicated that an "agency" is an entity of state or local government in New York. While there is no case law of which I am aware that deals with the issue, since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the City of Buffalo and a federal agency governmental entity, for such an entity would not be an agency for the purpose of the Freedom of Information Law.

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, 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 records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

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, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Copies of this opinion will be sent to Lt. Makowski and your son. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Mark Makowski
Benett Pearlman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9301

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

February 9, 1996

Mr. Thomas J. Concert
Broome County Jail
899 Front Street
Binghamton, NY 13901

Dear Mr. Concert:

Your letter of February 5 addressed to the Freedom of Information Officer at the Department of State and the Executive Office of the Governor has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

In your request, you referred to a "Governor's warrant" or a "probation warrant" that might have been filed between 1988 and 1993 "out of Broome County." In all honesty, I cannot determine the nature of the records in which you are interested. Further, neither the Department of State nor the Executive Chamber typically is involved in the issuance of warrants, nor would those agencies generally maintain copies of warrants. However, in an effort to provide clarification, I offer the following comments.

First, you cited 5 USC §§552 and 552a as the basis for your request. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies and have no application in New York. The statute generally dealing with rights of access to government records in this state is the Freedom of Information Law.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests. Based on your letter, it appears that the records of your interest may be maintained by the Broome County Probation Department.

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 an agency to locate and identify requested records.

Lastly, since you indicated that you are a poor person and requested a waiver of fees, I point out that the New York Freedom of Information Law does not include provisions concerning fee waivers. Further, it has been held that an agency may charge its established fees for copies even though the applicant may be an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing serves to clarify 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-9302

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

February 12, 1996

Mr. Alan Kassebaum
95-A_4619
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929-2002

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. Kassebaum:

I have received your letter of January 23 in which you sought assistance in obtaining records from the Office of the New York County District Attorney.

By way of background, in July you requested copies of records pertaining to your case and provided an indictment number to enable agency staff to locate the records. You were later informed that the indictment number that you gave does not pertain to your case. You wrote again and stated that you were one among several co-defendants and that the indictment number was correct. Consequently, you were informed by the District Attorney's Freedom of Information Appeals Officer that the Assistant District Attorney who initially responded to your request would examine the matter again and determine rights of access if indeed the indictment number that you provided involves your case. Most recently, you requested a "catalogue" of all records contained within the case file.

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 is not required to create a record in response to a request. If the Office of the District Attorney maintains a catalogue pertaining to your case, it would constitute a "record" subject to rights conferred by the Freedom of Information Law; if, however, no such record has been created, the Office of the District Attorney would not be required to prepare such a record on your behalf.

Second, assuming that your request is proper and that the indictment number pertains to the case involving you, I note 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. 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, in your initial request, you asked that fees for copies be waived or reduced. In this regard, while the federal Freedom of Information Act, which pertains to records maintained by federal agencies, includes provisions concerning fee waivers, the New York Freedom of Information Law, which would be applicable here, contains no such provision. Moreover, in a case involving an indigent inmate who sought a waiver of fees relating to records of the Office of the New York County District Attorney, it was held that the agency could charge its established fees, despite the inmate's indigency [see Whitehead v. Morgenthau. 552 NYS 2d 518 (1990)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Nina Keller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9303

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

February 12, 1996

Mr. Stanley P. Fortuna
90-B-3053
Fishkill Correctional Facility
P.O. 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 information presented in your correspondence.

Dear Mr. Fortuna:

I have received your letter of January 22 in which you sought assistance in obtaining information concerning an alleged "cover-up...involving corrupt police officers." You attached several letters of request and indicated that most have been "ignored." In this regard, I offer the following comments.

First, having reviewed your requests, in three you attempted to elicit information rather than seek records. In those letters, you wrote that you "would like to know the current status of missing property" and asked "if they have found the officer who stole this property." Here I point out that the Freedom of Information Law is a statute that enables the public to request records; it does not require agencies to provide information in response to questions. Moreover, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency need not create a record in response to a request. In the future, it is suggested that you prepare your requests by seeking existing records.

Second, in two of your requests you referred to your pre-sentence report and a statement in the report that a police department had received nine complaints. You requested copies of the complaints, including the names of the complainants.

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..." Of apparent relevance 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 and related information gathered "in connection with the question of sentence."

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 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, even if the complaints do not fall within the scope of §390.50 of the Criminal Procedure Law, it appears that they could be withheld under §87(2)(b) of the Freedom of Information Law. That provision states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." It has generally been advised that those portions of the complaint which, if disclosed, would identify complainants may be withheld on the ground that disclosure would constitute such an invasion of privacy. Further, §89(2)(b) of the Freedom of Information Law 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 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
cc: Patrick M. Reidy
Edward J. Pariso
Gordon L. Bjorck
Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9304

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

February 13, 1996

Mr. Anthony Logallo
90-A-1210
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 information presented in your correspondence.

Dear Mr. Logallo:

I have received your letter of January 19 in which you raised a variety of questions regarding "fee waiver standards." In this regard, there is no decision of which I am aware rendered in New York in which a court has held that an indigent person may obtain a fee waiver in conjunction with a request for records under the Freedom of Information Law. There is, however, a decision in which the court held to the contrary, that an agency could charge its established fees even though the applicant was an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

You asked what the opinion of the Committee is regarding fee waivers for indigent requesters, and, in this regard, the Committee has not taken a position on that particular issue. However, since its creation in 1974, the Committee had advised that records accessible under the Freedom of Information Law should be made equally available to any person, without regard to one's status or interest, and the courts have adopted a similar position [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)]. To the best of my knowledge, the State Legislature has never considered the issue and no bill has been introduced that would authorize fee waivers based upon indigency.

As you requested, enclosed are copies of the Freedom of Information Law and the Committee's 1994 and 1995 annual reports to the Legislature. The reports include recommendations for legislation to amend the Freedom of Information Law relative to fees, and those recommendations have in the past been introduced in the State Legislature. Also enclosed are copies of opinions

rendered by this office on the subject, including an opinion referenced in the Whitehead decision.

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- 9305

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

February 13, 1996

Mr. Charles Davis
80-A-0225
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 information presented in your correspondence.

Dear Mr. Davis:

I have received your letter of January 21 in which you sought assistance in obtaining records from the Senior Parole Officer at your correctional facility.

The records sought include policy and procedure manuals, as well as recommendations that might have been made concerning your application for parole by the office of a district attorney or other law enforcement agencies.

In this regard, I offer the following comments.

First, I note that your request to the Senior Parole Officer in some instances seeks information through questions. Here I point out that the Freedom of Information Law does not require agencies to provide information in response to questions; rather it requires agencies to respond to requests for existing records. Further, §89(3) of that statute provides in part that an agency need not create a record in response to a request. In short, in the future, rather than seeking information by raising questions, it is suggested that you request existing records.

Second, with respect to access to policy and procedures manuals and similar documentation, I point out that 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 §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

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. It would appear that the records in question would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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 records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to

evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of procedures, manuals and the like, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

Lastly, recommendations offered to the Board of Parole or the Division of Parole by representatives of an office of a district attorney or other agency would constitute inter-agency materials. Moreover, as suggested earlier, if those communications consist of recommendations, I believe that they could be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathy Graham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9306

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

February 13, 1996

Mr. Martin Hodge
86-A-8851
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 information presented in your correspondence.

Dear Mr. Hodge:

I have received your letter of January 23 addressed to Mr. Bookman and the recent letter addressed to me.

As your commentary pertains to your ability to gain access to records of the Office of the Chief Medical Examiner of New York City, I do not believe that I can offer additional guidance. For reasons described in my letter to you of December 18, access to records of that office would not be governed by the Freedom of Information Law but rather by the New York City Charter. Consequently, your ability to gain access to the records in question would involve issues beyond the scope of the jurisdiction or expertise of this office. It is suggested that you discuss the matter with a representative of Prisoners' Legal Services.

You also referred to requests to the New York City Police Department and the office of a district attorney that have not been answered, and you asked to whom you may appeal.

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)].

For your information, the person designated to determine appeals at the New York City Police Department is Karen Pakstis, Assistant Commissioner, Civil Matters. Since you did not identify which office of district attorney is the subject of your inquiry, I cannot provide the name of the designated appeals person.

Lastly, you raised a question concerning which law pertains to the preservation of records in this instance.

In the case of New York City, I believe that the City Charter deals with the retention and disposal of records of New York City agencies, including the Police Department. Further, the agency that oversees records management issues is the Department of Records and Information Services, 31 Chambers Street, New York, NY 10007. That agency develops schedules indicating minimum retention periods regarding City 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 9307

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

February 14, 1996

Mr. Reginald Cornelia
[redacted]

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. Cornelia:

I have received your letter of January 26. You expressed that I might have "somewhat misunderstood" what you are seeking from the Town of East Hampton Housing Office.

You noted that you are interested only in obtaining addresses, but not "the names, incomes or any other personal information" about tenants in Section 8 housing. Nevertheless, having reviewed my response to you, it was advised that "insofar as the records sought regarding the names, addresses or other identifying details pertaining to tenants in Section 8 housing, I believe that those items may be withheld" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Stated differently, because participation by tenants in Section 8 housing is based on an income qualification, disclosure of addresses alone would indicate that the tenants in a particular location are financially disadvantaged. For that reason, an agency in my view is not required to disclose addresses, even without names or other details regarding tenants.

If there are figures or statistics that include the information in which you are interested, I believe that they would be available, so long as they do not identify individuals. It is noted, however, that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if the figures or statistics in which you are interested do not exist, an agency would not be required to prepare them on your behalf.

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

FOIL-AO-9308

162 Washington Avenue, Albany, New York 12231
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February 14, 1996

Janet G. Bell, 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 information presented in your correspondence.

Dear Ms. Bell:

I have received your correspondence of January 31 in which you requested an advisory opinion concerning the denial of access to records by the Village of Scarsdale.

Specifically, you requested a copy of a business plan provided to the Village by Kids Base, which is apparently a nursery school. In response to your request, the Village Manager indicated that the business plan "was accepted under a proprietary understanding", and that, therefore, the documentation would be withheld.

In this regard, I offer the following comments.

First, it has been held 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 involving a promise by a state agency that it would keep certain records furnished by an insurance company confidential, it was held that the 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)].

In short, I do not believe that a promise of confidentiality would serve to remove from public rights of access records that would otherwise be available.

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, the only ground for denial of relevance is §87(2)(d), which enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of Kids Base.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or

business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY2d ___, December 27, 1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

"FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...

"As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

"Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as

> part of FOIA's principal aim of promoting openness in government (id.).
>
> "The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL."

Lastly, it is noted 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).

From my perspective, while it is possible that aspects of the documentation might justifiably be withheld, it is unlikely that the Village could properly withhold the material in its entirety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred A. Gatta

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9309

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

February 14, 1996

Ms. Lillian B. Griffin
[redacted]

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 Ms. Griffin:

I have received your undated letter, which reached this office on January 29.

You described a series of problems relating to your efforts to inspect voter registration books maintained by the Village of Lake Grove. Specifically, the Village imposed time limitations regarding your ability to inspect the records. Further, the Village apparently denied access to a list of registered voters, which differs from the list of registered voters maintained by the County Board of Elections.

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 agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

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..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division, Second Department, which includes Lake Grove. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Second, the Freedom of Information Law pertains to agency records, and §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."

Therefore, even when a different agency, i.e., a county board of elections, maintains the same records as the Village (which does not appear to be so in this instance), the Village records would be subject to the Freedom of Information Law, and the Village would be required to respond to a request for such 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. From my perspective, a voter registration list or equivalent records that might be used to comprise such a list would be available, for none of the grounds for denial could justifiably be cited to withhold the records.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Marian J. Zetterberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9310

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

February 14, 1996

Mr. P. Cotterell
95-A-2044
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 information presented in your correspondence.

Dear Mr. Cotterell:

I have received your letter of January 25 in which you complained with respect to a delay in disclosure of records that you requested from 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)].

For your information, I believe that the person designated to determine appeals by the District Attorney is Melanie Marmer.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Theresa Piccolo
Melanie Marmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9311

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

February 14, 1996

Mr. Joseph Plater
95-B-2336
Sing Sing Correctional
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 information presented in your correspondence.

Dear Mr. Plater:

I have received your letter of January 21, which reached this office on January 29. You have complained that your request to the Cortland County Clerk for records pertaining to your case has not been answered.

In this regard, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, and others that may be held in the capacity as clerk of a court. I point out that the Freedom of Information Law applies 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 the term "judiciary" to mean:

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to

suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the time for responding to a request or the right to appeal a denial) would not ordinarily be applicable. In short, if your request involves court records, the Freedom of Information would not apply.

On the other hand, if the request involves records subject to the Freedom of Information Law, an agency would be required to respond in accordance with the direction provided by that statute. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that the foregoing serves to enhance your understanding of the matter 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-9312

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

February 15, 1996

Captain Vincent Fitzgerald
Commanding Officer
Central Records Section
County of Suffolk Police Department
30 Yaphank Avenue
Yaphank, NY 11980

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 Captain Fitzgerald:

I have received your thoughtful letter of January 26 concerning the policy of the Suffolk County Police Department in relation to the ability of members of the public to request records under the Freedom of Information Law by fax communication.

As a general matter, it has been advised that any request made in writing that reasonably describes the records sought should satisfy the requirements of the Freedom of Information Law. Typically, if a request is made by means of a fax communication, there may be no valid basis for refusal to accept the request, and a failure to accept the request might result in an unreasonable delay in response.

Nevertheless, in view of the considerations that you described in relation to the Department's policy on the matter, I believe that the Department may validly require that requests be made under the Freedom of Information Law by submitting them either in person or by mail.

As you indicated, §87(1) of the Freedom of Information Law requires that agencies promulgate rules and regulations to implement that statute in a manner consistent with the statute and the regulations issued by the Committee on Open Government (21 NYCRR Part 1401). Neither the statute nor the Committee's regulations refers specifically to requests made by fax. Consequently, the issue in my view is whether the policy of the Department is inconsistent with the Freedom of Information Law or the Committee's regulations or is otherwise unreasonable.

You indicated that the Central Records Section of the Department maintains five fax machines that "serve specific law enforcement functions." Three are used solely to receipt arrest worksheets; one is used solely to receive modifications relative to warrants issued and recalled; the remaining machine is used only to carry out law enforcement functions, particularly for the purpose of making non-routine interdepartmental communications, as well as interdepartmental orders, directives and the like. You wrote further that your Department receives approximately 100,000 requests annually and that the receipt of requests by fax would have a "severe negative impact" on the ability to engage in authorized interdepartmental fax communications.

Based on the foregoing, from my perspective, as long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery, it appears that the policy adopted by the Department is valid, for it does not unreasonably inhibit the public's ability to seek records under the Freedom of Information Law.

As you requested, a copy of this opinion will be forwarded to Mr. Frank Castagna, the individual who questioned the validity of your practice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank Castagna

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9313

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

February 15, 1996

Mr. Al Blanche
88-A-6605
135 State Street
Auburn, NY 13021

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

Dear Mr. Blanche:

I have received your letter of January 28. As you requested, enclosed is the Committee's latest annual report to the Governor and the Legislature.

You have asked whether, in my view, "there is a chance of obtaining" your pre-sentence report under the Freedom of Information Law. From my perspective, the Freedom of Information Law does not govern rights of access to pre-sentence reports, and an effort to acquire a pre-sentence report through that statute would be unsuccessful.

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 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9314

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

February 16, 1996

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

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

Dear Mr. Sheehan:

I have received your letter of January 30 in which you questioned the validity of a fees for copies charged by the Village of Rockville Centre Police Department. Specifically, that agency charges $22 for copies of incident reports, and a different section of a response to your request pertaining to "accident reports" indicates that the fee is $12 for the first two pages, "$2.30 additional for each additional page up to seven days from date of accident" and "after seven days from date of accident $22 for the first two pages; $2.30 for each additional page."

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or service.

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

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. As you are aware, 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. The same result was reached in a more recent decision in which a court invalidated a provision of a county code the authorized fees for copies in excess of fees permitted under the Freedom of Information Law (Gancin, Schotsky & Rappaport, P.C. v. Suffolk County, Supreme Court, Suffolk County, NYLJ, December 30, 1994).

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Records & License Unit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-935

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

February 16, 1996

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

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

Dear Mr. Sheehan:

I have received your letter of January 30 in which you questioned the validity of a fee established by the City of Buffalo Police Department of $10 for a copy of an accident report.

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or service.

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

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. As you are aware, 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. The same result was reached in a more recent decision in which a court invalidated a provision of a county code the authorized fees for copies in excess of fees permitted under the Freedom of Information Law (Gancin, Schotsky & Rappaport, P.C. v. Suffolk County, Supreme Court, Suffolk County, NYLJ, December 30, 1994).

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

> "Except when a different fee is otherwise prescribed by statute:

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda D. Craig

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9316

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

February 16, 1996

Mr. John Pothews
Suffolk County Correctional Facility
100 Center Drive
Riverhead, NY 11901

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. Pothews:

I have received your letter of January 26 in which you wrote that you are attempting to obtain your rap sheet and records relating to your placement in the "Rockefeller Program." You have asked that this office direct you to the appropriate agency or forward the records to you. In addition, due to your indigency, you asked that fees for copies be waived.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records. The Committee does not have possession or control of records generally. Nevertheless, in an effort to assist you, 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 on the foregoing, an "agency", in general, is an entity of state or local government. Therefore, the agency that maintains rap sheets, the Division of Criminal Justice Services, would be required to disclose its records in accordance with law. I am unfamiliar, however, with the "Rockefeller Program" or whether

records pertaining to that program are maintained by an agency subject to the Freedom of Information Law.

Second, a request for agency records should be directed to the agency's "records access officer." That person has the duty of coordinating the agency's response to requests. Further, §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 of interest.

To acquire information concerning the procedure for seeking your rap sheet, it is suggested that you write to the Division of Criminal Justice Services, Office of Identification Systems, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

Lastly, since you referred to a waiver of fees, I note that there is nothing in the Freedom of Information Law pertaining to fee waivers and that it has been held that an agency may charge its established fees, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518, (1990)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9317

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

February 16, 1996

Mr. Jean Arlington Smith
91-A-7313 E-2-50
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Smith:

I have received copies of your correspondence involving your requests for records made under the Freedom of Information Law and directed to the Katonah Medical Group.

In this regard, it is emphasized 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 upon the foregoing, in general, the Freedom of Information Law is applicable to entities of state and local government; it would not apply to private entities, such as the Katonah Medical Group, which is a professional corporation.

However, as you may be aware, §18 of the Public Health Law generally provides patients with rights of access to medical records pertaining to themselves. Therefore, it would appear that any rights of access that you might have would exist under that statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J. Volmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9318

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

February 21, 1996

Mr. William S. Hecht
[redacted]

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, unless otherwise indicated.

Dear Mr. Hecht:

I have received your letter of January 22 in which you sought clarification concerning an issue arising under the Freedom of Information Law.

According to your letter, Ms. Lee Neville of the City of Syracuse Department of Water informed you that a report that you requested could be made available only "in a paper format even though this is on disk" at the office of an engineering firm retained by the City that prepared the report. You wrote that the City contends that it maintains the record solely in paper format and is not required to release it to you on a disk. You contend, however, that there is "no difference between the City and their contractors as long as the information in question is owned by the City."

As indicated to you by phone, I am unaware of the relationship between the contractor and the City. Further, although I tried to reach Ms. Neville and an attorney for the City who may be familiar with the matter, my calls have not been returned. In my view, resolution of the issue is dependent on that relationship, which would determine "ownership" of the record.

In this regard, I offer the following comments.

First, at issue is whether the material in question constitutes a record of the City of Syracuse. The Freedom of Information Law pertains to agency records and §86(4) of that statute defines the term "record" broadly to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the

> state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In holding that it does, the Court wrote that:

> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]). Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their natural and most obvious meaning in interpreting 'records' under FOIL]."

Based on the foregoing, when records are maintained for an agency by a third party, I believe that the records would fall within the coverage of the Freedom of Information Law, even though they may not be in the physical possession of the agency.

Second, in Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)], the state's highest court found that records prepared by a consultant for an agency should be treated as if they were prepared by an agency. If the contractor in this instance was retained as a consultant, I believe that the records that were prepared for the City would fall within the coverage of the Freedom of Information Law. On the other hand, if the contractor was not hired as a consultant, the disk or other records prepared by the contractor would appear to fall beyond the scope of the Freedom of Information Law. By means of example, if a city hires a firm to fill potholes, and the firm maintains records regarding the means by which it carries out its duties under the contract, the records prepared by the firm in my view would be internal and could not be characterized as agency records.

Lastly, assuming that the contractor was retained as a consultant and that the records, including the computer disk in

question were prepared for the City, I believe that the City would be obliged to ensure that the information sought be made available on a disk. There are judicial decisions indicating that an agency is required to make information accessible under the Freedom of Information Law in the format or medium of the applicant's choice when it has the ability to do so. 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 information was produced or prepared for the City and that it can be made available to you by means of a disk, I believe that the City would be required to make it available to you in that form.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lee Neville
Joe Berry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9319

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 21, 1996

Ms. T. R. Pavis-Weil
Staff Writer
Times Herald Record
Monticello Bureau
5 Bank Street
Monticello, NY 12701

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

Dear Ms. Pavis-Weil:

I have received your recent letter, as well as a variety of materials relating to your request for records directed to the New York State Racing and Wagering Board. The records sought pertain to a request directed to the Board for approval of an interim operating agreement and consulting agreement concerning the operation of Monticello Raceway. While much of the information sought has been disclosed, you questioned the propriety of various deletions.

The deletions were made on the basis of §§87(2)(b), (c), (d), and 89(2)(b) of the Freedom of Information Law. 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. From my perspective, many of the grounds for denial, and each of the grounds upon which the Board relied, deal with potentially harmful effects of disclosure, perhaps to an individual in terms of one's privacy, to a commercial enterprise in terms of its competitive position, or to a governmental entity in terms of its ability to carry out its official duties effectively and in the best interest of the public.

If my understanding of the matter is accurate, §87(2)(c) would not serve as a valid basis for denial. That provision permits an agency to withhold records to the extent that disclosure would

"impair present or imminent contract awards". In my view, the quoted language is intended to pertain to situations in which an agency is a contracting or potentially contracting party. The Board in this instance is a regulatory agency authorized, in essence, to grant or deny an application; it is not a party, potentially or otherwise, to a contractual agreement with the parties identified in the records in question. While those parties may be involved in contractual agreements with each other, neither a "contract award" by nor a contractual agreements with the Board is contemplated in the records as I understand them. If that is so, I do not believe that §87(2)(c) would serve as a basis for denial.

Sections 87(2)(b) and 89(2)(b) enable an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and some of the deletions appear to be appropriate. For instance, I would agree that home addresses of individuals identified in the records could be withheld pursuant the privacy provisions. While I cannot conjecture as to the content of the information that has been deleted in each instance, it is important to note that there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities. For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided

statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished"

(supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

Based on the foregoing, to the extent that the deletions were based on the privacy provisions of the Freedom of Information Law and pertain to persons in a business or professional capacity, the deletions might not have appropriately been made.

The remaining ground for denial cited in response to your request, §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."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities identified in the records to the RFI.

With respect to the substance of the matter, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information

> which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the

first time, considered the phrase "substantial competitive injury" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY2d ___, December 27, 1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a

> potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).

> "The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL."

Since I am unfamiliar with the degree or nature of competition in the area or areas of commerce in which the firms identified in the records are engaged, the extent to which the Board made deletions is in my opinion, questionable. Some of the information that has been deleted may be available from other sources, such as filings under the Uniform Commercial Code or other government records sources or from Dun & Bradstreet or similar organizations. Further it seems unlikely that the criteria for withholding discussed in the preceding paragraphs would apply to each item deleted. For example, on the income statement regarding Watermark Investments Limited, it seems doubtful that most of the items of "operating expenses" could justifiably be denied.

Lastly, it is noted that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly

> demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and,if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

In an effort to encourage a full review of the records sought, copies of this opinion will be forwarded to the Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Robert A. Feuerstein
Gale D. Berg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9312

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

February 15, 1996

Captain Vincent Fitzgerald
Commanding Officer
Central Records Section
County of Suffolk Police Department
30 Yaphank Avenue
Yaphank, NY 11980

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 Captain Fitzgerald:

I have received your thoughtful letter of January 26 concerning the policy of the Suffolk County Police Department in relation to the ability of members of the public to request records under the Freedom of Information Law by fax communication.

As a general matter, it has been advised that any request made in writing that reasonably describes the records sought should satisfy the requirements of the Freedom of Information Law. Typically, if a request is made by means of a fax communication, there may be no valid basis for refusal to accept the request, and a failure to accept the request might result in an unreasonable delay in response.

Nevertheless, in view of the considerations that you described in relation to the Department's policy on the matter, I believe that the Department may validly require that requests be made under the Freedom of Information Law by submitting them either in person or by mail.

As you indicated, §87(1) of the Freedom of Information Law requires that agencies promulgate rules and regulations to implement that statute in a manner consistent with the statute and the regulations issued by the Committee on Open Government (21 NYCRR Part 1401). Neither the statute nor the Committee's regulations refers specifically to requests made by fax. Consequently, the issue in my view is whether the policy of the Department is inconsistent with the Freedom of Information Law or the Committee's regulations or is otherwise unreasonable.

You indicated that the Central Records Section of the Department maintains five fax machines that "serve specific law enforcement functions." Three are used solely to receipt arrest worksheets; one is used solely to receive modifications relative to warrants issued and recalled; the remaining machine is used only to carry out law enforcement functions, particularly for the purpose of making non-routine interdepartmental communications, as well as interdepartmental orders, directives and the like. You wrote further that your Department receives approximately 100,000 requests annually and that the receipt of requests by fax would have a "severe negative impact" on the ability to engage in authorized interdepartmental fax communications.

Based on the foregoing, from my perspective, as long as requests traditionally made are accepted, i.e., requests made in writing by mail or by personal delivery, it appears that the policy adopted by the Department is valid, for it does not unreasonably inhibit the public's ability to seek records under the Freedom of Information Law.

As you requested, a copy of this opinion will be forwarded to Mr. Frank Castagna, the individual who questioned the validity of your practice.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank Castagna

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9313

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

February 15, 1996

Mr. Al Blanche
88-A-6605
135 State Street
Auburn, NY 13021

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

Dear Mr. Blanche:

I have received your letter of January 28. As you requested, enclosed is the Committee's latest annual report to the Governor and the Legislature.

You have asked whether, in my view, "there is a chance of obtaining" your pre-sentence report under the Freedom of Information Law. From my perspective, the Freedom of Information Law does not govern rights of access to pre-sentence reports, and an effort to acquire a pre-sentence report through that statute would be unsuccessful.

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 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9314

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

February 16, 1996

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

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

Dear Mr. Sheehan:

I have received your letter of January 30 in which you questioned the validity of a fees for copies charged by the Village of Rockville Centre Police Department. Specifically, that agency charges $22 for copies of incident reports, and a different section of a response to your request pertaining to "accident reports" indicates that the fee is $12 for the first two pages, "$2.30 additional for each additional page up to seven days from date of accident" and "after seven days from date of accident $22 for the first two pages; $2.30 for each additional page."

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or service.

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

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. As you are aware, 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. The same result was reached in a more recent decision in which a court invalidated a provision of a county code the authorized fees for copies in excess of fees permitted under the Freedom of Information Law (Gancin, Schotsky & Rappaport, P.C. v. Suffolk County, Supreme Court, Suffolk County, NYLJ, December 30, 1994).

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Records & License Unit

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-935

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

February 16, 1996

Mr. John J. Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

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

Dear Mr. Sheehan:

I have received your letter of January 30 in which you questioned the validity of a fee established by the City of Buffalo Police Department of $10 for a copy of an accident report.

In this regard, in my view, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or service.

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

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. As you are aware, 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. The same result was reached in a more recent decision in which a court invalidated a provision of a county code the authorized fees for copies in excess of fees permitted under the Freedom of Information Law (Gancin, Schotsky & Rappaport, P.C. v. Suffolk County, Supreme Court, Suffolk County, NYLJ, December 30, 1994).

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

> "Except when a different fee is otherwise prescribed by statute:

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda D. Craig

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9316

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

February 16, 1996

Mr. John Pothews
Suffolk County Correctional Facility
100 Center Drive
Riverhead, NY 11901

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. Pothews:

I have received your letter of January 26 in which you wrote that you are attempting to obtain your rap sheet and records relating to your placement in the "Rockefeller Program." You have asked that this office direct you to the appropriate agency or forward the records to you. In addition, due to your indigency, you asked that fees for copies be waived.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records. The Committee does not have possession or control of records generally. Nevertheless, in an effort to assist you, 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 on the foregoing, an "agency", in general, is an entity of state or local government. Therefore, the agency that maintains rap sheets, the Division of Criminal Justice Services, would be required to disclose its records in accordance with law. I am unfamiliar, however, with the "Rockefeller Program" or whether

records pertaining to that program are maintained by an agency subject to the Freedom of Information Law.

Second, a request for agency records should be directed to the agency's "records access officer." That person has the duty of coordinating the agency's response to requests. Further, §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 of interest.

To acquire information concerning the procedure for seeking your rap sheet, it is suggested that you write to the Division of Criminal Justice Services, Office of Identification Systems, Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

Lastly, since you referred to a waiver of fees, I note that there is nothing in the Freedom of Information Law pertaining to fee waivers and that it has been held that an agency may charge its established fees, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS 2d 518, (1990)]

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9317

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 16, 1996

Mr. Jean Arlington Smith
91-A-7313 E-2-50
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Smith:

I have received copies of your correspondence involving your requests for records made under the Freedom of Information Law and directed to the Katonah Medical Group.

In this regard, it is emphasized 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 upon the foregoing, in general, the Freedom of Information Law is applicable to entities of state and local government; it would not apply to private entities, such as the Katonah Medical Group, which is a professional corporation.

However, as you may be aware, §18 of the Public Health Law generally provides patients with rights of access to medical records pertaining to themselves. Therefore, it would appear that any rights of access that you might have would exist under that statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: J. Volmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9318

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 21, 1996

Mr. William S. Hecht
[redacted]

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, unless otherwise indicated.

Dear Mr. Hecht:

I have received your letter of January 22 in which you sought clarification concerning an issue arising under the Freedom of Information Law.

According to your letter, Ms. Lee Neville of the City of Syracuse Department of Water informed you that a report that you requested could be made available only "in a paper format even though this is on disk" at the office of an engineering firm retained by the City that prepared the report. You wrote that the City contends that it maintains the record solely in paper format and is not required to release it to you on a disk. You contend, however, that there is "no difference between the City and their contractors as long as the information in question is owned by the City."

As indicated to you by phone, I am unaware of the relationship between the contractor and the City. Further, although I tried to reach Ms. Neville and an attorney for the City who may be familiar with the matter, my calls have not been returned. In my view, resolution of the issue is dependent on that relationship, which would determine "ownership" of the record.

In this regard, I offer the following comments.

First, at issue is whether the material in question constitutes a record of the City of Syracuse. The Freedom of Information Law pertains to agency records and §86(4) of that statute defines the term "record" broadly to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the

> state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In holding that it does, the Court wrote that:

> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]). Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their natural and most obvious meaning in interpreting 'records' under FOIL]."

Based on the foregoing, when records are maintained for an agency by a third party, I believe that the records would fall within the coverage of the Freedom of Information Law, even though they may not be in the physical possession of the agency.

Second, in Xerox Corporation v. Town of Webster [65 NY 2d 131 (1985)], the state's highest court found that records prepared by a consultant for an agency should be treated as if they were prepared by an agency. If the contractor in this instance was retained as a consultant, I believe that the records that were prepared for the City would fall within the coverage of the Freedom of Information Law. On the other hand, if the contractor was not hired as a consultant, the disk or other records prepared by the contractor would appear to fall beyond the scope of the Freedom of Information Law. By means of example, if a city hires a firm to fill potholes, and the firm maintains records regarding the means by which it carries out its duties under the contract, the records prepared by the firm in my view would be internal and could not be characterized as agency records.

Lastly, assuming that the contractor was retained as a consultant and that the records, including the computer disk in

question were prepared for the City, I believe that the City would be obliged to ensure that the information sought be made available on a disk. There are judicial decisions indicating that an agency is required to make information accessible under the Freedom of Information Law in the format or medium of the applicant's choice when it has the ability to do so. 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 information was produced or prepared for the City and that it can be made available to you by means of a disk, I believe that the City would be required to make it available to you in that form.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lee Neville
Joe Berry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9319

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 21, 1996

Ms. T. R. Pavis-Weil
Staff Writer
Times Herald Record
Monticello Bureau
5 Bank Street
Monticello, NY 12701

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

Dear Ms. Pavis-Weil:

I have received your recent letter, as well as a variety of materials relating to your request for records directed to the New York State Racing and Wagering Board. The records sought pertain to a request directed to the Board for approval of an interim operating agreement and consulting agreement concerning the operation of Monticello Raceway. While much of the information sought has been disclosed, you questioned the propriety of various deletions.

The deletions were made on the basis of §§87(2)(b), (c), (d), and 89(2)(b) of the Freedom of Information Law. 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. From my perspective, many of the grounds for denial, and each of the grounds upon which the Board relied, deal with potentially harmful effects of disclosure, perhaps to an individual in terms of one's privacy, to a commercial enterprise in terms of its competitive position, or to a governmental entity in terms of its ability to carry out its official duties effectively and in the best interest of the public.

If my understanding of the matter is accurate, §87(2)(c) would not serve as a valid basis for denial. That provision permits an agency to withhold records to the extent that disclosure would

"impair present or imminent contract awards". In my view, the quoted language is intended to pertain to situations in which an agency is a contracting or potentially contracting party. The Board in this instance is a regulatory agency authorized, in essence, to grant or deny an application; it is not a party, potentially or otherwise, to a contractual agreement with the parties identified in the records in question. While those parties may be involved in contractual agreements with each other, neither a "contract award" by nor a contractual agreements with the Board is contemplated in the records as I understand them. If that is so, I do not believe that §87(2)(c) would serve as a basis for denial.

Sections 87(2)(b) and 89(2)(b) enable an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", and some of the deletions appear to be appropriate. For instance, I would agree that home addresses of individuals identified in the records could be withheld pursuant the privacy provisions. While I cannot conjecture as to the content of the information that has been deleted in each instance, it is important to note that there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities. For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided

statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished"

(supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

Based on the foregoing, to the extent that the deletions were based on the privacy provisions of the Freedom of Information Law and pertain to persons in a business or professional capacity, the deletions might not have appropriately been made.

The remaining ground for denial cited in response to your request, §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."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities identified in the records to the RFI.

With respect to the substance of the matter, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information

> which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the

first time, considered the phrase "substantial competitive injury" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY2d ___, December 27, 1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a

> potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).

> "The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL."

Since I am unfamiliar with the degree or nature of competition in the area or areas of commerce in which the firms identified in the records are engaged, the extent to which the Board made deletions is in my opinion, questionable. Some of the information that has been deleted may be available from other sources, such as filings under the Uniform Commercial Code or other government records sources or from Dun & Bradstreet or similar organizations. Further it seems unlikely that the criteria for withholding discussed in the preceding paragraphs would apply to each item deleted. For example, on the income statement regarding Watermark Investments Limited, it seems doubtful that most of the items of "operating expenses" could justifiably be denied.

Lastly, it is noted that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly

> demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and,if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Moreover, in the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

In an effort to encourage a full review of the records sought, copies of this opinion will be forwarded to the Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Robert A. Feuerstein
Gale D. Berg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 9320

162 Washington Avenue, Albany, New York 12231
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February 21, 1996

Mr. Louis Jackson
#91-A-1371
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 information presented in your correspondence.</u>

Dear Mr. Jackson:

I have received your letter of January 23, which did not reach this office until February 2. You indicated that you requested certain records from a police department under the Freedom of Information Law, and that the agency gave you a "file number", but that you have received no response in four months. You have asked how long an agency has "to render a decision on a 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)].

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 9321

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 22, 1996

Ms. Bette I. Szesny
[redacted]

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 Ms. Szesny:

I have received your letters of February 2 and 3. In brief, you have sought an advisory opinion concerning rights of access under the Freedom of Information Law to bank account numbers of the Town of Schuyler. You wrote that the Town Supervisor "has expressed concern that releasing town bank account numbers might subject the town's accounts to tampering by enabling those equipped with this information to make 'electronic transfers'".

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, only one of the grounds for denial is pertinent to an analysis of rights of access. Specifically, §87(2)(i) authorizes an agency to withhold "computer access codes". Based on its legislative history, that provision is intended to permit agencies to withhold access codes which if disclosed would provide the recipient of a code the ability to gain unauthorized access to information. Insofar as disclosure would enable a person with an access code to gain access to information without the authority to do so, or to shift, add, delete or alter information, i.e., to make "electronic transfers", I believe that the items in question could justifiably be withheld. On the other hand, insofar as disclosure would not permit an individual to gain unauthorized access information or the ability to alter the information, there would likely be no basis for denial.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Dorothy Luther, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9322

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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February 22, 1996

Ms. Katrina K. Dinan
[redacted]

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 Ms. Dinan:

I have received your letter of January 29 in which you sought assistance in relation to a denial of a request for a record by the Wynantskill Union Free School District.

Having reviewed your correspondence and related documentation, the nature of the report that you requested is unclear. According to your letter, the report in question, which is entitled "Progress Report: Business Management Consultancy", was prepared by a consultant "hired" by the District. In response to your appeal, the District Clerk wrote that the report "does not conform to the definition of records according to Section 86 of the Public Officers Law. This report was not filed *for* the use of the District" (emphasis hers). She added that "if the report had been prepared for and presented to the Board of Education, it could be exempt from disclosure, according to Section 87 of the Public Officers Law because it would be categorized as *intra-agency* material" (emphasis hers).

In this regard, I offer the following comments.

First, if the report at issue is in possession of the District or was produced for the District, I believe that it would fall within the coverage of the Freedom of Information Law. That statute pertains to agency records, and §86(4) 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."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In its consideration of the issue, the Court determined that the State University clearly is an "agency" that is required to comply with the Freedom of Information Law [see definition of "agency", §86(3)]. In this instance, it is equally clear that the District is an agency for purposes of that statute. Further, the Court described the relationship between the Auxiliary Service Corporation (ASC) and the University and concluded that records maintained by the ASC for the University were subject to the Freedom of Information Law. Specifically, the Court wrote as follows:

> "In order to fulfill its educational mission, SUNY must provide certain auxiliary services to its campus community. As set forth unequivocally in ASC's bylaws, the function of ASC is to supply these essential services--including the campus bookstore--for SUNY. ASC's acts in discharging this delegated duty, then, are performed on SUNY's behalf.
>
> "Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a governmental agency. In other words, the booklist information is 'kept' or 'held' by ASC 'for an agency' (Public Officers Law § 86[4]). Thus, the information falls within the unambiguous definition of the term 'records' under FOIL.
>
> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]}. Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their

> natural and most obvious meaning in interpreting 'records' under FOIL]."

While it is unclear whether the situation that you described is similar to that considered by the Court of Appeals, it is clear in my view that if the report is maintained by or was produced for the District, it is a "record" subject to the Freedom of Information Law.

The foregoing is not intended to suggest that the report must of necessity be disclosed in its entirety. Rather, it is my view that the report constitutes a record that falls within the scope of rights of access conferred by the Freedom of Information Law. In brief, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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, assuming that it is a "record", insofar as the report consists of advice, recommendations or opinions, it could be withheld. However, to the extent that it consists of statistical or factual data, for example, I believe that it would be available, unless a different ground for denial could be asserted.

In an effort to resolve the mater in a manner consistent with 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:jm

cc: Patricia A. Noel, Clerk of the Board
Donald Perrott, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1922
FOIL-AO-9323

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

February 22, 1996

Mr. Wallace S. Nolen
94-A-6723
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Nolen:

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

Your inquiry concerns rights of access to:

> "...a data base consisting of the names of the news media (e.g. newspapers, radio, television) used by DOCS press office which contains such information as the name, address, voice and fax telephone numbers, contact person's name and other general information relating to news or organization which DOCS regularly uses to issue such things as press reports, etc."

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, most pertinent to an analysis of rights of access in my view are provisions concerning the protection of personal privacy. Among the grounds for denial appearing in the Freedom of Information Law is §87(2)(b), which enables an agency to withhold records to the extent that disclosure would "constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article." Further,

§89(2)(b) provides a series of examples of unwarranted invasions of personal privacy.

Related is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has bee collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purpose of the Personal Privacy Protection Law, the term "record" is defined to mean "any time, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter."

It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Privacy Protection Law, it is precluded from disclosing under the Freedom of Information Law. Further, the foregoing in my opinion indicates that the relationship between the Freedom of Information Law and the Personal Privacy Protection Law is somewhat circular and, consequently, the sole question in this situation is whether the disclosure of the items in question would result in an unwarranted invasion of personal privacy.

There are several judicial decision, both New York State and federal, which in my opinion are relevant, for they pertain to records about individuals in their business or professional capacities, rather than their personal capacities.

For instance, one decision involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with

respect to 'personal' information relating to natural persons." Further, the court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition

> that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

The standard in the New York Freedom of Information Law, as in the case of the federal Act, is subject to conflicting points of view, and reasonable people often differ with respect to issues concerning personal privacy. In this instance, the information in question, although identifiable to particular individuals, would appear to pertain solely to their professional or business duties as members of the news media. Unlike an individual's social security number or medical records identifiable to patients, which

would involve unique and personal details of people's lives, the records in question are not "personal" in my opinion; rather, again, they deal with functions carried out by individuals in their capacities as professional journalists. In short, in my view and as suggested in the decisions cited above, the exception concerning privacy does not extend to the kind of record at issue, which relates to persons acting in their business or professional capacities. Therefore, I believe that disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

The remaining aspects of your inquiry have been addressed in opinions prepared in the past at your request.

As you requested, a copy of this opinion will be forwarded to Mr. Annucci of the Department of Correctional Services.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9324

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

February 22, 1996

Ms. Lynne V. Swanson
[redacted]

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 Ms. Swanson:

I have received your letter of February 1, in which you sought assistance in obtaining certain information from the Weedsport Central School District.

According to your letter and the correspondence attached to it, due to what you characterized as the "poor design" of school tax bills, you and apparently others have made mistakes and paid your taxes late, thereby incurring penalties for late payment. Your view of the misleading nature of the bill is not unique, for you wrote that the Cayuga County Treasurer indicated that "he had received many complaints about the design of the Weedsport School tax bill and that many people had made innocent mistakes similar to [yours]."

Although you paid the penalty, you protested before the Board of Education, which rejected your request for the return of penalties that you paid. In addition, you wrote that you informed the District of your intent to bring suit in Small Claims Court for return of the penalty amount and "requested, in writing, the names, addresses and phone numbers of the other 46 people who faced the same penalty predicament as [you]".

In this regard, I offer the following comments.

First, the Court of Appeals, the State's highest court, has held that one's status as a litigant or potential litigant has no effect on his or her rights of access as a member of the public when seeking records under the Freedom of Information Law [see Farbman v. NYC Health and Hospitals Corp., 62 NY 2d 75 (1984)]. Therefore, if the information sought is otherwise available under the Freedom of Information Law, the District in my opinion, could not withhold it from you due to your status as a litigant or

potential litigant, or because you might use the information in conjunction with a lawsuit.

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, one of the grounds for denial is relevant to an analysis of rights of access. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy". In addition, §89(2)(b) includes a series of examples of unwarranted invasions of privacy.

Records relating to the assessment and collection of real property taxes, including the school tax, have long been a matter of public record not only under the Freedom of Information Law, but also pursuant to laws preceding the enactment of that statute. For instance, the contents of assessment rolls, which identify the owners of real property, the assessed value of the property, and the amount of tax owed or paid, are accessible to the public {see e.g., Szikszay v. Buelow, 436 NYS 2d 558 (1981)]. Therefore, insofar as records identify those owners of real property that have not paid their taxes on time or that have been penalized due to late payment or non-payment are, in my opinion, clearly accessible to the public. Similarly, the imposition of a penalty indicates that a final agency determination has been made, and a record so indicating would be available [see Freedom of Information Law, §87(2)(g)(iii)]. In short, I believe that records identifying the owners of those parcels of real property against whom penalties have been imposed, including their addresses, must be disclosed.

On the other hand, however, I believe that the telephone numbers of those who have been penalized may be withheld as an unwarranted invasion of personal privacy. The home phone numbers likely do not appear on the kinds of records described above. Moreover, many people have chosen to have unlisted phone numbers in an effort to protect their privacy.

Lastly, one of the examples of an unwarranted invasion of personal privacy appearing in §89(2)(b) involves the ability to withhold a list of names and addresses if the list would be used for "commercial or fund-raising purposes". Consequently, if the names and addresses of the property owners in question would be used for a commercial or fund-raising purpose, I believe that the District could justifiably deny access. However, if that is not your intent, the names and addresses must in my opinion 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 Board of Education.

I hope that I have been of some assistance.

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-9325

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

February 23, 1996

Mr. Michael Carlucci
Senior Associate
MCL Associates
793 Washington Street
Canton, MA 02021

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, unless otherwise indicated.

Dear Mr. Carlucci:

As you are aware, I have received your letter of February 2 concerning a denial by the Office of the State Comptroller of your request "for vendors names on the system's outstanding and uncashed check listing."

In my view, if the contentions expressed by the records access officer, Jeffrey R. Gordon, are accurate, the information sought could likely be justifiably denied.

It is noted that I have conferred with individuals representing both New York State government and the banking community with respect to your request in an effort to ascertain the effects of disclosure. While I am not suggesting that your intent is to engage in any sort of illegal activity, I have been informed that financial institutions have experienced a significant increase in check fraud during recent years due in part to the proliferation of desktop publishing. Through the development of software and laser products, checks can be duplicated or printed and, therefore, counterfeited. In the context of your request, a disclosure of the information you seek coupled with a check number, the date of issuance of the check and its amount would enable unscrupulous recipients of those items to create duplicate fraudulent checks. The records access officer wrote that the ability to do so would cause substantial harm to both the state and its bank and undermine existing security protocols. If that is so, it would appear that both of the grounds for denial cited by the records access officer would be pertinent.

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 so-called "trade secret" exception, §87(2)(d) of the Freedom of Information Law, 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..."

Based upon the statement offered by the records access officer, it would appear that the bank involved in the transactions has expended substantial time, effort and money in developing security protocols to ensure the integrity of financial transactions and to prevent or diminish the possibility of fraud or other illegal activity. If disclosure would nullify or reduce the value of the efforts undertaken by the bank to ensure security, the bank could be placed at a disadvantage in relation to is competitors, and disclosure in that event could cause "substantial injury to its competitive position." Assuming the accuracy of those contentions, it would appear that §87(2)(d) would serve as a valid basis for a denial of access.

The other provision upon which the Office of the State Comptroller relied, §87(2)(i), states that an agency may withhold "computer access codes." The intent of that exception in my view is to enable an agency to withhold codes that would permit unauthorized access to an agency's computers or information stored electronically, and to preclude a person without authority to do so to add, delete, alter or use information that is stored or which can be generated electronically. It is my understanding that although a check number is not a "computer access code" *per se*, it is used in much the same manner as a computer access code. In other words, if the account number is disclosed in combination with other data, it could be used to engage in unauthorized and perhaps illegal activity. If that is so, based upon the intent of §87(2)(i), it would appear that an account number, particularly when coupled with additional unique information, might be justifiably withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey Gordon, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9326

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

February 23, 1996

Mr. James F. Zizak
[redacted]

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, unless otherwise indicated.

Dear Mr. Zizak:

As you are aware, a copy of your letter addressed to the Attorneys General of the United State and the State of New York has been forwarded to the Committee on Open Government. The Committee is authorized to provide advice concerning the Freedom of Information Law.

In brief, you wrote that you requested records from the City of Binghamton on January 21 pursuant to the state's Freedom of Information Law. Since you have received no response, you expressed the view that you cannot "pursue an appeal."

In this regard, as we discussed by phone, if a request is denied either by means of a written response or a failure to respond, I believe that an applicant may appeal. By way of background, 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 encourage compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to officials of the City of Binghamton.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard Bucci
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9357

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

February 23, 1996

Mr. Mark Hollenbeck
[redacted]

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. Hollenbeck:

I have received your letter of January 31 and the materials attached to it. You have sought assistance in obtaining records from the Broome County Sheriff's Department.

It is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. Having reviewed your correspondence, I offer the following comments.

First, 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 a record in response to a request. Therefore, in the context of your request, if, for example, there is no list of "prints lifted" by the Department, there would be no obligation on the part of the Department to prepare a list or a new record on your behalf.

Second, as a general matter and 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 §87(2)(a) through (i) of the Law.

Insofar as your request involves fingerprints of persons other than yourself, relevant in my view would be §87(2)(b), which enables an agency to withhold records when disclosure would constitute "an unwarranted invasion of privacy." I believe that fingerprints pertaining to persons other than yourself, perhaps as well as other personal information, could be withheld under that provision.

With regard to other aspects of your request, if a record exists that indicates "amounts of audio tape recording and a list of dates or tapes recovered and amount of time per each tape", it appears that such a record would be accessible under §87(2)(g)(i) of the Freedom of Information Law. That provision requires that statistical or factual information contained within inter-agency or intra-agency materials must be disclosed, unless a different ground for denial can be asserted.

Lastly, it is unclear whether or the extent to which the records in question might have been introduced into evidence or disclosed during a public judicial proceeding. It is 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. 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Kenneth L. Crump

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9328

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

February 26, 1996

Mr. Rene Tellier
Reg. No. 32515054
Box 1000
Lewisburg, PA 17837

Dear Mr. Tellier:

I have received your letter of dated February 9, which reached this office today. You requested a variety of records from this office that are apparently kept by the Warwick and New York City Police Departments.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain possession of records generally and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the records that you requested available, because this office does not possess them. Nevertheless, I offer the following comments.

First, a request for records should be made to the agency that maintains the records. In the context of your request, you requests should be directed to the Town of Warwick and the New York City Police Department.

Second, 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, and a request should be directed to that person. I believe that the records access officer for the New York City Police Department is Lt. Joseph Cannata.

Lastly, §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.

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-9329

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

February 26, 1996

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 information presented in your correspondence.

Dear Mr. Mentzer:

I have received your recent letter and the materials attached to it. You have sought an opinion concerning the propriety of a denial of your request to inspect certain records maintained by the Wappingers Central School District.

The request involves records indicating gross wages paid to District employees that include the employees' social security numbers. The District contends that social security numbers are "confidential" and that, therefore, you cannot inspect the records. You were informed, however, that the records would be made available following the redaction of the social security numbers upon payment of a fee for copying. You added that the District three years ago apparently made equivalent records available for inspection at no charge "with the social security numbers cut off."

In this regard, I offer the following comments.

First, when records are available under the Freedom of Information Law in their entirety, any person would have the right to inspect those records at no charge. However, there are often situations in which records include portions that must be disclosed, as well as others that may be withheld. In the context of your request, I believe that portions of the records reflecting wages paid to public employees must be disclosed. However, if the same records include social security numbers, those items could clearly be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b), also Seelig v. Sielaff, 607 NYS 2d 300, 201 AD 2d 298 (1994)]. When records include information that may properly be withheld, such as a social security number, an applicant in my opinion would not have the right to inspect the record. In that circumstance, an agency could prepare a photocopy

from which deletions could be made, and I believe that the agency could charge its established fee for photocopying.

Second, that the District prepared copies of an earlier version of the same records three years ago, cut off the social security numbers, and made the remainder available for inspection at no charge would not, in my opinion, create a precedent binding on the District or a right on your part. While the District could choose to engage in the same practice or even permit you to inspect the records with social security numbers included, I do not believe that it would be required do so.

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

cc: John G. Marmillo, Superintendent
Joseph DiDonato, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9330

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

February 26, 1996

Mr. Rudy Hodor
Three Village Taxpayer's Association
20 Woodfield Road
Stony Brook, NY 11790

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. Hodor:

As you are aware, I have received your letter of February 5 in which you sought assistance relative to a request for records directed to the Three Village Central School District.

You wrote that you asked to examine records pertaining to "the last two contract negotiations between the district and the unions." In response to the request, you were informed that the records were not kept at District offices, but rather with the law firm that represented the District in the negotiations. Further, you indicated that the attorneys "apparently informed the school administrator, Mr. John Lorentz, that in their opinion, [you were] not entitled to examine the files under the Freedom of Information Law." Although you sought a written confirmation of the denial, you had not received any written response as of the date of your letter to this office.

In this regard, I offer the following comments.

First, whether the documentation in question is maintained by the District at its offices or by attorneys retained by the District in their place of business, I believe that it would fall within the scope of the Freedom of Information Law. That statute pertains to agency records, and §86(4) 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."

The Court of Appeals, the state's highest court, has construed the language quoted above expansively on several occasions and most recently dealt with whether "material received by a corporation providing services for a State university and kept on behalf of the university constitute[s] a 'record' that is presumptively discoverable under FOIL" (see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). In its consideration of the issue, the Court determined that the State University clearly is an "agency" that is required to comply with the Freedom of Information Law [see definition of "agency", §86(3)]. In this instance, it is equally clear that the District is an agency for purposes of that statute. Further, the Court described the relationship between the Auxiliary Service Corporation (ASC) and the University and concluded that records maintained by the ASC for the University were subject to the Freedom of Information Law. Specifically, the Court wrote as follows:

> "In order to fulfill its educational mission, SUNY must provide certain auxiliary services to its campus community. As set forth unequivocally in ASC's bylaws, the function of ASC is to supply these essential services--including the campus bookstore--for SUNY. ASC's acts in discharging this delegated duty, then, are performed on SUNY's behalf.
>
> "Because ASC receives a copy of the booklist compiled by its subcontractor, Barnes & Noble, to ensure that the campus bookstore is adequately maintained, it does so for the benefit of SUNY, a governmental agency. In other words, the booklist information is 'kept' or 'held' by ASC 'for an agency' (Public Officers Law § 86[4]). Thus, the information falls within the unambiguous definition of the term 'records' under FOIL.
>
> "SUNY's contention that disclosure turns solely on whether the requested information is in the physical possession of the agency ignores the plain language of FOIL defining 'records' as information kept or held 'by, with or for an agency' (Public Officers Law § 86[4]}. Where, as here, the literal language of a statute is precise and unambiguous, that language is determinative (Roth v Michelson, 55 NY2d 278; see also, Capital Newspapers v Whalen, 69 NY2d 246, 248 [giving words their

> natural and most obvious meaning in interpreting 'records' under FOIL]."

Based on the foregoing, any materials maintained by the law firm for the District or produced or received by the firm for the District would in my view constitute "records" that fall within the coverage of the Freedom of Information Law.

Second, the foregoing is not intended to suggest that the records must of necessity be disclosed in their entirety. Rather, it is my view that they constitute records that fall within the scope of rights of access conferred by the Freedom of Information Law. In brief, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am not familiar with the contents of the records, it would appear that three of the grounds for denial would be relevant to an analysis of rights of access.

Section 87(2)(c) permits an agency to withhold records which if disclosed "would impair present or imminent contract awards or collective bargaining negotiations." If my understanding of the facts is accurate, the negotiations to which the records pertain have ended and collective bargaining agreements have been reached. If that is so, I do not believe that §87(2)(c) would serve as a valid basis for a denial of access.

Also pertinent is the initial ground for denial, §87(2)(a), which concerns records that "are specifically exempted from disclosure by state or federal statute." One such statute is §3101(c) of the Civil Practice Law and Rules (CPLR), which exempts from disclosure the work product of an attorney; another is §4503 of the CPLR, which codifies the attorney-client privilege. Records falling within the scope of those statutes remain confidential so long as they are not disclosed to an adversary or third party or filed with a court, for example.

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)].

In short, insofar as the records consist of the work product of an attorney or fall within the scope of the attorney-client privilege, I believe that they may be withheld. However, insofar as the records in question have been communicated between the District and a union, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or privileged material are transmitted to an adversary or a third party, i.e., from the District to a union, I believe that the capacity to claim exemptions from disclosure under §§3101(c) or 4503 of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

The remaining provision of relevance would also pertain to communications between District officers or employees and their attorneys, for they would constitute "intra-agency materials" that fall within §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.

In sum, while I believe that the documents in which you are interested are District records, whether they are physically maintained by the District or its attorneys, it is likely that some of the records could properly be withheld in accordance with the preceding commentary.

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)].

Copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Mary Barter, Superintendent
John Lorentz, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9331

Committee Members

William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
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Executive Director

Robert J. Freeman

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

February 26, 1996

Mr. Mark B. Pangburn
93-B-2465
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-2500

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

Dear Mr. Pangburn:

I have received your letter of February 5 in which you complained that Livingston County officials have failed to respond to your requests for records under the Freedom of Information Law and asked that this office "conduct a full investigation" concerning your claims.

In this regard, the Committee on Open Government is authorized to provide advice pertaining to the Freedom of Information Law. The Committee has neither the authority nor the resources to conduct an investigation, and it is not empowered to enforce the law or otherwise compel an agency to grant or deny access to records. Further, although you expressed the belief that your remedy involves the initiation of a federal civil action, a claim of failure to comply with the State Freedom of Information Law would involve the initiation of a proceeding under Article 78 of the Civil Practice Law and Rules in State Supreme Court. Nevertheless, I offer the following comments.

First, some of the items sought appear to be court records. 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. Insofar as your inquiry involves court records, i.e., testimony given or records used in evidence during a public judicial proceeding, for reasons to be discussed later, 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.

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 §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, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas E. Moran
John M. York
Dominic F. Mazza
David J. Morris
Timothy Stoufer
John Pauer
James Culbertson
James McCann
Frank Constine
Hon. Ronald A. Cicorias

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9332

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

February 27, 1996

Mr. Daniel L. Keel
[redacted]

Dear Mr. Keel:

I have received your letter of February in which you asked that this office conduct an investigation concerning what you characterized as "missing documents" that were allegedly "expunged" by the Mayor of the City of Elmira.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to conduct investigations, and it is not clear that the Freedom of Information Law is pertinent to the matter. That statute pertains to existing records and the extent to which they must be made available to the public. From my perspective, the kind of petition to which you referred would clearly be accessible, and if you have not done so already, it is suggested that you request to inspect the petition under the Freedom of Information Law in order to determine whether it continues to exist or to be maintained by the City of Elmira.

I point out that the Freedom of Information Law does not include provisions concerning the preservation or destruction of records. However, other statutes offer direction pertaining to the custody, security, retention and disposal of records. Specifically, §57.25 of the Arts and Cultural Affairs Law, which is part of the "Local Government Records 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" 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.

It is noted that the Local Government Records Law, like the Freedom of Information Law, includes a broad definition of the term "record". Specifically, §57.17(4) of the Arts and Cultural Affairs Law states 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 any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Additionally, §57.17(1) defines "local government" to mean:

> "any county, city, town, village, school district, board of cooperative educational services, district corporation, public benefit corporation, or other government created under state law that is not a state department, division, board, bureau, commission or other

agency, heretofore or hereafter established by law."

I am unaware of the minimum period that a petition such as that described must be retained. To seek guidance concerning that issue, it is suggested that you contact the State Archives and Records Administration (SARA). SARA is the entity in the State Education Department that is authorized to develop records retention schedules and can be reached by phone at (518)474-6926.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Howard Townsend, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2573
FOIL-AO-9333

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

February 27, 1996

Mr. Ian B. Banks
Ladendown Preservation League
89 Old Route 202
Pomona, NY 10970

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. Banks:

I have received your letter of February 7, as well as the correspondence attached to it. You have sought assistance in relation to your requests for records of the Village of Pomona.

In brief, in December, your organization requested a Village mailing list. The Village Clerk indicated that the Village uses its tax rolls as its mailing list and that you could purchase copies or inspect them for the purpose of preparing your own list. Nevertheless, you were told later, in your words, "that the list could be made available only from separate 8 1/2 x 11' individual tax sheets for [you] to copy, one by one, at a cost of 25 [cents] per sheet", rather than a "computer-generated list." In addition, your requests for "copies of the meeting minutes of a public hearing" held on October have not yet resulted in disclosure.

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."

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that " [i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In a decision pertinent to your correspondence, 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). That decision involved a request for a school district wide mailing list in the form of computer generated mailing labels. Since the district had the ability to generate the labels, the court ordered it to do so.

With respect to the minutes, I point out that the Open Meetings Law does not necessarily apply to a hearing, and that there is a distinction between a meeting and a hearing. A meeting generally involves a situation in which a quorum of a public body convenes for the purpose of deliberating as a body and/or to take action. A public hearing, on the other hand, generally pertains to a situation in which the public is given an opportunity to express its views concerning a particular issue, such as a zoning matter, a local law or perhaps a budget proposal, for example. While the Open Meetings Law includes provisions concerning minutes of meetings, I know of no law that deals with or requires the preparation of minutes of hearings.

If there is a record of the proceedings in question, for reasons described at the outset, I believe that it would fall within the coverage of the Freedom of Information Law. If the gathering was a meeting, or perhaps a meeting and a hearing, the provisions in the Open Meetings Law concerning minutes would appear to be relevant. Specifically, §106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

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

Based upon the foregoing, it is clear that minutes must be prepared and made available within two weeks. It is also noted 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 they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Eloise Litman, Clerk
Reuben Ortenberg, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9334

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

February 27, 1996

Mr. Vincent Williams
93-A-4312 H-3-303T
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Williams:

I have received your undated letter, which reached this office on February 8. As I understand the matter, following a series of correspondence between yourself and the Office of the Queens County District Attorney, you were informed that the records that you requested had been lost.

While there is little aid that I can offer, it is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Horwitz
Nicole Bader

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9335

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

February 27, 1996

Mr. Eric Jenkins
94-A-5879 C-32-21
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011-0149

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

Dear Mr. Jenkins:

I have received your letter of February 6. You indicated that the New York City Police Department and the Office of the Kings County District Attorney have failed to respond to your requests for records in a timely manner, and you asked that this "office step in and take control of this situation."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee cannot enforce the law or otherwise compel an agency to grant or deny access to records. Nevertheless, 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 that statute states in part that:

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

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

opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 Police Department is Karen A. Pakstis, Assistant Commissioner Civil Matters; the person so designated by the District Attorney is Melanie Marmer, Assistant District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Pakstis
Melanie Marmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9336

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

February 27, 1996

Mr. Lazaro Burt
94-A-2189
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

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

Dear Mr. Burt:

I have received your letter of February 1 in which you complained that the records access officer at your facility has failed to respond to your request for records in a manner consistent with law.

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 compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Access Officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert A. Butera, Sr. Corrections Counselor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9337

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

February 28, 1996

Mr. Keith E. Fox
84-C-0865
P.O. Box 480
Scotch Settlement Road
Gouverneur, NY 13642

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

Dear Mr. Fox:

I have received your letter of February 7 in which you sought assistance concerning access to a certain record.

It is your belief that the Board of Parole denied your release due to objections expressed in writing by the Office of the Monroe County District Attorney. Having sought the record under the Freedom of Information Law, your request was rejected pursuant to §87(2)(g) of that statute.

In my view, it is likely that a denial of access to the record in question was appropriate.

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.

Section 87(2)(g) pertains to "inter-agency" and "intra-agency materials." A communication between agencies, such as a letter or memorandum sent by the office of a district attorney and the Board of Parole would constitute "inter-agency" material. Specifically, the cited 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. Assuming that the record in question consists of a recommendation or an opinion offered to the Board of Parole by an agency, I believe that it could justifiably be withheld.

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-9338

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

February 28, 1996

Mr. Martin Jones, Sr.
89-C-0145
Attica Correctional Facility
P.O. Box 149
Attica, NY 14011

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

Dear Mr. Jones:

I have received your letter of February 9 in which you raised questions concerning the Freedom of Information Law.

First, although you asked that records be "certified correct" by the City of Buffalo Police Department, upon receipt of the records, there was no such certification. You have asked how you might remedy the matter.

In this regard, in an effort to clarify the Department's responsibilities under the Freedom of Information Law, a copy of this opinion will be sent to the officer mentioned in your letter, and it is suggested that you contact him as well.

With respect to the issue, when a request for a record is approved, §89(3) of the Freedom of Information Law states in part that:

> "Upon payment 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."

Based upon the foregoing, an agency is required to certify that a copy of a record made or to be made available is a true copy upon request to do so.

I point out that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

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."

Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in relevant part that:

> "The records access Officer is responsible for assuring that agency personnel...
>
> (5) Upon request, certify that a record is a true copy..."

Pursuant to §1401.2(b)(5) and to implement §89(3) concerning an agency's duty to provide certification, the records access officer has the duty of ensuring that agency personnel certify that copies of records are true copies.

It is also noted that a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to

§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.

Additionally, it has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

Second, you wrote that your family sent requests to the Department on October 4 and that having received no response, they visited headquarters with a copy of the request and "were told that they could not inspect/copy anything, flat out." You asked which Department records are not subject the Freedom of Information Law and what your family can do to gain access.

Without knowledge of the nature of the records sought, I cannot offer specific guidance. However, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Larry Baehre
Lt. Mark Makowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9339

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

February 29, 1996

Mr. Wilfred Flecha
88-T-2145 A-3-4
Groveland Correctional Facility Annex
P.O. Box 46
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 information presented in your correspondence.

Dear Mr. Flecha:

I have received your letter of February 12 in which you referred to an opinion rendered on January 29 in response to your inquiry and sought a reconsideration of the matter.

The records in question are so-called "quarterly reviews", and it is your view that the decision that I cited, Rowland D. v. Scully [152 AD2d 570 (1989)] is inapposite and that my opinion concerning rights of access was unduly narrow.

In this regard, while I am unfamiliar with the specific contents of the records sought, I continue to believe that reliance upon Rowland D. was appropriate due to the principle enunciated in that decision, even though the records at issue there may have been somewhat different from the quarterly reviews that you requested. As I understand their contents, both the "program Security and Assessment Summary forms" considered in Rowland D. and the quarterly reviews consist essentially of opinions of staff at a correctional facility concerning an inmate. Insofar as the records sought are reflective of opinions or recommendations or are evaluative in nature, I believe that they may be withheld under §87(2)(g) of the Freedom of Information Law. That provision was quoted in full and explained in my earlier response to you.

If my understanding of the contents of the quarterly reviews is inaccurate, my analysis of rights of access may be inaccurate as well. If your understanding of the contents of those records is different from mine, please so inform me. Alternatively, you could appeal the denial, and, although I am not suggesting that you do so, you could seek judicial review of the denial following the exhaustion of your administrative remedies.

I hope that the foregoing serves to enhance your understanding of the rationale of the earlier opinion.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9340

Committee Members

William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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

March 1, 1996

Mr. Simon Stewart
95-A-2813 B-7-2-B
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 information presented in your correspondence.

Dear Mr. Stewart:

I have received your letter of February 11 and the materials attached to it. You have sought assistance concerning your efforts in gaining access to records under the Freedom of Information from Supreme Court, Bronx County.

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though

other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that the foregoing serves to clarify your understanding of the matter and the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9341

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

March 4, 1996

Ms. Laura Boyd
Associate Appellate Counsel
The Legal Aid Society
Criminal Appeals Bureau
15 Park Row
New York, NY 10038

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

Dear Ms. Boyd:

I have received your letter of February 13, as well as the correspondence attached to it. You have sought an advisory opinion concerning the adequacy of a request for records directed to the New York City Police Department.

By way of background, in a letter of August 22, 1995 sent to the Department's records access officer, you requested:

> "All police reports filed pursuant to the investigation of Bronx County Docket No. 91X016811; specifically, all reports of Police Officer Pusins, shield no. 03542, as well as all noted written and reports filed pursuant to interviews with Eva Muniz."

In addition to citing the name of the case to which the records relate and providing the docket number and shield number of the arresting officer, you also provided in your letter an arrest number, the date of the arrest, and the defendant's NYSID number, her date of birth and her social security number. Notwithstanding the variety of identifying details in the request, you were informed in a response dated January 25, 1996, more than five months after submitting the request, that the Department was "unable to access any records on the basis that your request is to [sic] broad in nature and does not reasonably describe a specific document."

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require, as the response to your request suggests, that an applicant seek or describe "a specific document." When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals 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)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and 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.

While I am unfamiliar with the Department's recordkeeping systems, it seems unlikely that staff could not locate records pertaining to a case when the array of information that you provided is included in a request. Assuming that the records sought can be located with reasonable effort, I believe that your request would have met the requirement that you "reasonably describe" the records. Notwithstanding the foregoing, there was no

indication in the response of the means by which or the information needed to be supplied in order to meet the Department's standard.

Moreover, the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist the requester in identifying requested records, if necessary" [21 NYCRR 1401.2(b)(2)].

Second, the lapse of time between your request and the Department's response in my opinion represented a constructive denial of access. I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this

> petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis, Assistant Commissioner
Lt. Glen A. Suarez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 193
OML-AO-2579
FOIL-AO-9342

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

March 5, 1996

Mr. Bernard J. Morosco
[redacted]

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. Morosco:

I have received your letter of February 19 and a copy of the attached appeal directed to the Board of Commissioners of the City of Utica Municipal Housing Authority.

By way of background, you requested a variety of records from the Authority pursuant to the Freedom of Information and Personal Privacy Protection Laws beginning in October of 1995, and as I understand the matter, you have not yet received a response. The records sought include minutes of Board meetings pertaining to yourself and the position of Human Resource Coordinator, advertisements or postings related to that position, records referring to you, the position and your performance since being hired, and copies of certain individuals' contracts and their salary schedules.

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

First, it is noted that the Freedom of Information Law is applicable to agency records and that §86(3) of the Law defines the term "agency" to include:

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

Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations. Since the definition of "agency" includes public corporations, I believe that a public housing authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Westchester Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

Second, however, I point out that 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 a municipal housing authority.

Third, 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. From my perspective, two of the grounds for denial are relevant to an analysis of rights of access to the records sought, insofar as they exist.

Section 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." Insofar as the records in question pertain to you, you could not engage in an unwarranted invasion of your own privacy. However, it is possible that others have commented in writing with respect to your performance, for example. If what you characterize as an "external" source (i.e., a member of the public or other person not acting as an agency employee) offered a recommendation, praise or criticism of your performance, in my view, any identifiable details pertaining to that person could be withheld as an unwarranted invasion of personal privacy.

The other ground for denial of potential significance, 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. Based upon the foregoing, while factual information pertaining to you contained in inter-agency or intra-agency materials must be made available to you, those aspects of such materials consisting of expressions of opinion, for instance, could be withheld.

Advertisements and postings would in my opinion clearly be available for none of the grounds for denial could be asserted. Similarly, a contract between an agency and an individual, as well as one's salary, would in my view clearly be accessible, for none of the grounds for denial could justifiably be asserted to withhold those records.

With respect to minutes of meetings, I direct your attention to the Open Meetings Law. Section 106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not

> include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, although minutes must be prepared and made available within two weeks, it is clear that minutes need not consist of a verbatim account of every comment that was made. Further, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

It is also noted that the Freedom of Information Law has long required that when final action is taken by a public body, a record must be prepared indicating how each member cast his or her vote [see Freedom of Information Law, §87(3)(a)]. The record of members' votes typically appears in minutes of meetings.

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 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 encourage compliance with law, a copy of this opinion will be forward to the Board of Commissioners.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9343

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

March 5, 1996

Mr. Joseph DeRosa
89-C-0182
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 information presented in your correspondence.

Dear Mr. DeRosa:

I have received your letter of February 13 in which you referred to our earlier correspondence relating to a request for records of the City of Utica.

You indicated that the receipt of your request was acknowledged by the City's records access officer, who informed you that a determination would be made in the "near future." Nevertheless, three months have passed, and no determination has been made. You have sought assistance in the matter.

In this regard, as suggested in my response to you of August 1, "if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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."

Under the circumstances, it appears that your request has been constructively denied and that you may appeal. Due to the change in administration in the City of Utica, I am unaware of the identity of the person to whom an appeal should be directed. However, it is suggested that, if you decide to appeal, the appeal should be made to the Corporation Counsel, and you should ask that the appeal be forwarded to the appropriate person, if necessary.

Lastly, in an effort to encourage compliance, a copy of this response will be sent to the City's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Ashe, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9344

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 5, 1996

Mr. John Castronova
93-R-0241
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556

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

Dear Mr. Castronova:

I have received your letter of February 12 in which you sought advice concerning access to records. Specifically, you wrote that you are interested in obtaining documents submitted to the court as part of a "pre-sentence investigation."

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 and related records.

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 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 the records that are the subject of your inquiry 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. It is suggested that you review that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9345

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 5, 1996

Mr. J. Woods
81-A-2413
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 information presented in your correspondence.

Dear Mr. Woods:

I have received your letter of February 9, which reached this office on February 15.

You wrote that you are a parole violator recently "returned to the correctional system" and that you are attempting to obtain your "old visiting - correspondence - phone lists" from your facility. In response to your request for the information in question, you were informed that it is unavailable because, to use your word, it was "inactivated." You have asked how those items can be obtained and "reactivated."

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. If records were destroyed or discarded, the Freedom of Information Law would not apply. Similarly, if there are no lists of your visitors or phone calls made or received, the agency would not be obliged to create or prepare records on your behalf.

Second, assuming that the records sought continue to exist, whether they are characterized as inactive or otherwise, I believe that they would be subject to rights of access conferred by 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 §87(2)(a) through (i) of the Law.

If a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the

facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found 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 a visitor's log or phone records, if they exist, are kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors or phone calls, it would likely be

easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors or phone calls and each page would have to be reviewed in an effort to identify visitors of or calls made by a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

Since you also referred to other institutional records pertaining to you, I point out the regulations promulgated by the Department of Correctional Services indicate that your "personal history data" must be made available to you [see §5.21(c)]. Further, the phrase "personal history" is defined in §5.5(i) of the regulations to mean "records consisting of inmate name, age, birthdate, birthplace, city of previous residence, physical description, occupation, correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."

Lastly, the regulations indicate that requests for records maintained at a correctional facility may be directed to the facility superintendent or his designee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2580
FOIL-AO-9346

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 6, 1996

Mr. George 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 information presented in your correspondence.

Dear Mr. Valentine:

I have received your letter of February 13, which reached this office on February 21. You have complained with respect to the manner in which the Brookhaven Town Board has given effect to both the Open Meetings Law and the Freedom of Information Law.

The first issue that you raised pertains to the sufficiency of a motion to enter into executive session at a recent meeting of the Town Board. Since the subjects for consideration in executive session were merely described as "personnel" and "litigation", you asked for greater specificity. However, you wrote that the Supervisor said that the Board was not obligated to reveal any additional details.

In my opinion, which is based on the judicial interpretation of the Open Meetings Law, the descriptions of the matters to be discussed in executive session were inadequate.

By way of background, 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. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Perhaps the most frequently cited ground for entry into executive session is the so-called "personnel" exception. Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <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).

Based on the insertion of the term "particular" in §105(1)(f), I believe that a discussion under that provision 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.

Due to the presence of the term "particular" in §105(1)(f), it has been advised that a motion describing the subject to be discussed as "personnel" or as a "specific personnel matter" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving employment, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1)(f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed

> discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 207 AD 2d 55 (1994)].

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held by the Appellate Division, Second, Department, 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.

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 note that the Daily Gazette decision was cited by the Appellate Division in Gordon.

The second issue involves what appears to be an incapacity on your part to know where records are kept or from whom they may be requested. In this regard, since you referred specifically to minutes of meetings, I note that §30 of the Town Law states in part that the town clerk is responsible for preparing minutes of town board meetings and that the clerk is the legal custodian of all town records. Further, §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 is the Town Board, and 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.

One of the requirements pertains to the Town Board's obligation 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. In addition, §1401.9 of the Committee's regulations states that:

> "Each agency shall publicize by posting in a conspicuous location and/or by publication in a local newspaper of general circulation:
>
> (a) The locations where records shall be made available to inspection and copying.
>
> (b) The name, title, business address and business telephone number of the designated records access officer.
>
> (c) The right to appeal by any person denied access to a record and the name and business address of the person or body to whom an appeal is to be directed."

Lastly, when you requested a subject matter list of the Town's records, you were informed that no such list existed. As a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §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)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

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.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this opinion will be forwarded to the Town Board and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9347

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 6, 1996

Mr. Joseph Cunningham
93-R-7992
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

<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 information presented in your correspondence.</u>

Dear Mr. Cunningham:

I have received your letter of February 12, which reached this office on February 20. You have sought assistance in obtaining records from your court appointed attorney. As of the date of your letter, he apparently had not responded to your requests made under 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 on the foregoing, the Freedom of Information Law generally includes within its scope records maintained by entities of state and local government. Records maintained by a private attorney would not fall within the coverage of that statute.

I hope that the preceding serves to enhance your understanding of the matter and regret that I cannot be of further assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2581
FOIL-AO- 9348

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

March 8, 1996

Ms. 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 information presented in your correspondence.

Dear Ms. Phillips:

I have received your letter of February 20 and the materials attached to it. In your capacity as a member of the Board of Education of the Enlarged City School District of Troy, you have asked whether, in my view, you have "broken any rules, regulations, guidelines, etc. by releasing this material [certain documentation that you attached] to parents and PTA/PTO leaders." You expressed the opinion that your "position as Board member prevents and precludes [you] from releasing information received from executive sessions or information received as confidential", but that "[n]one of the enclosed memoranda fall under those categories."

In this regard, first, the Committee on Open Government is not a court and I am not a judge. Although I have reviewed the documents that you enclosed, I cannot make a judgment or determination. I believe, however, that with the exception of a few statements reflective of opinions, the memoranda would be available to any person in response to a request made under the Freedom of Information Law.

Second, I am unfamiliar with the rules that might have been adopted by the Board of Education, and I cannot conjecture as to whether you may have complied with or broken any such rules. For instance, I am unaware of the existence of any Board rule or policy that might deal with unilateral disclosures by Board members or ethical guidelines relating to disclosure by Board members. While I cannot advise that the disclosures in question were ethical or unethical, I do not believe that any statute would have prohibited you from disclosing the records.

According to your letter, some of the information contained in the records was reviewed and discussed at meetings of the PTA/PTO and the Shared Decision Making Committee. Assuming that PTA/PTO

meetings are held on school grounds, any member of the public would have the right to attend [see Education Law, §414(1)(c)]. Similarly, it has been advised that shared decision making committees established pursuant to regulations promulgated by the Commissioner of Education constitute "public bodies" required to conduct their meetings in accordance with the Open Meetings Law (see attached advisory opinion, OML-2456). Therefore, insofar as the contents of the documentation at issue were effectively disclosed at meetings open to the public, I do not believe that there would be any basis for withholding.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 records, as you suggested, consist of intra-agency materials that 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, those 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, the records in question consist in great measure of factual information, expressions of agency policy or direction given to staff. To that extent, I believe that they would be accessible under subparagraphs (i), (ii) or (iii) of §87(2)(g). As suggested earlier, minor portions might be

characterized as opinions that the District could choose to withhold.

You also referred to objections concerning the protection of personal privacy. The issue, in my view, is whether disclosure of the information sought would constituted an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. 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. 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); 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].

As I understand the documentation, references to names involve public employees in relation to the performance of their official duties. If that is so, it would appear that disclosure would not have resulted in an unwarranted invasion of personal privacy.

Lastly, both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances described in paragraphs (a) through (h) of §105(1), there is no requirement that an executive session be held even though a public body has 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 that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency

may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information at issue. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I note that 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 instance, 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 educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Edcuation, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of

Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9349

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

March 8, 1996

Mr. Bruce L. Hoffman
94-B-2822
Mohawk Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Hoffman:

I have received your letter of February 20. You have sought guidance concerning "the use of FOIA, PA or Public Officers Law to obtain records kept by government of court proceedings against a citizen." You referred specifically to requests to a county clerk for minutes of a criminal proceeding.

In this regard, I offer the following comments.

First, the "FOIA" and "PA" are, respectively, the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies; they do not apply to federal, state or local courts.

It is assumed that your reference to the Public Officers Law pertains to the New York Freedom of Information Law. That statute is applicable to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines the term "judiciary" to mean:

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

An office of a district attorney, or a police or sheriff's department, would clearly constitute an "agency" required to comply with the Freedom of Information Law. However, I note that in Moore v. Santucci [151 AD 2d 677(1989)], it was found that the office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

Lastly, as you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

I hope that the foregoing serves to clarify your understanding 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 9350

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

March 8, 1996

Mr. George O'Dell
94-A-6654 G2-36B
Orleans Corr. Facility
3531 Gaines Basin Road
Albion, NY 14411

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

Dear Mr. O'Dell:

I have received your letter dated February 5, which reached this office on February 21. You referred to difficulty in obtaining medical records under the Freedom of Information Law from the Greene County Jail.

In this regard, I offer the following comments.

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

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

Second, pertinent to your inquiry is §18 of the Public Health Law. In brief, that statute generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the

Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

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

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Records Access Officer, Greene County Jail

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2582
FOIL-AO-9351

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

March 11, 1996

Ms. Ellen L. Kilbourn
[redacted]

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 Ms. Kilbourn:

I have received your letter of February 17 and the news article attached to it.

You have questioned the propriety of a procedure used by the City of Salamanca Board of Education. Specifically, the article states in relevant part that:

> "Under a new practice the school board takes one consensus vote to approve all items under Roman numeral three of the board's agenda. Specific items may be removed from the consensus vote and debated or voted on separately with a boardmember's request."

The article indicates that the new procedure was adopted "as a way to shorten lengthy board meetings."

In this regard, I know of no provision of law that pertains directly to the issue or that would prohibit the Board from continuing to implement its new procedure. However, I believe that the Board must comply with provisions within the Open Meetings and Freedom of Information Laws designed to guarantee the public's right to know of governmental decisions and ensure accountability.

For instance, §106(1) of the Open Meetings Law provides direction concerning the contents of minutes of meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals,

> resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, if, for instance, a consensus motion includes the appointment of a number of people, I believe that the minutes would be required to identify each person appointed and the position to which he or she was appointed. In a decision that may be pertinent to the matter, Mitzner v. Goshen Central School District Board of Education [Supreme Court, Orange County, April 15, 1993], the case involved a series of complaints that were reviewed by the School Board president, and the minutes of the Board meeting merely stated that "the Board hereby ratifies the action of the President in signing and issuing eight Determinations in regard to complaints received from Mr. Bernard Mitzner." The court held that "these bare-bones resolutions do not qualify as a record or summary of the final determination as required" by §106 of the Open Meetings Law. As such, the court found that the failure to indicate the nature of the determination of the complaints was inadequate. In the context of your question, I believe that, in order to comply with the Open Meetings Law and to be consistent with the thrust of the holding in Mitzner, minutes must indicate in some manner the precise nature of the Board's action.

In addition, §87(3)(a) of the Freedom of Information Law states that: "Each agency", which includes a board of education, "shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." Therefore, when the Board takes action, a record must be prepared that indicates the manner in which each member cast his or her vote. Typically, that record is included as part of the minutes.

I hope that I have been of 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 9352

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 12, 1996

Mr. Joe Hackett
[redacted]

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. Hackett:

I have received your letter of February 23, as well as the materials relating to it. You have sought assistance in obtaining records of the Olympic Regional Development Authority.

Having requested a variety of information from the Authority on December 13, you received a response some two and a half months later. Portions of the response indicate that certain aspects of the request were "too vague" or "not specific enough"; in other instances items were deleted without explanation and "inter-office correspondence" was withheld in its entirety. Further, the response does not refer to the right to appeal the denial of access.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require, as the response to your request suggests, that an applicant seek particular records or describe a specific document. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since 1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. I point out that it has been held by the Court of Appeals 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)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and 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.

While I am unfamiliar with the Authority's recordkeeping systems, insofar as the records sought can be located with reasonable effort, I believe that your request would have met the requirement that you "reasonably describe" the records. Notwithstanding the foregoing, there was no indication in the response of the means by which or the information needed to be supplied in order to make an appropriate request.

I note that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state that an agency's designated records access officer has the duty of assuring that agency personnel "assist the requester in identifying requested records, if necessary" [21 NYCRR 1401.2(b)(2)].

Second, the lapse of time between your request and the Department's response in my opinion represented a constructive denial of access. I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of that statute states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record

> available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to

> records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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, while I am not questioning the veracity of the response as it pertains to "inter-office correspondence", it is important to note that the courts have construed the provision pertaining to those items expansively in terms of an agency's duty to disclose. That provision, §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.

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 Authority's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald J. Krone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9353

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

March 12, 1996

Mr. Maurice Samuels
85-A-0184
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. Samuels:

I have received your letter of February 10. You have sought assistance in obtaining records from your attorney and the Office of the New York County District Attorney.

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."

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government. While the office of a district attorney would clearly constitute an "agency" falling within the coverage of the Freedom of Information Law, a private attorney and that person's records would, in my view, be outside the scope of that statute.

Second, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provide in part that an agency need not create a record in response to a request. If indeed the Office of the District Attorney does not maintain the records sought, the Freedom of Information Law would not apply.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Third, when requested materials exist as records and can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Since you referred to 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 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. 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 §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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent W.S. Lai, Assistant District Attorney
Gary J. Galperin, Chief, Special Projects Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9354

Committee Members

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

March 12, 1996

Ms. Beverly Remington Neigut
[redacted]

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 Ms. Neigut:

I have received your letter of February 19 concerning your efforts in gaining access to records of the Village of Oxford. Having reviewed the correspondence attached to your letter, it appears that the Village Clerk provided the information that you requested. However, you have sought assistance and questioned the propriety of a delay in response to a request.

In this regard, I offer the following comments.

First, as indicated in the newspaper article that you enclosed, pursuant to regulations promulgated by the Committee on Open Government (21NYCRR Part 1401), each agency, including a village, 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 for records, and requests should 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)].

Enclosed for your consideration is a copy of "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws and includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Sherry A. Behe, Village Clerk-Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9355

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

March 12, 1996

Mr. Michael Bethea
91-A-2950
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 information presented in your correspondence.

Dear Mr. Bethea:

I have received your letter of February 22. You have sought guidance concerning your ability to gain access to records pertaining to your arrest and conviction.

In this regard, I offer the following comments.

First, a request should be directed to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests for records. I note, too, 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 staff to locate and identify the records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9356

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

March 13, 1996

Mr. Gary Ruberg
94-A-4430
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

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. Ruberg:

I have received your letter of February 13 and the correspondence attached to it.

As I understand the matter, you requested records from a police department relating to a charge initiated against you that was later dismissed. In response to the request, you wrote that you were informed that a court order "was issued to prevent disclosure." You indicated that you are unaware of the basis for the issuance of a court order and asked for suggestions concerning steps that you might take to attempt to acquire the records.

In this regard, based on a review of the materials that you enclosed, it would appear that the records in question were sealed pursuant to §160.50 of the Criminal Procedure Law. In brief, under that statute, when criminal charges against a person are dismissed in his or her favor, a court is generally required to order that the charges and related records be sealed. There are, however, provisions within §160.50 that authorize disclosure to the subject of the records. Consequently, because I have neither the jurisdiction nor the expertise to offer specific guidance concerning the Criminal Procedure Law, it is suggested that you review §160.50 in an effort to make an appropriate request and that you discuss the matter with your attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian C. Nichols, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9357

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

March 14, 1996

Mr. Reginald Cornelia
[redacted]

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. Cornelia:

I have received your letter of February 23. For purposes of clarification, you specified that you have no interest in knowing the names or addresses of tenants who may be involved in the Section 8 housing program. Rather, you specified that you "only seek to know how many children are in [your] school district as a result of the Section 8 program."

In this regard, the issue in my opinion is whether an agency maintains a record that would reflect the number of such children in your school district. I note that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no record exists reflective of the total number of school children in your school district involved in Section 8 housing, an agency would not be required to review its records for the purpose of preparing a total or a new record on your behalf. On the other hand, if a record exists containing the figure or statistics in which you are interested, I believe that it would be available. In short, none of the grounds for denial appearing in the Freedom of Information Law would in my opinion authorize an agency to withhold such a figure or statistics.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Nina J. Stewart
Records Access Officer, Springs School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9358

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

March 14, 1996

Mr. Philip Pizzuti
[redacted]

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. Pizzuti:

I have received your letter of February 22. You have asked whether in my view, you have the right to obtain from the Westchester County Public Administrator "the name of each estate" for which the Public Administrator "retained an attorney for the year 1995 and the name of the attorney...retained for each estate."

In this regard, I offer the following comments.

First, 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. However, it is my understanding that an office of public administrator is not a court. 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9359

162 Washington Avenue, Albany, New York 12231
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March 14, 1996

Mr. Edward J. Shea
[redacted]

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

Dear Mr. Shea:

I have received your letter of February 24. In brief, on February 1, you submitted a request to the Three Village Central School District for a variety of records communicated among or between School District officials relating to budget requests. You specified that the records sought should include a "listing of proposed reductions."

In this regard, I offer the following comments.

First, I note at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there is no list of proposed reductions, the District would not be required to create a list on your behalf.

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. As I understand the matter, it is possible that two of the grounds for denial would be relevant to an analysis of rights of access.

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.

In a case involving "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, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

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.

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations. If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, it would appear that those portions of the records 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

cc: Board of Education
Dr. Mary Barter, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9360

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

March 15, 1996

Mr. Lansing Sickles
[redacted]

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. Sickles:

I have received your letter of February 21 in which you sought assistance in obtaining records from the Ravena-Coeymans-Selkirk School District. Specifically, expressed interest in obtaining "the hiring and working contracts pertaining to certain individuals employed by the district", as well as the "most recent forms that were signed and approved which the individuals are working under".

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, 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 employee, including 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 employment contract applicable to a particular employee, 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, and the District as the employer.

Lastly, since you indicated that you received an unsatisfactory answer 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 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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Roger Lewis, Business Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9361

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

March 15, 1996

Mr. Larry G. Mack
Cattaragus County Legislature
4911 Humphrey Road
Great Valley, NY 14741

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. Mack:

I have received your letter concerning a denial of access to records by the Office of Parks, Recreation and Historic Preservation. You requested cabin rental records and receipts relating to certain facilities in Allegany State Park. The agency withheld the records on the ground that disclosure would constitute an "unwarranted invasion of privacy."

I agree with the agency's determination.

Although the Freedom of Information Law is based on a presumption of access, §87(2)(b) of that statute authorizes an agency to withhold records insofar as disclosure would result in "unwarranted invasion of personal privacy". From my perspective, disclosure of the identities of members of the public who are vacationers or campers, including dates on which they rented state facilities, would represent an unreasonable intrusion into their lives. Where and when a member of the public chooses to go on vacation is, in my view, nobody's business. Consequently, I believe that the agency's denial of your request was justified.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: James M. Rich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9362

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

March 15, 1996

Mr. Craig Butchino
87-D-0101
Attica Corr. Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Butchino:

I have received your letter of February 23 in which you requested an advisory opinion concerning the Freedom of Information Law.

As I understand the matter, while you were participating in a work release program, a person that you named allegedly filed a complaint against you with the Village of Malone Police Department. Although the complaint did not result in an arrest or "criminal liability", you wrote that it served as the basis for disciplinary action taken against you by the Department of Correctional Services. Your initial request to the Police Department was not answered, and you subsequently appealed to the Chief of Police.

In this regard, 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, §87(2)(b) of the Freedom of Information Law is often most relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

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.

When the deletion of identifying details would not serve to protect a complainant's privacy, it has been advised that an agency may withhold the complaint in its entirely. In this instance, it appears that the Village of Malone could validly withhold the complaint, particularly since it resulted in no action on the part of the Village.

Second, since you appealed to the Chief of Police, I would conjecture that he is not the person designated to determine appeals. The Police Department is a unit within an agency, the Village of Malone. With respect to the right to appeal a denial of access to records, §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."

Therefore, in the case of a village, an appeal would be made to the village board of trustees or a person or body designated by the board.

Lastly, if the Department of Correctional Services conducted a proceeding resulting in disciplinary action, I believe that

principles of due process would enable you to obtain records used as evidence in the proceeding. Therefore, if the record in question was introduced or used in a proceeding initiated against you, it is suggested that you seek the record from the Department of Correctional Service. Under the Department's regulations, a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

Enclosed, as requested, is the Committee's latest annual report.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Chief of Police
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9363

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

March 15, 1996

Mr. Timothy Rupert
91-B-1598
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 information presented in your correspondence.

Dear Mr. Rupert:

I have received your letter of February 25. Enclosed are copies of the advisory opinions that you requested, as well as the Committee's latest annual report.

You also sought guidance concerning your right to obtain registration records from the Albany and Clinton County Board of Elections.

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. Further, §89(6) of the Freedom of Information Law states that: "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any part to records." Therefore, if records are available pursuant to a provision of law other than the Freedom of Information Law, nothing in the Freedom of Information Law can be asserted to withhold those records.

Here I direct your attention to §3-220 of the Elections Law, which pertains to records maintained by county boards of elections. Subdivision (1) of that statute states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter [the Election Law] shall be public records..." As such, registration records maintained by a county board of elections are clearly accessible to the public.

Second, when a request is denied, either in writing or by means of a failure to respond in accordance with §89(3) of the Freedom of Information Law, the applicant may appeal the denial. By way of background, 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, while I cannot advise of its specific authority, complaints concerning the Election Law may be directed to the State Board of Elections.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Albany County Board of Elections
Clinton County Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9364

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

March 15, 1996

Mr. William A. Seyse
[redacted]

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. Seyse:

I have received your letter, which reached this office on February 29.

You attached a newsletter distributed by the Village of Scotia that states that certain action was taken "in direct response to an independent poll of village residents last year..." You expressed an interest in obtaining "poll data", including "the poll sample size, the dates the poll was conducted, the questions asked...the number and types of answers that were given to said questions, and other related information as to who conducted the poll, etc." As of the date of your letter, the information in question had not been disclosed by the Village.

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 is not required to create a record in response to a request. Insofar as the information sought does not exist in the form of a record or records, the Village would not be required to prepare new records on your behalf.

Second, to the extent that the Village maintains records falling within the scope of your request, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 the records in question must be disclosed, except to the extent that they identify members of the public who responded to the poll.

The only pertinent ground for denial, as I understand the matter, would be §87(2)(b). That provision authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, names, addresses or other identifying details pertaining to those who responded to the poll could be withheld pursuant to §87(2)(b). Responses to the poll, without identifying details, would in my opinion be accessible. Similarly, a record indicating the questions asked would be available, except to the extent that such record might include personally identifiable details.

Other records, such as those indicating poll sample size, the number and types of response, dates the poll was taken and similar records would in my view be available. Of likely significance is §87(2)(g). Although that provision potentially serves as a basis for withholding records, due to its structure, if 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. Therefore, insofar as existing records that you requested consist of "statistical or factual tabulations or data", I believe that they must be disclosed, unless a different ground for denial [i.e., §87(2)(b)] is applicable.

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 opinion will be forwarded to Village officials.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9365

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

March 15, 1996

Mr. Anthony G. Gill
94-A-8208
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

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. Gill:

I have received your recent letter, which reached this office on February 29. You have requested an advisory opinion concerning the Freedom of Information Law.

You indicated that you recently directed a request to the Ministerial Services Division of the Department of Correctional Services in which you sought "a copy of a video tape of the Jehovah Witness Assembly [during] which [you were] baptised."

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, a videotape maintained by an agency would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my view, a record reflective of a demonstration of personal religious beliefs or activities could be withheld on the ground that disclosure could constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, since you were present at the event, I believe that those aspects of the videotape that depict activities that you witnessed must be disclosed to you. I note that the Department could charge a fee for the duplication of the tape based on the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)].

Lastly, I point out that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility should be directed to the facility superintendent or his designee; requests for records kept at the Department's Albany offices should be sent to the Deputy Commissioner for Administration.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Division of Ministerial Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9366

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

March 15, 1996

Mr. Edward F. Gonzalez
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 information presented in your correspondence.

Dear Mr. Gonzalez:

I have received your letter of February 23 in which you sought guidance concerning access to records and raised a series of questions relating to the duties of district attorneys.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The questions that you posed pertaining to the duties of district attorneys are beyond the scope of the jurisdiction or expertise of this office. Consequently, the following comments will pertain solely to the Freedom of Information Law.

According to your letter, you were denied access to certain records by the Office of the Westchester County District Attorney that were "withheld...from your trial." However, you wrote that the Office of the Queens County District Attorney would be "willing" to provide access to the records, but that they are not in possession of that agency.

If my understanding of the matter is accurate, because the Office of the Queens County District Attorney does not possess the records, it can neither grant nor deny access to them. Further, despite your claim concerning its willingness to disclose the records, that agency is not obliged by the Freedom of Information Law to acquire records on your behalf from another agency.

Second, insofar as the records sought are maintained by the Office of the Westchester County District Attorney, I believe that they would be subject to rights conferred by the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that

records or portions thereof fall within one or more grounds for denial appearing in §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 hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven J. Chananie
Richard Weil

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9367

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

March 15, 1996

Mr. Dale D'Amico
95-A-4203
Clinton Correctional Facility
P.O. Box 2002
Dannemora, NY 12929-2002

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. D'Amico:

I have received your letter of February 26, as well as the correspondence attached to it. You have sought guidance concerning your ability to gain access to records involving the background of an attorney.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the background or 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 the foregoing serves to clarify 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-9368

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

March 15, 1996

Mr. Juan Reyes
92-A-9329
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. Reyes:

I have received your recent letter, which reached this office on February 29. You have sought my opinion concerning rights of access to certain records that you requested from the Office of the Westchester County District Attorney relating to your arrest and conviction.

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 section 87(2) (g). Those records might include opinions or recommendations, for example, that could be withheld.

I point out that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. 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, with regard to probation records, §243(2) of the Executive Law states in relevant part that the director of the Division of Probation and Correctional Alternatives has the authority to promulgate regulations and that "[s]uch rules and regulations shall be binding upon all counties and eligible programs...and when duly adopted shall have the force and effect of law". Section 348.1(b) of the Division's regulations 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 or other agencies become the responsibility of the court or other agencies as records."

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-9369

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

March 15, 1996

Mr. Joseph Plater
95-B-2336 BU-45
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 information presented in your correspondence.

Dear Mr. Plater:

I have received your letter of February 22. You wrote that you are interested in obtaining statements made by witnesses to a police department.

In this regard, I offer the following comments.

First, since you referred to a request sent to a county clerk, I note that a request made under the Freedom of Information Law should be directed to the agency that maintains the records. In this instance, it would appear that a request should be sent to the arresting agency, the police department, unless you know that the county clerk maintains the records sought.

Second, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a district attorney, may be pertinent to the matter. In Moore, it was found 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).

Based on the foregoing, insofar as witnesses' statements are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if witness statements have not been previously disclosed, two grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the statements in question include substantially different information, that provision may be applicable.

Also potentially relevant 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).

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-9370

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

March 15, 1996

Mr. Philip King
91-A-5926
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. King:

I have received your letter of February 22 in which you request an advisory opinion concerning the Freedom of Information Law.

You wrote that you are interested in obtaining "pictures" of the complainant introduced at your trial and shown to the jury. Further, if they are accessible, you asked whether you are entitled to duplicate photographs, opposed to photocopies, for you indicated that, having seen photocopies, "you just can't tell is what". You also sought my opinion concerning other records that you requested from the Office of the Queens County District Attorney.

In this regard, I offer the following comments.

First, based upon §86(4) of the Freedom of Information Law, photographs maintained by an agency in my view clearly constitute records subject to rights of access.

Further, §89(3) of the Freedom of Information Law states in part that, upon payment of the appropriate fee, an agency "shall provide a copy of such record." Further, the provision in the Law pertaining to fees, §87(1)(b)(iii), states that an agency's rules and regulations must include reference to:

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

As I interpret the language quoted above, unless a different statute authorizes other fees, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be duplicated by means of photocopying. In my view, if a photocopy of a photograph serves as an adequate reproduction of such a record, a photocopy would likely suffice to comply with the Law. However, if a photocopy does not serve to provide an accurate method of reproducing what appears on a photograph, as agency, in my view, would be obliged to "copy" the record, i.e., prepare a reprint of a photograph upon payment of the actual cost of reproduction.

It is noted that in a recent decision, it was stated that the Freedom of Information Law "no where suggests that an agency must provide reprints of photographs" [Adams v. Hirsch, 582 NYS 2d 724 (1992)]. However, in that case, the agency could not locate the photographs. In other contexts, it is clear that agencies have been required to produce records in the medium suggested when they have the ability to do so. For example, it has been found that an agency was required to supply data on a computer tape, rather than by means of computer printouts, when it had the capacity to do so and the applicant was willing to pay the actual cost of reproduction [see e.g., Brownstone Publishers, Inc. v. New York City Department of Buildings, 166 AD 2d 294 (1990)].

Second, with respect to your rights of access to the photographs and the other records to which you referred, it appears that they were introduced into evidence at your trial. If that is so, of likely relevance is 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, but in which 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 note that, 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9371

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

March 15, 1996

Mr. Vincent Williams
93-A-4312
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 information presented in your correspondence.

Dear Mr. Williams:

I have received your letter of February 21. You complained that you were told that records requested from the office of a district attorney were lost. In addition, you asked "what's the situation with [your] Article 78".

In this regard, first, I have no personal knowledge of the status of the Article 78 proceeding to which you referred. Further, as a matter of policy and in the interest of fairness, advisory opinions are not rendered to parties to judicial proceedings involving the Freedom of Information Law.

Second, with respect to the assertion that records have been lost, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Wendy Brown, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9372

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

March 18, 1996

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 information presented in your correspondence.

Dear Mr. Kless:

I have received your letter of February 25 in which you referred to an opinion sent to you last year concerning transcripts prepared by Erie Community College.

You contend that transcripts are existing records, for it is your understanding that they are prepared merely by printing out data from a computer. As I reviewed the other opinion addressed to you, I do not believe that there was any disagreement with your contention, assuming that the process of preparing a transcript is as simple as you suggest. As stated in that response: "if a request is made for an existing record pertaining to a student by the student, I believe that an agency would be required to disclose the record in a manner consistent with the Freedom of Information Law and/or the Family Educational Rights and Privacy Act (20 U.S.C. §1232g), so long as the requisite fees chargeable under those statutes are paid."

Somewhat related is your statement that the College will not send you an "official copy" of the transcript. You wrote that "they will send it where ever you want but they will not give [you] a copy."

In this regard, as indicated in the earlier letter to you, I believe that "official" transcripts are not existing records; rather they are created by preparing a transcript and adding to the transcript the seal of the College or some similar certification indicating that the contents of the transcript are accurate. In short, I do not believe that an "official" copy exists; while an official transcript may be prepared at the request of a student and sent to a third party, I do not believe that an educational institution would be required to prepare an official copy for the student's personal use. That kind of activity would, for reasons

previously described, exceed the institution's obligations under the Freedom of Information Law. Moreover, if "official" transcripts were made available to students, there would be no guarantee that those documents would not be altered prior to their dissemination by the students.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of the President, Erie County Community College

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 9323

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

March 21, 1996

Mr. Sergio Mendez
95-A-6786
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 information presented in your correspondence.

Dear Mr. Mendez:

I have received your letter of February 28 addressed to William Bookman, Chairman of the Committee on Open Government, as well as the materials attached to it. You have complained that the New York City Police Department has failed to respond to your request or your appeal 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 and appeals. Specifically, §89(3) of that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In an analogous situation in

which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 one aspect of your request involved police officers' memo books and the Department's contention that those documents are the personal property of police officers, I note that it has 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, 179 AD 600 (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.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis, Assistant Commissioner, Civil Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9374

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

March 22, 1996

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 information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of March 1 and the materials attached to it.

You referred to a determination of an appeal rendered by Bruce K. Gelbard, Secretary to the New York City Board of Education, on February 8 and you asked whether Mr. Gelbard forwarded a copy of the determination to this office as required by §89(4)(a) of the Freedom of Information Law. A search of our files indicates that the record in question was not sent to this office.

Several issues that you raised have been considered in opinions previously rendered. Therefore, it is unnecessary to reiterate the points already offered. I note, however, that I am unaware of any judicial decision in which it was held that the reasons for denial cited in the determination of an appeal must be consistent with those offered by the records access officer in an initial denial. Similarly, there is nothing in the Freedom of Information Law that would require consistency in terms of the basis for denials rendered by the records access and appeals officers.

I cannot offer commentary in addition to that previously rendered with respect to meeting the standard of reasonably describing the records as required by §89(3) of the Freedom of Information Law. However, as you are aware, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Next, with regard to the "appropriate frequency and duration" of times during which you may inspect records, from my perspective, the appropriate frequency of the ability to inspect would be based upon attendant facts and circumstances. If, for example, records are constantly in use by an agency, it would be unreasonable to suggest that the agency is required to provide inspection on an ongoing basis over a period of days or weeks. With respect to the duration of the period during which records may be inspected, I point out that it has been held that an agency's rule limiting the hours during a given day during which records could be inspected "to a period of time less than the business hours of the clerk's office" contravened the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (see Murtha v. Leonard, 210 AD 2d 411). Therefore, if, for example, an appointment is to inspect records on a particular day, it would appear that you should have the ability to review the records during business hours.

Lastly, you referred to the use of "file folders of non-hazardous variety" and the responsibility of a records access officer to avoid hazards (i.e., by not using materials that might cause paper cuts). In short, I am unaware of any responsibility imposed upon an agency's records access officer pertaining to the issue that you raised.

In an effort to remind Mr. Gelbard of the duty to send appeals and determinations to this office, a copy of this opinion will be sent to him. In addition, a copy will be forwarded to Ms. Deedy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Bruce K. Gelbard
Susan Deedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-194
FOIL-AO-9375

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

March 22, 1996

Daniel T. Smith, Esq.
Art Tennyson Road
Chestertown, NY 12817

Ms. June Maxam
Box 408
Chestertown, NY 12817

<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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Mr. Smith and Ms. Maxam:

I have received your letters, which are dated, respectively, March 4 and March 6. The issue involves a request by Ms. Maxam to the Town of Chester for the "Names of all dog licenses issued between 12/30/95 and 1/31/96 with validation number, date issued and to whom."

Mr. Smith, in his capacity as Town Attorney, wrote that the Town has "been advised that all records in reference to dog licenses are the property of the State Department of Agriculture and Markets and are '...solely for official use in the enforcement of Article 7 of the Agriculture and Markets Law.'" Mr. Smith also questioned the obligation of the Town to prepare a list and whether disclosure would contravene the provisions of the Personal Privacy Protection Law. Ms. Maxam contended that she did not request a list and that license records are generally public.

I believe that I am familiar with the statement made by the Department of Agriculture and Markets to which Mr. Smith referred. If my assumption is accurate, that statement indicates that:

> "THE FOLLOWING LIST WAS PREPARED BY THE NEW YORK STATE DEPARTMENT OF AGRICULTURE AND MARKETS AND IS SUPPLIED SOLELY FOR THE OFFICIAL USE OF THE MUNICIPALITY IN THE ENFORCEMENT OF ARTICLE 7 OF THE AGRICULTURE AND MARKETS LAW. USE OF THIS LIST FOR ANY OTHER PURPOSE IS NOT AUTHORIZED AND MAY

CONSTITUTE AN UNWARRANTED INVASION OF PERSONAL PRIVACY UNDER THE FREEDOM OF INFORMATION LAW SECTIONS 89(2)(B) AND 96(1)(C)."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if, for example, a list is requested and no such list exists, an agency would not be required to prepare a list or a new record on behalf of an applicant. In this instance, it does not appear that a list was requested or that the Town was asked to prepare a list.

Second, although the Department of Agriculture and Markets prepares various documents in conjunction with its statutory duties, when those documents come into physical custody of a municipality, such as a town, I believe that they become "records" of the town. Here I point out that §86(4) of the Freedom of Information Law defines the term "record" to mean:

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

Since the Town is an "agency" [see §86(3)], any document transmitted to the Town by the Department in my view constitutes a record of the Town that is subject to rights of access granted by the Freedom of Information Law. Moreover, even though a record may be maintained by two or more agencies, any of those agencies in receipt of a request for the record would be required to respond to a request in accordance with the Freedom of Information Law.

Third, in a related vein, while a record may be prepared or "supplied solely for official use", an assertion of confidentiality, absent specific statutory authority, is essentially meaningless. When confidentiality is conferred by 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." In this instance, however, I do not believe that any statute specifically exempts the records in question from disclosure. If that is so, the records are subject to whatever rights exist under the Freedom of Information Law [see Doolan v. BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and

Substance Abuse, 415 NYS 2d 780 (1979)]. In short, without appropriate statutory authority, I do not believe that the Department can impose restrictions on a town's use or dissemination of a record in possession of a town, even though the record might have been prepared by and sent to a town by the Department.

Fourth, the text quoted earlier states that disclosure of the list "may constitute an unwarranted invasion of personal privacy under the Freedom of Information Law." While a denial on that basis may be justified in some instances, it may not be appropriate in others.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From my perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as owning a dog and ensuring that the dog is cared for appropriately. I believe that licenses and similar records are available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

The standard in the Freedom of Information Law pertaining to the protection of privacy in my opinion is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives, such as medical information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to an agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

In this instance, if I correctly understand the matter, the records would be available, for disclosure would, in my opinion, result in a permissible rather than an unwarranted invasion of personal privacy.

Names and addresses of licensees have been found to be available in Kwitny v. McGuire [53 NY 2d 968 (1981)] involving pistol licenses, American Broadcasting Companies v. Siebert [442

NYS 2d 855 (1981)] involving licensed check cashing businesses, Herald Company v. NYS Division of the Lottery [Supreme Court, Albany County, November 16, 1987] involving licensed lottery agents and New York State Association of Realtors, Inc. v. Paterson [Supreme Court, Albany County, July 15, 1981] involving licensed real estate brokers and salespeople. In short, I believe that records identifiable to licensees are generally accessible to the public.

Lastly, the statement from the Department of Agriculture and Markets referred to §96(1)(c), which is a provision within the Personal Privacy Protection Law. That statute, however, pertains only to records maintained by state agencies [see definition of "agency", §92(1)]. Therefore, it does not apply to records in possession of the Town and would not prohibit the Town from disclosing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9376

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

March 22, 1996

Mr. Dorian Cabrera
94-A-8669
Clinton Correctional Facility Annex
Box 2002
Dannemora, NY 12929

Dear Mr. Cabrera:

I have received your letter of March 18 in which you appealed a denial of access to records by the New York City Police Department.

In this regard, 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, §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."

For your information, the person designated to determine appeals by the New York City Police Department is Karen Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9377

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

March 22, 1996

Mr. David W. Groeneveld
[redacted]

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. Groeneveld:

I have received your note of February 28 and the correspondence attached to it. Having been informed by the Town of Babylon that a variety of information that you requested does not exist, you wrote that you "can not believe" that to be so.

By way of background, citing the Freedom of Information Law, you requested that the Town essentially fill in a series of blanks indicating, for example, the "total number" of full time and part time employees, miles maintained by the Town Highway Department, the "10 top" full time and part time wages paid in that Department, and the like.

In this regard, 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 provide information by responding to questions or filling in the blanks, 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 instance, the Town does not possess a record indicating the number of miles maintained by its Highway Department, I do not believe that staff would be required by the Freedom of Information Law to prepare a new record containing that information on your behalf.

Based upon the foregoing, in a technical sense, the Town in my view is not obliged to provide the information sought by answering questions raised or filling in the blanks. Nevertheless, in conjunction with the general thrust, intent and spirit of the

Freedom of Information Law, it is likely that the Town maintains records reflective of some of the information sought, and that it can readily disclose "information" derived from existing records.

Further, while the Freedom of Information Law generally does not require that agencies maintain or prepare records, 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..."

Although §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].

It is clear in my view that records reflective of salaries of public employees must be prepared and made available. Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. It is also noted that those portions of W-2 forms indicating public employees' names and gross wages have been found to be available to the public (Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In sum, the Town's response may be technically accurate, for, again, the Freedom of Information Law pertains to existing records

and does not require that an agency prepare new records in response to a request. In order to acquire the information in which you are interested, rather than seeking "totals" or asking that the Town provide information by filling in the blank spaces, it is suggested that you renew your request by seeking existing records. There may be no record that contains a figure representing a total number of full time employees; there may, however, be a record or records identifying employees as full time or part time. Insofar as records of that nature exist, I believe that they would be accessible under the Law and that you could prepare your own totals.

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:jm

cc: Janice A. Stamm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2586
FOIL-AO-9378

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

March 25, 1996

Mr. William S. Hecht
[redacted]

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. Hecht:

I have received your letter of March 4 in which you raised questions relating to both the Freedom of Information and Open Meetings Laws.

First, you asked whether you have the right to gain access to a "draft document", such as a proposed town plan. You compared the situation to that of minutes of meetings, which although unapproved and prepared in draft, must nonetheless be disclosed within two weeks of a meeting. In this regard, I do not believe that the situations are comparable. It was advised that unapproved draft minutes must be disclosed because §106 of the Open Meetings Law requires that minutes of meetings of public bodies be prepared and made available within two weeks of the meetings to which they pertain. There is no analogous requirement that relates generally to drafts. Nevertheless, whether a document is characterized as a draft or internal, for example, I believe that it would fall within the coverage of the Freedom of Information Law. That statute pertains to all agency records, and §86(4) 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, when information exists in some physical form, irrespective of its status or characterization as draft or

final, I believe that it constitutes a "record" 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 §87(2)(a) through (i) of the Law.

Relevant with respect to drafts 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. A draft would usually consist of intra-agency material that could be withheld except to the extent that it contains any of the four categories of available information delineated in subparagraphs (i) through (iv) of §87(2)(g). Therefore, insofar as a draft consists of statistical or factual information, for example, it would be available.

Notwithstanding the preceding remarks, insofar as a draft has been distributed to the public or perhaps disclosed at meetings open to the public, I do not believe that there would be a basis for a denial of access. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], if disclosure is intentional rather than inadvertent, I believe that the public would enjoy rights of access.

Second, you asked whether "meetings [can] be held without any notice in the paper." Here I direct your attention to §104 of the Open Meetings Law, which states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Based upon the foregoing, it is clear that notice must be posted and given to the news media prior to every meeting. However, §104 does not specify which news media organizations must be given notice. In many instances, there are may be several news media organizations, i.e., newspapers, radio and television stations, that operate in the vicinity of a public body. So long as notice of a meeting is given to at least one news media organization prior to a meeting, I believe that a public body would be acting in compliance with the requirement that notice be given to the news media. I point out that although a public body must give notice to the news media prior to every meeting, there is no requirement that the news media publish or publicize the notice. Therefore, there may be situations in which a public body provides notice to a newspaper, for example, but the newspaper, for whatever the reason, does not publish it.

Third, you asked whether the Town may require you to abide by certain conditions prior to disclosure of records, such as a requirement that you "add a disclaimer at the top of each page" that you receive indicating that the record is "draft or unapproved." In this regard, 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, 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)].

Therefore, once it is determined that a record is accessible under the law, I believe that it must be made available unconditionally, irrespective of its intended use. Records are disclosed on an ongoing basis to the public and the news media, despite the possibility of misunderstanding, misinterpretation, misquotation or use out of context. In short, I do not believe that you can be required to add a disclaimer, for example, to a record that you receive in response to request made under the Freedom of Information Law.

Lastly, you referred to the possibility of delays in disclosure and expressed the opinion that "digital data should be released on day one of the day environmental review process." While it does not require immediate disclosure, 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 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 9379

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

March 25, 1996

Mr. Steven Marshall
95-A-8248
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Marshall:

I have received your letter of March 5 and the materials attached to it. You have complained that your request for records directed to the Mid-Hudson Psychiatric Center on January 31 has not yet been answered.

In this regard, having reviewed your request, I note that you cited 5 USC §§552 and 552a. Those statutes are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies; they would not be applicable in this instance. Other statutes would govern rights of access.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If the Mid-Hudson Psychiatric Center maintains the records, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. Alternatively, it is possible that the records in question were transferred when you were placed in a state correctional facility. If that is so, the records may be

maintained by a different agency. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Erdogan Tekben, M.D., Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9380

Committee Members

William Bookman, Chairman
Peter Delaney
Walter W. Grunfeld
Elizabeth McCaughey
Warren Mitofsky
Wade S. Norwood
David A. Schulz
Gilbert P. Smith
Alexander F. Treadwell
Patricia Woodworth
Robert Zimmerman

Executive Director

Robert J. Freeman

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

March 25, 1996

Mr. Joseph Fero
90-T-2401
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 information presented in your correspondence.

Dear Mr. Fero:

I have received your letter of March 4 in which you alleged that the Office of the Medical Examiner in Suffolk County has "refused" to respond to your requests made under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time 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 in Suffolk County is the County Attorney.

Second, while you did not indicate the nature of the records you have 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 section 87(2)(a) through (i) of the Law. Of possible relevance is the initial ground for denial, §87(2)(a), which 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 example, for the ability to obtain such a report is based solely on §677(3)(b) of the County Law.

While you may 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Medical Examiner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-195
FOIL-AO-9381

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

March 25, 1996

Mr. David Silvestri
92-A_6856
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 information presented in your correspondence.

Dear Mr. Silvestri:

I have received your letter of March 4 in which you complained that your requests directed to a senior parole officer have not been answered. The requests relate to drug use and rejections of your application to participate in a work release program.

In this regard, I offer the following comments.

First, since your requests cited 5 U.S.C. §§552 and 552a, I note that those citations pertain to the federal Freedom of Information and Privacy Acts, both of which apply only to records maintained by federal agencies; they are inapplicable in the context of your requests. The New York counterparts are the Freedom of Information Law, which is applicable to all agency records, and the Personal Privacy Protection Law.

Although §95(1) of the Personal Privacy Protection Law generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or

> supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, while the Personal Privacy Protection Law applies to records maintained by state agencies, rights of access conferred by that law do not include records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

Second, as indicated earlier, the Freedom of Information Law applies to all agency records. 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.

While I am not familiar with the contents of the records sought, it appears that §87(2)(g) may be relevant to the matter. 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 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)].

For your information, I believe that the person designated to determine appeals at the Division of Parole is Counsel to the Division, Ann Horowitz.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Horowitz
Senior Parole Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9382

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

March 26, 1996

Mr. Leslie C. Smith 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 information presented in your correspondence.

Dear Mr. Smith:

I have received your letter of March 4, as well as the correspondence attached to it, which you forwarded in view of the Committee's oversight authority concerning the Freedom of Information Law.

The first item of correspondence pertains to a request directed to the Town of Hempstead for records reflective of "FOIL cases...litigated through" the Office of the Town Attorney. In this regard, I believe that records indicating litigation under the Freedom of Information in which the Town has been a party would, in general, be accessible. However, 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, if the Town maintains its litigation files in a manner that enables staff to locate and identify those records concerning litigation brought under the Freedom of Information Law, the request would likely meet the standard of reasonably describing the records. On the other hand, if, due to the nature of its filing systems, there is no way of locating the records in question (if they exist) other than by searching all of the Town's litigation files maintained since 1974, the year in which the Freedom of Information Law went into effect, the request would not likely meet that standard.

In the second item of correspondence, you asked the County Executive to intervene with respect to an allegedly unanswered request for records. If that request is analogous to that involving the Town of Hempstead, the same commentary concerning the requirement that a request reasonably the records would be applicable. Whether the request involves similar records or otherwise, I note 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Susan P. Jacobs
Gerard Giuliano

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9383

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

March 26, 1996

Ms. Betsy Sullivan
[redacted]

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

Dear Ms. Sullivan:

I have received your letter of March 7, as well as a variety of related correspondence.

In brief, you and others have alleged that an employee of the New York State Department of Transportation has engaged in misconduct, and you wrote that Department officials provided "assurances...that appropriate action would be taken." Although you were apparently informed that the subject of your allegations was issued a "counseling memo", you indicated that you have attempted since January, without success, to obtain the results of the Department's investigation and answers to your inquiries. You have asked for assistance in obtaining the information sought.

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 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 agency officials may in many circumstances 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. In short, Department officials in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

Second, as I understand the matter, the "result" of the Department's investigation was the issuance of a counseling memo. As that phrase is commonly used, a counseling memo does not represent a determination to the effect that an employee has been found to have engaged in misconduct; rather, a counseling memo is essentially a warning, an admonition, or advice offered to an employee. If my interpretation of the matter is accurate, based on the ensuing analysis, the counseling memo and much of the documentation leading to its preparation could justifiably be withheld.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

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.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions 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 they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, in general, 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]. One of the decisions cited above, Capital Newspapers, involved an element of your request that was granted. That case dealt with a request for records indicating the days and dates of sick leave claimed by a particular employee, and it was held that those records were relevant to the performance of the employee's duties and, therefore, were accessible. On the basis of that decision, it is clear that time and attendance records must be disclosed.

The other 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.

Records prepared in conjunction with an investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. For instance, recommendations concerning the course of an investigation or opinions offered by witnesses or employees interviewed could be in my opinion 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.

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 or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Further, if indeed a counseling memo is essentially a warning rather than a conclusion reflective of a finding of misconduct, it would not constitute a final agency determination, and I believe that it could be withheld under §87(2)(g).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: William T. Bonacum
John B. Dearstyne
Peter Shawhan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9384

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

March 26, 1996

Mr. Gary D. Walker
96-C-0895
Groveland Corr. Facility
PO Box 104, Sonyea Road
Sonyea, NY 14556

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

Dear Mr. Walker:

I have received your letter of March 5 in which you sought assistance in obtaining records from the Division of Parole.

You wrote that you are attempting to obtain copies of the conditional release papers that you signed in order to try to comply with the special conditions imposed concerning an approved residence. In addition, you expressed interest in obtaining documents that describe an approved residence, the "methods or procedures used by the Division of Parole to approve a residence for an inmate seeking conditional release", and "any other documents which describe what is required of [you] to obtain an approved residence."

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 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 §87(2)(a) through (i) of the Law. From my perspective, the documents that you signed or that had previously been disclosed to you must be made available. In short, none of the grounds for denial could be asserted to withhold those records. With respect to the remaining materials, I believe that three of the grounds for denial are relevant to an analysis of rights of access.

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. It would appear that the records in question would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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 records in question, it would appear that those portions which, if disclosed, would permit potential lawbreakers to engage in activities designed to enable them to commit illegal acts or 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.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

I hope 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 9385

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

March 26, 1996

Mr. David Zaire
83-A-2242
Great Meadow Corr. Facility
Box 51
Comstock, NY 12821

Dear Mr. Zaire:

As you are aware, your letter addressed to the Attorney General has been forwarded to the Committee on Open Government. As you also know from our previous correspondence, the Committee is authorized to provide advice concerning the Freedom of Information Law.

According to your letter, your request for certain records maintained by the 42nd precinct of the New York City Police Department made sometime in 1994 was approved. Although you mailed a check to pay for copies and the check was subsequently cancelled, you have not yet received copies of the records.

In this regard, it is suggested that you contact the person who responded to your request in an effort to remind him of the matter and to obtain copies of the records. Alternatively, you might consider the failure to have provided copies of the records as a constructive denial of access. In that event, you might appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. If you choose to appeal on that basis, it is recommended that you describe the circumstances and indicate that the request was approved and that you have paid for copies of the records. It would likely be beneficial to include documentation proving that the request was approved and that payment was made.

For your information, the person designated to determine appeals by the Department is Karen A. Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Lt. McKenna
Karen Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 9386

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

March 27, 1996

Mr. Benett Pearlman
#07355-055 SHU
P.O. Box 420
Fairton, NJ 08320

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. Pearlman:

I have received your letter of March 5. As in the case of previous correspondence, the issue involves your unsuccessful efforts in obtaining records from the City of Buffalo.

In this regard, rather than attempting to use legal language, it is suggested that you resubmit your request and describe the records sought as clearly as you did in the letter to me. In that letter, you asked rhetorically "how the vehicle could have been transferred from a state agency to a federal agency "without any paperwork" (emphasis yours). You might, therefore, request records reflective of the transfer of the vehicle in question between the City of Buffalo and United States government.

Since you have been informed in the past that the records that you requested do not exist, it is also suggested that if the City of Buffalo again claims that it does not maintain the records of your interest, you request the certification described in the opinion addressed to your father. Again, §89(3) of the Freedom of Information Law provides in part that, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

Lastly, if indeed paperwork was prepared, it is likely that a federal agency would maintain it. Based on that assumption, it might be worthwhile to request the records in question from the federal agency that you believe would maintain them pursuant to the federal Freedom of Information Act.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Mark Makowski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9387

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 27, 1996

Mr. Denis E. Wilson
Executive Director
Fulmont Development Facility, Inc.
Montgomery County Annex Building
P.O. Box 308
Fonda, NY 12068

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, unless otherwise indicated.

Dear Mr. Wilson:

I have received your letter of March 11 and the materials attached to it. In your capacity as executive director of Fulmont Development Facility ("Fulmont"), you have asked whether, in my view, Fulmont is required to honor a request for records sought under the Freedom of Information Law by the Amsterdam Recorder.

At the time of our telephone conversation on the matter, it was preliminarily suggested that Fulmont is likely not required to comply with the Freedom of Information Law. However, having reviewed the materials that you forwarded, I learned that it is a community action agency that functions in accordance with the Federal Economic Opportunity Act of 1964. For that reason, I believe that Fulmont is required to disclose its records, with exceptions.

By way of background, the New York Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute "governmental entities" or, therefore, are agencies subject to the Freedom of Information Law.

It is also my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to §201 of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [§201(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [§201(b)].

When community action agencies are designated, §211 indicates that they perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations

> involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency."

Whether the Freedom of Information Law applies or otherwise, I believe that it offers guidance concerning the disclosure of the information sought.

That statute, 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 the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that a single record might be accessible or deniable in whole or in part.

Of likely relevance under the circumstances in terms of the authority to withhold is §87(2)(b) of the Freedom of Information Law. That provision enables an agency to withhold records or portions of records the disclosure of which would result in an "unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal details of individuals' lives.

From my perspective, a disclosure that permits the public determine the general income level of a participant in a program based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Therefore, insofar as the records sought include the names, addresses or other identifying details pertaining to those receiving assistance based on an income eligibility requirement, I believe that those items may be withheld or deleted, as the case may be, from Fulmont's records (see e.g., Tri-State Publishing Co.

v. City of Port Jervis, Community Development Agency, Supreme Court, Orange County, March 4, 1992).

In sum, although the application of the Freedom of Information Law may be questionable, due to the direction provided by the federal law quoted earlier, it is my view that records regarding the functions and operation of community action agencies must be disclosed. Concurrently, however, in a manner consistent with provisions of both the state Freedom of Information Law and the federal Freedom of Information Act, it would appear that Fulmont would have the ability to withhold records insofar as disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Teresa Cuda

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 9388

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

March 27, 1996

Mr. Philip Cotterell
95-A-2044
P.O. Box 2000
Pine City, NY 14871

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

Dear Mr. Cotterell:

I have received your letter of March 7 in which you sought assistance concerning delays in responses to requests for records that you directed to the office of a 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 note that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 9389

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

March 27, 1996

Mr. Duamutef
84-A_1026
P.O. Box 2500
Marcy, NY 13403-2500

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

Dear Mr. Duamutef:

I have received your letter of March 11 in which you sought guidance concerning the Freedom of Information Law. You complained that your appeals directed to the Department of Correctional Services have not been determined in a timely manner.

In this regard, §89(4)(a) of the Freedom of Information Law requires that agencies respond to appeals within ten business days of their receipt. Specifically, that provision states in relevant part that:

> "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 note that it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9390

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

March 27, 1996

Hon. Larry G. Mack
Cattaraugus County Legislature
3911 Humphrey Road
Great Valley, NY 14741

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. Mack:

I have received your letter of March 6 in which you sought assistance concerning a request made under the Freedom of Information Law that you directed to Cattaraugus County.

By way of background, according to your letter, the County has determined to pay employees a $1,000 a year for opting out of the County's health insurance coverage. You requested a list of the names and addresses of the employees who have opted for the "buy out."

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no list exists, the County would not be obliged to prepare a list on your behalf. In the future, unless it is certain that a list exists, it is suggested that you request records containing the information of your interest rather than a list.

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.

Relevant to the matter is §87(2)(b), which enables agencies to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy. Although tangential to the issue, I point out that records indicating the salaries of

public employees must be disclosed. Specifically, §87(3)(b) of the Freedom of Information Law states that: "Each agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency..." Similarly, records reflective of other payments, whether they pertain to overtime, or participation in work-related activities, for example, would be available, for those records in my view would be relevant to the performance of one's official duties. It is also noted that those portions of W-2 forms indicating public employees' names and gross wages have been found to be available to the public (Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In my opinion, a record of payment to a public employee would generally be accessible to the public. In this instance, it is my view that the names of those who have received payments in conjunction with the "buy out" should be made available.

Lastly, §89(7) of the Freedom of Information Law states in relevant part that the home addresses of public employees need not be disclosed. Therefore, while I believe that the names of the employees in question should be made available, the County is not required to disclose their home addresses.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County Clerk
County Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9391

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

March 27, 1996

Mr. Brison Hamilton, AKA
Butch Miller
80-A-0966
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733-0116

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

Dear Mr. Hamilton:

I have received your letter of March 11, as well as the materials attached to it. You have complained that the New York City Police Department has failed to respond to your request in a timely manner.

According to the materials, having made a request on June 1, the receipt of your request was acknowledged on June 14, at which time you were informed that it could be anticipated that a determination would be made on or about July 23. Because you received no further response, you transmitted a letter reminding the Department of your request on November 15. It does not appear that you have received any additional 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 by the New York City Police Department is Karen A. Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9392

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

March 27, 1996

Mr. Rodney D. James
93-B-3105 (H3-36)
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 information presented in your correspondence.

Dear Mr. James:

I have received your letter of March 11 in which sought opinions concerning access to a variety of "materials/information by employing the Freedom of Information Law."

One of the requests involves access to records maintained by the office of a district attorney, including court transcripts of grand jury proceedings, witness testimony, and "all forensic investigative reports filed/evidence records."

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

You referred to a request to a municipal police department involving "personal property, forensic reports in the forms of ballistics, fingerprints and photographs", as well as other records maintained by that agency. I point out that the Freedom of Information Law pertains to records; it does not apply to requests for property [see Allen v. Strojnowski, 129 Ad 2d 700; motion for leave to appeal denied, 70 NY 2d 871 (1989)].

With respect to the records to which you referred, the same considerations as those described earlier concerning records maintained by the office of a district attorney would be pertinent. However, with regard to ballistic tests, fingerprints and other investigative techniques and procedures, of particular relevance 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.

Next, you referred to records maintained by a county clerk. Here I point out that the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is

not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

County clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. In this instance, it appears that the records would involve those of the county clerk in his or her capacity as clerks of a court. Consequently, provisions other than the Freedom of Information Law would govern rights of access.

Lastly, you sought an opinion concerning the right to obtain a coroner's inquest report and similar records maintained by a county medical examiner. Pertinent to the matter is §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 §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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2588
FOIL-AO- 9393

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

March 28, 1996

Mr. James P. McCarthy
Superintendent of Schools
South Glens Falls Central School
6 Bluebird Road
South Glens Falls, NY 12803

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. McCarthy:

I have received your letters of March 15 and March 21, which deal, respectively, with issues arising under the Open Meetings Law and the Freedom of Information Law.

In the former, you asked whether subcommittees appointed by the Board of Education are subject to the Open Meetings Law.

First, judicial 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, even if a member of the Board of Education or the administration participates.

Second, however, when a committee consists solely of members of a public body, such as a board of education, I believe that the Open Meetings Law is applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the

status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for 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."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of a board of education, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of

Education consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

The second letter involves whether an improper practice charge filed by the local teachers' association, as well as the answer to the charge, are available under the Freedom of Information Law. You indicated that the charge and answer have been filed with PERB.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 ground for denial of possible significance would be §87(2)(b). That provision enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

If, for example, a grievance relates to an issue involving a public employee in the nature of a health or medical problem, I believe that identifying details pertaining to the employees could justifiably be withheld. On the other hand, if the charge does not focus on a particular employee but rather deals with a practice or policy of the District, for example, privacy would not be an issue, and the records in question would likely in my view be available in their entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9394

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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March 28, 1996

Mr. Ronald L. Morris
95-R-3848
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642

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

Dear Mr. Morris:

I have received your letter of March 12 in which you sought assistance concerning a request directed to the Town of Tonawanda Police Department for medical records pertaining to the complainant who initiated police contact that resulted in your arrest.

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 under the circumstances 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, records of medical emergency calls or treatment rendered by a paramedic unit would consist in great measure of what might be characterized as medical records or histories relating to the persons needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

In my opinion, portions of records pertaining to 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 those details represents a personal and somewhat intimate event in the individual's life.

Lastly, your rights under the Freedom of Information Law may differ from those accorded to you as a defendant. For the reasons described above, I believe that the records in question may properly be withheld under the terms of the Freedom of Information Law. Nevertheless, it is suggested that you discuss the matter with your attorney in the event that an alternative disclosure mechanism may be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief, Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9395

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

March 28, 1996

Mr. Jerry Connor
91-A-3235
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411

<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 information presented in your correspondence.</u>

Dear Mr. Conner:

I have received your letter of March 12 in which you asked that the Committee on Open Government "direct the New York City Department of Corrections to respond to your F.O.I.L. request" sent to the Department on January 14. The request, which was directed to the Inspector General, involved the Department's subject matter list required to be maintained pursuant to §87(3)(c) of the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to "direct" or compel an agency to grant or deny access to records. Nevertheless, I offer the following comments in an effort to assist you.

First, I note that 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, and requests should ordinarily be made to that person. In this instance, although the request was not made to the records access officer, from my perspective, the person in receipt of your request should have either responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

Second, the Freedom of Information 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, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to the list that you requested. Specifically, §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)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Inspector General, the Records Access Officer, and the Freedom of Information Appeals Officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Inspector General
Thomas Antenen, Records Access Officer
Ernesto Marrero, General Counsel and Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9396

182 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 28, 1996

Mr. Michael S. Pascazi
President
Fiber Optek
232-236 New Hackensack Road
Wappingers Falls, NY 12590

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. Pascazi:

I have received your letter of March 6, as well as the correspondence attached to it. In brief, you have sought assistance regarding unanswered requests for records made under the Freedom of Information Law directed to the State University of New York at Albany Purchasing Department.

In this regard, I note that 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, and requests should ordinarily be made to that person. In this instance, the request was not made to the records access officer, and I would conjecture that the person in receipt of your request may be unaware of his or her responsibilities imposed by the Freedom of Information Law. From my perspective, the person in receipt of your request should have either responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

In order to ensure that your request is answered expeditiously, I have forwarded copies of your correspondence to the office of the records access officer, Joel Blumenthal. I believe that he will guarantee that your request is answered promptly.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joel Blumenthal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9397

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

March 28, 1996

Mr. Carlos Davila
241-95-04048
C-74 MOD-10 Upper
11-11 Hazen Street
E. Elmhurst, NY 11370

Dear Mr. Davila:

I have received your letter of March 11 in which you complained that the New York State Department of Social Services has failed to respond to your requests for records maintained in the Child Abuse and Maltreatment Register. You also indicated that you have initiated an Article 78 proceeding in the matter.

In this regard, I note that §87(2)(a) of the Freedom of Information Law provides that an agency may deny access to records or portions thereof that: "are specifically exempted from disclosure by state or federal statute..." Section 422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included in the register. Subdivision (4)(A) of §422 states that reports of child abuse as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute.

Whether your request involves a matter under which disclosure may be authorized is unknown to me. Nevertheless, I believe that any rights that you might have concerning access to records would be conferred by the Social Services Law, not the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9398

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

March 29, 1996

Ms. Jean A. Black
[redacted]

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 Ms. Black:

I have received your letter of March 15 in which you sought assistance relating to an unanswered request made under the Freedom of Information Law to the Rochester City School District.

In this regard, I offer the following comments.

First, I note that 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, and requests should ordinarily be made to that person. In this instance, although the request was not made to the records access officer, from my perspective, the person in receipt of your request should have either responded in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer.

Second, the Freedom of Information 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, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a payroll list of an agency's employees. Specifically, §87(3)(b) of the Freedom of Information Law requires that "Each agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." If the District does not maintain a list identifying only administrators and their salaries, I do not believe that it would be required to prepare a new record on your behalf. However, you could review or obtain a copy of the list required to be maintained, which would contain the information sought.

In an effort to enhance compliance with the Freedom of Information Law, copies of this response will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Dr. Clifford Janey
Barbara Jarzyniecki

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9399

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

April 2, 1996

Ms. Eve B. Burton
Vice President/Assistant General Counsel
Daily News
450 West Thirty-Third Street
New York, NY 10001-2681

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, unless otherwise indicated.

Dear Ms. Burton:

As you are aware, I have received your letter of January 31 in which you requested an advisory opinion concerning a response to a request by the Daily News for closing memoranda prepared by the New York City Department of Investigation (DOI). In addition, I have received a variety of related materials, including a lengthy and thoughtful letter prepared by Richard W. Mark, First Deputy Commissioner of DOI.

Although some areas of accord have been reached between yourself and DOI, you have questioned the propriety of the extent to which DOI has withheld various aspects of the memoranda.

By way of background, DOI initially denied the request in its entirety, even though you indicated that the Daily News "routinely obtained the identical information prior to the current mayoral administration." Upon reconsideration, DOI provided access to some memoranda, which in your words were in each instance, in a "highly redacted and unusable form."

Having met with officials of DOI, you agreed not to challenge its "redaction of the names and identifying details in memoranda relating to cases in which the DOI found there was no wrong-doing." Similarly, you did not challenge the deletion of names and identifying details pertaining to third party witnesses, including those who provided testimony during investigations. Nevertheless, you questioned all other redactions based upon your contention that the memoranda are final determinations of a government agency to which you are generally entitled. Additionally, you "challenged DOI's wholesale deletion of the names, title and employment

addresses of those DOI officials who took part in the investigation."

For purposes of clarification, I note that Mr. Mark in his letter to me wrote that "[W]hile DOI does conduct some studies and issues some reports that, at the conclusion, turn out not to involve criminal misconduct, those otherwise public reports are not the object of the Daily News' request." He added that in his view, you sought memoranda pertaining only to "criminal investigations." You informed me, however, that your request involved closing memoranda prepared with respect to all cases, whether they were prepared in relation to criminal investigations or others. Mr. Mark referred to DOI's mission as reflected in the New York City Charter, §803(b), as well as a mayoral executive order, and in a telephone conversation with him, he characterized the DOI as "New York City's FBI." While it may be true that DOI conducts a variety of criminal investigative functions, it is my understanding that it also deals with issues concerning the practices and activities of City employees that may not rise to the level of criminal wrongdoing. Mr. Mark in fact referred to a portion of the executive order that relates in part to the elimination of corrupt activities and conflicts of interest within agencies. As stated in §803(b) of the Charter, the Commissioner [of DOI] "is authorized and empowered to make any study or investigation which in his opinion may be in the best interest of the City, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency." It is my understanding that your request encompasses not only those closing memoranda dealing with criminal activities, but also those dealing with other activities that might be the focus of certain DOI investigations.

For reasons to be discussed later in detail, I believe that the statements offered by DOI reflecting the rationale for redactions are in some instances categorically too broad or inaccurate. However, I also disagree with your statement that "all the investigations" to which the memoranda pertains "have ended." While DOI's role in the investigations might have ended, some investigations might nonetheless continue after information has been forwarded to other agencies, such as the New York City Police Department, the FBI or perhaps the office of a district attorney. This is not to suggest that DOI's closing memoranda do not represent its final determinations, but rather merely that they may relate to matters that have ended in terms of the functions of DOI, but which have not ended in terms of their final action.

Mr. Mark also described the contents of closing memoranda somewhat more expansively than you did in your letter. In brief, you wrote that they include the name of the agency investigated, the charges against the agency or its employee, the scope of the investigation, the names of witnesses, and the name of the DOI employee who conducted the investigation. Mr. Mark wrote that:

> "Closing memoranda contain more than DOI's final determination in a case. The document summarizes the allegation, steps taken to

> investigate the allegation (including witness identities and confidential operations), the agency's analysis of the facts, recommendations that grow out of the factual predicate, and the result of DOI's work. As the produced documents show, DOI reviewed each memorandum individually and applied FOIL exemptions. The material released provided the requestor with documents that, in general, disclosed the nature of the allegation, investigative steps taken (excepting methods held confidential), and the result of the investigation (e.g., unsubstantiated, substantiated and referred to another agency). Other, protected material was redacted."

With respect to the substance of the memoranda, DOI officials have referred to the "official information privilege" as a means of bolstering its contentions regarding the ability to withhold records or portions of records. Mr. Mark wrote that "DOI's position is not that the privilege stands alone as a justification for the redactions. Instead, while we rely on specific FOIL exemptions [to] cover the redacted materials, we point to this judicially-described privilege as an additional rationale for invoking these exemptions." From my perspective, although the official information privilege or its equivalent might be properly asserted in other contexts, it does not exist with respect to the ability to withhold records under the Freedom of Information Law. As stated by the Court of Appeals in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [see Doolan v. BOCES, 48 NY 2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; and if they do not, there would be no basis for denial, notwithstanding a claim of privilege.

Similarly, there is some reliance placed upon a decision rendered by the U.S. Supreme Court concerning the federal Freedom of Information Act, specifically, Reporters Committee for Freedom of the Press v. U.S. Department of Justice [489 US 749 (1989)]. While the Court of Appeals has stated that New York State's Freedom of Information Law is "patterned" on its federal counterpart, the Court has declined to follow either the federal Act or its judicial interpretation when the language of the state statute or its legislative history indicates that following the lead of the federal government may be inappropriate [see Encore College Bookstore, Inc. v. Auxiliary Service Corporation, __ NY 2d __, December 27, 1995]. In this instance, I do not believe that the holding by the U.S. Supreme Court in Reporters Committee, supra, could be characterized as precedential or controlling. The Court in that decision held that "rap sheets", criminal history records, maintained by the Federal Bureau of Investigation were not subject to disclosure under the federal Freedom of Information Act. Its rationale was based on the conclusion that the purpose of the federal Act is to give the public the right to know of government's

actions, and that since the disclosure of the personal information contained in a rap sheet revealed nothing about an agency's actions, an agency could withhold the information based on considerations of privacy. Under Reporters Committee, it would appear that records may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy, unless the record sheds light on some governmental activity.

Nevertheless, the Court of Appeals has construed New York's Freedom of Information Law more expansively. In Capital Newspapers v. Whalen [69 NY 2d 246 (1987)], the Court of Appeals noted that: "The Appellate Division held that the Legislature intended to subject to disclosure only those records which revealed the workings of government..." (id., 250). In rejecting and reversing the decision of the Appellate Division, the Court of Appeals relied heavily on the specific language of the Freedom of Information Law, particularly the definition of the term "record". In short, I believe that reliance upon Reporters Committee would be misplaced, for I know of no judicial decision rendered under the state's Freedom of Information Law that has cited or relied upon that decision as a basis for determining issues involving the protection of privacy or otherwise.

The Daily News and DOI have focused essentially on several points of disagreement regarding the response to the denial.

The first involves the application of subparagraphs (i) and (iii) of §87(2)(e). Those provisions enable 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...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

DOI has contended that the provision cited above can be applied to "both information relating to ongoing cases and investigations, and to information where there is no pending proceeding because of the "chilling effect" that disclosure of confidential information would have on future investigations. The Daily News, on the other hand, has suggested that the capacity to withhold as stated by DOI is too broad and that the ability to cite §87(2)(e) diminishes when an investigation has ended.

In this regard, for reasons described earlier, I do not believe that the preparation of a closing memorandum necessarily signifies the end of an investigation, for DOI might refer the matter to a different agency for further investigation and/or prosecution. Consequently, although closing memoranda are presumptively accessible to the public, I believe that DOI may in

appropriate circumstances withhold the memoranda or portions thereof on the ground that disclosure would interfere with an investigation that is continuing and is being carried out by another agency or in the rare circumstance in which disclosure would interfere with a judicial proceeding. I agree with your view that some of DOI's statement is overbroad, particularly its reference to the chilling effect of disclosure on future investigations regarding confidential law enforcement information. However, as I understand the agreement reached between DOI and the Daily News, the News has agreed that names of witnesses, for example, need not be disclosed, and the News is not seeking that kind of information. Moreover, as a matter of law, I do not believe that an agency can, by means of practice or policy, generally withhold information based upon a contention that disclosure would adversely affect future investigations. In my opinion, the ability to withhold records under the Freedom of Information Law can only be based on the effects of disclosure in conjunction with attendant facts. Stated differently, I believe that there must be some identifiable harm to be demonstrated in accordance with one or more of the grounds for denial appearing in §87(2) in order to justify a denial. As stated by the Court of Appeals:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the 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 sum, while there may be a basis for withholding a closing memorandum or portions thereof under §87(2)(e) when DOI has referred the matter to another law enforcement agency, I do not believe that it could rely as a matter of policy or routine practice upon that provision in every instance, especially when cases and investigations are no longer ongoing. Rather, I believe that the propriety of asserting §87(2)(e) must be determined on a case by case basis.

The foregoing is intended to pertain to the substance of the closing memoranda, and not the identities of witnesses or other third parties, for those items do not appear to be at issue. In a related vein, 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 ensuing exceptions. Based upon the phrase quoted in the preceding sentence, it is clear that an agency must review records sought in their entirety to determine which portions, if any, may justifiably be withheld. In the context of the matter at hand, it would appear that identifying details, especially those pertaining to witnesses, "sources", or others might justifiably be deleted, while other related aspects of the records might be accessible under the Law. Those kinds of identifying details could in my view be withheld irrespective of whether an investigation has been completed or whether it relates to a criminal or non-criminal matter. Exceptions that would require disclosure would pertain to those situations where disclosures have been made in other contexts, i.e., those in which witnesses or others are identified during judicial proceedings.

I note, too, that a denial based on §87(2)(e) might be valid today but inappropriate in the future. If a matter is referred to another law enforcement agency for further investigation or prosecution now, disclosure might indeed interfere with the investigation. However, if in the future, the matter results in a public judicial proceeding, the harmful effects of disclosure described in §87(2)(e) might essentially have disappeared. In that event, DOI and perhaps other agencies may be required to disclose records that previously had been properly withheld.

With respect to the "privacy interests of an accused subject", DOI has contended that privacy must be protected in all cases, but especially where no wrongdoing is established. Further, DOI cited an advisory opinion rendered by this office on August 28, 1987 that, in its view, bolsters its position. In that opinion, it was advised that a complaint made against a public employee "and records related to it that identify the person against whom the complaint is made may generally be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy." I continue to have that opinion in a relation to cases where no determination has been reached or where the charges are found to be baseless. Nevertheless, if a final determination identifies a person who is the subject of a charge or allegation

and the determination is that the charge or allegation has no merit, I believe that an applicant would have the right to obtain the substance of the determination, following the deletion of personally identifiable details. The Daily News may be interested not only in those cases in which charges have been substantiated, but also those in which the charges are found to have been without merit, perhaps as a means of attempting to ascertain more fully how DOI operates and carries out its official duties.

Also with regard to accused subjects, for purposes of clarification regarding the stance of this office, I note that Mr. Mark in footnote 5 of his letter referred to guidance given by the Appellate Division concerning requests for records pertaining to city marshals. He wrote that the First and Second Departments have supervisory authority of the marshals "which they have delegated to DOI." Mr. Mark alluded specifically to disciplinary proceedings and wrote that "[w]hile the courts stated that findings and sanctions should be disclosed, they also stated that 'the release of information regarding disciplinary action taken against individual marshals should not include the identities of the individuals involved in cases were the sanction imposed was less than removal from office'." With all due respect to the First and Second Departments, numerous decisions indicate that final determinations reflective of disciplinary action taken or sanctions imposed are available, even though sanctions rarely involve removal from office.

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].

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, even though the sanction was far short of removal from office, it was recently held that a settlement agreement between an employee and an agency was available insofar as it included admissions of misconduct [Larocca v. Board of Education of Jericho Union Free School District, 632 NYS 2d 576, ___ AD 2d ___ (1995)].

You have contended that DOI cannot redact the names, titles and employment addresses of its employees involved in investigations. DOI, however, has expressed the belief that the Freedom of Information Law "allows DOI to withhold identification of a law enforcement agent assigned to a particular investigation because disclosure may impede that individual's effectiveness in future investigations, and would also amount to an invasion of privacy." In short, I disagree with DOI's contention. If a DOI employee is currently involved in an investigation and disclosure of identifying details pertaining to that employee in relation to that investigation would interfere with the investigation, I would agree that the records could be withheld under §87(2)(e)(i) of the Freedom of Information Law. Nevertheless, after a closing memo has been prepared and DOI's investigation has been completed, disclosure of the identity of its employees would no longer interfere with the investigation. Moreover, as suggested in the discussion concerning the privacy of public employees, as a general matter, disclosure of employees' names associated with their work product would be relevant to the performance of their official duties and disclosure would, therefore, constitute a permissible rather than an unwarranted invasion of their personal privacy. The foregoing is not intended to suggest that names of others (i.e., the subjects of unsubstantiated allegations or witnesses) could not be withheld, but rather that the names of DOI employees who have completed their duties relative to an investigation must, in my view, be disclosed. I note, too, that recent judicial decisions suggest that the exceptions to rights of access pertaining to the protection of privacy would not apply to an individual acting in his or her business capacity [see e.g., ASPCA v. NYS Dept. of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989, concerning a request for names and addresses of mink and fox farmers; Newsday v. NYS Dept. of Health, Supreme Court, Albany County, October 15, 1991, concerning names of cardiac surgeons coupled with empirical data regarding their surgical performance].

Mr. Mark also contended that certain aspects of the closing memoranda may be withheld under §87(2)(g), particularly with respect to "procedural recommendations...suggested to other agencies" and similar materials. The cited provision states that an agency may withhold records or portions thereof that:

> "are inter-agency or intra-agency materials which are not:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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, there is a distinction between those portions of the memoranda that indicate the result of an investigation (i.e., unsubstantiated or substantiated) that may be characterized as DOI's final determinations and others that might include recommendations to other agencies. The recommendations could in my view be withheld; the remainder, however, including factual information, would in my opinion be required to be disclosed, unless a different ground for denial could properly be asserted.

Lastly, the Freedom of Information Law is permissive. While an agency may withhold records or portions thereof 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 some aspects of the records at issue may be withheld in accordance with the preceding commentary, there is no requirement that they must be withheld. Frequently, for a variety of reasons, agencies choose to disclose, especially opinions and recommendations, even though they may have the authority to withhold those kinds of materials.

A copy of this opinion will be forwarded to Mr. Mark in an effort to enable the Daily News and DOI to reach an accord short of litigation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard W. Mark

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 9400

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

April 2, 1996

Mr. Christopher Freeze
[redacted]

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. Freeze:

I have received your letter of March 11, which reached this office on March 20. You have requested an interpretation of §87 of the Public Officers Law.

According to your letter, you have requested copies of traffic tickets issued by various members of the New York City Police Department. The request, however, was denied "on the basis that the records sought were court records and therefore excluded from the Freedom of Information Law." You have sought my views on the correctness of that response.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records. Section 86(3) defines the term "agency" to include:

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

In turn, §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, while the Police Department, for example, is clearly an agency required to comply with the Freedom of Information Law, a court would fall beyond the coverage of the statute.

Second, §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."

From my perspective, since traffic tickets are issued by members of the New York City Police Department, tickets or copies thereof maintained by the Department would clearly constitute agency records subject to rights of access conferred by the Freedom of Information Law. I am mindful of a situation in which it was held that certain documents maintained by an agency were found to be court records that fell beyond the coverage of the Freedom of Information Law. Nevertheless, that decision, Moore v. Santucci [151 AD 2d 677 (1989)] dealt with transcripts of judicial proceedings, copies of which were in possession of the office of a district attorney. A case involving court records transferred to the office of a district attorney is in my opinion clearly distinguishable from a situation in which traffic tickets issued by an agency are kept by the issuing agency. The possibility that those records may later be used in court in my view would not remove them from the coverage of the Freedom of Information Law.

Lastly, in a case involving a request by a newspaper for speeding tickets issued by the State Police, the Court of Appeals held that the records must be disclosed pursuant to the Freedom of Information Law, unless they have been sealed pursuant to §160.50 of the Criminal Procedure Law [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

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 Police Department's records access officer.

I hope that I have been of 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-9401

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

April 2, 1996

Ms. Ruth M. Queen
[redacted]

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. Queen:

I have received your correspondence involving a request made under the Freedom of Information Law directed to the Pine Plains Central School District. Having received a telephone call from Mr. David Queen on March 26, he indicated that you would like an advisory opinion concerning the matter.

By way of background, in September, you requested six items from the School District pertaining to your employment with the District during the 1972-73 school year. The assistant superintendent responded by indicating that he had made available "all payroll documents held in the District's files" that fell within the scope of your request. Since you only received one of the six items, you complained that the District did not specifically respond with respect to the other five that had been requested, and you construed the response as a denial. Consequently, you appealed on February 28.

In this regard, it does not appear that the response by the assistant superintendent represents a denial of access to records. Rather, it appears that any records maintained by the Department falling within the scope of your request were made available and that the District does not possess the remaining items sought. I point out that the Freedom of Information Law pertains to existing records. Further, §89(3) of the Law provides in part that an agency need not create a record not in its possession in response to a request. Specifically, that provision states that "[n]othing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity..." I would conjecture that the kinds of records that you requested that have not been made available were disposed of years ago and simply no longer exist.

When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, your request made in September identifies Richard Linden as the records access officer. You wrote in your letter of February 28 that Mr. Linden informed you that he is the person to whom an appeal may be made. I point out in this regard that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specify that the records access officer and the appeals officer cannot be the same person [see §1401.7(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Linden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9402

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

April 3, 1996

Mr. John Brooks
91-A-7623
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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. Brooks:

I have received your letter, which reached this office on March 20. In brief, you have sought assistance in obtaining certified copies of various records maintained by the court that sentenced you.

In this regard, I note that the statute within the Committee's advisory jurisdiction, 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though

other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you direct a request to the clerk of the appropriate court, citing an applicable provision of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9403

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

April 3, 1996

Mr. Alfred O'Connor
Staff Attorney
NYS Defenders Association, Inc.
11 North Pearl Street - 18th Floor
Albany, NY 12207-2709

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, unless otherwise indicated.

Dear Mr. O'Connor:

I have received your letter of March 21 in which you requested an advisory opinion concerning the Freedom of Information Law. Specifically, you asked whether in my view "an audiotape of a judicial seminar conducted by the Office of Court Administration (OCA) is subject to disclosure under New York's Freedom of Information Law."

In your letter, you described a three-day seminar for New York State judges concerning the death penalty law and the trial of a capital case. You indicated further that the seminar was led by a variety of speakers, including many from other jurisdictions, as well as other experts on the subject. In order to learn more of the matter, I contacted OCA. In brief, I was informed that the seminar was more akin to a series of roundtable discussions rather than lectures. In the same vein, I was told that the judges were active, candid participants and not merely listeners.

I agree with your contention that OCA is an "agency" required to comply with the Freedom of Information Law [see Quirk v. Evans, 455 NYS 2d 918, 97 AD 2d 992 (1983) and Babigian v. Roberts, 515 NYS 2d 944 (1986)]. Further, the audiotape in my view would constitute an agency record that falls within the coverage of the Freedom of Information Law. Section 86(4) of that statute defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to,

> reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, it is clear in my opinion that the audiotape in which you are interested constitutes an agency record 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 §87(2)(a) through (i) of the Law.

From my perspective, it is likely that the tape recording falls within the scope of one of the grounds for denial, §87(2)(g). As I understand the event, the speakers essentially served as consultants. If that is so, even though the audiotape differs in some respects from a memorandum or report, for example, I believe that, under the circumstances, the communications captured on the audiotape could be characterized as "intra-agency" in nature.

The provision pertaining to those kinds of communications permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 for agencies, 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, records prepared by a consultant for an agency may be withheld based upon the same standards as in situations in which records are prepared by the staff of an agency. Again, although the audiotape might not represent the more traditional kind of communication furnished by a consultant to an agency, it appears that the communications between the expert consultants and judges and employees were analogous to the kinds of exchanges that occur frequently in written form between consultants and agencies.

In short, insofar as the audiotape consists of recommendations, suggestions or expressions of opinion, for example, whether offered by expert consultants or by judges or employees, it appears that the audiotape could justifiably be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Barry Cozier, Deputy Chief Administrative Judge

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9404

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

April 3, 1996

Mr. Donald N. Hobel
[redacted]

Dear Mr. Hobel:

As you are aware, I have received your correspondence concerning a request made under the Freedom of Information Law for copies of bank statements or checks received by the Niagara County Industrial Development Agency for fees. The request was denied, apparently upon the advice of counsel.

From my perspective, there would be no basis for withholding the records in question. In this regard, I offer the following comments.

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

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

Section 856 of the General Municipal Law deals generally with industrial development agencies, and subdivision (2) states in part that "[a]n agency shall be a corporate governmental agency, constituting a public benefit corporation". Section 66(1) of the General Construction Law states that a "public benefit corporation" is a "public corporation". Further, §916-a of the General Municipal Law specifically established the "Niagara County Industrial Development Agency" as "a body corporate and politic" subject to the requirements of Article 18-A of the General Municipal Law. Based on the foregoing, I believe that the Niagara County Industrial Development Agency is an "agency" required to comply with the Freedom of Information Law.

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

In my opinion, none of the grounds for denial could justifiably be asserted to withhold the records in question. Moreover, even prior to the enactment of the Freedom of Information Law, records analogous those that you requested were available to the public pursuant to §51 of the General Municipal Law. That provision has for decades stated in relevant part that:

> "All books of minutes, entry or account, and the books, bills, vouchers, checks, contracts or other papers connected with or used or filed in the office of, or with any officer, board or commission acting for or on behalf of any county, town, village or municipal corporation in this state...are hereby declared to be public records, and shall be open during all regular business hours..."

In an effort to enhance compliance with and understanding of the matter, a copy of this opinion will be forwarded to the Executive Director of the Agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leo J. Nowak, Jr., Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2590
FOIL-AO-9405

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

April 3, 1996

Ms. Donna K. Hintz
Assistant Corporation Counsel
City of Kingston
City Hall
One Garraghan Drive
Kingston, NY 12401

<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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Ms. Hintz:

As you are aware, I have received your letter of March 19. You have asked whether in my view the Kingston Local Development Corporation ("KLDC") is subject to the Freedom of Information and Open Meetings Laws. You indicated that the entity in question was formed pursuant to Article XIV of the Not-for-Profit Corporation Law, that the Mayor of the City of Kingston serves as its president, and that the Mayor is authorized to appoint the members of its board.

In my view, the issue is whether the KLDC is an "agency" for purposes of the Freedom of Information Law or a "public body" for purposes of the Open Meetings Law.

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" [§86(3)].

In this regard, as you suggested, specific reference is found in §1411 of the Not-for-Profit Corporation Law to local development

corporations. The cited provision describes the purpose of those corporations and states in part that:

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

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

Relevant to your inquiry is a recent decision rendered by the Court of Appeals in which it was held that a particular not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding, the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy

> dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the KLDC and the City of Kingston is similar to that of the BEDC and the City of Buffalo, the KLDC would constitute an "agency" required to comply with the Freedom of Information Law.

Because the Mayor serves as the president of the KLDC and has the authority to choose the members of its board, it is clear that the City of Kingston exercises substantial control over the KLDC. If that is so, I believe that the KLDC constitutes an "agency" 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.

If the KLDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its board would constitute a "public body" for purposes of the Open Meetings Law. Section 102(2) defines that phrase to mean:

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

By breaking the definition into its components, I believe that each condition necessary to a finding that the board of KLDC is a "public body" may be met. It is an entity for which a quorum is required pursuant to the provisions of the Not-for-Profit Corporation Law. It consists of more than two members. Further, based upon the language of §1411(a) of the Not-for-Profit Corporation Law, which was quoted in part earlier, and the degree of governmental control exercised by the City of Kingston, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Kingston.

Like the Freedom of Information Law, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that an executive session may be conducted in accordance with the provisions of paragraphs (a) through (h) of §105(1) of that statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9406

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

April 3, 1996

Mr. David E. Hernandez
88-A-7818
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 information presented in your correspondence.

Dear Mr. Hernandez:

I have received your letter of March 18, in which you complained that the New York City Police Department has failed to respond to your request in a timely manner.

According to your letter, having made a request on October 29, the receipt of your request was acknowledged and you were informed that it could be anticipated that a determination would be made on or about February 5. Because you received no further response, you transmitted a letter reminding the Department of your request, but it does not appear that you have received any additional 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied.

Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 by the New York City Police Department is Karen A. Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9407

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

April 3, 1996

Mr. Ferdinand C. Scaglione, 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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Scaglione:

I have received your letter of March 18, as well as the correspondence attached to it. You have sought assistance in obtaining certain records from the Mamaroneck Union Free School District.

As I understand the matter, you were the subject of allegations or charges initiated by an employee or employees of the District. Following an investigation of the matter, it was determined that the charges "had no validity." Notwithstanding that finding, you requested from the District records pertaining to the charges, including records of testimony that might have been given by certain individuals that you named. Both your initial request and the appeal that ensued were denied, and the Superintendent expressed the view "that the underlying documents which you request are intra-agency materials which do not represent the final determination and are not available under the Freedom of Information Law."

I am in general agreement with the Superintendent. In this regard, I offer the following comments.

First, in an effort to obtain clarification concerning the matter, I contacted Mr. Michael Luzzi, the District's Compliance Officer. Based on our conversation, it is my understanding that you were the subject of allegations or complaints rather than formal charges. By means of analogy, if charges are initiated under §3020-a of the Education Law against a tenured teacher, for example, the charges must be based on a finding of probable cause, and they must be served on the person charged, who has the right to a hearing and due process. In this instance, however, there apparently was no finding of probable cause, no formal charges were

made, and the allegations were found to be without merit. Notwithstanding the foregoing, Mr. Luzzi indicated that he had disclosed the allegations to you either verbally or in writing. In the event that they were disclosed verbally and you want a copy of the allegations in writing, he said that such a record would be made available to you.

Second, with respect to the other records that you requested, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, two of the grounds for denial are relevant to an analysis of the matter.

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].

Also pertinent 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.

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. A determination reflective of a finding of misconduct would be available, for it would be final and, therefore, accessible under §87(2)(g)(iii). Moreover, because such a finding would be relevant to the performance of one's official duties, disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy. 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)]. I note, however, that while final determinations reflective of disciplinary action are accessible, it has been held that predecisional materials leading to those determinations, the records in which you appear to be most interested, may generally be withheld (see Sinicropi, Scaccia, supra).

Allegations made by employees are essentially expressions of opinion that have not (and were not in this case) proven. Other records prepared in the investigation of the matter would be predecisional. Consequently, I believe that they could properly be withheld pursuant to §87(2)(g) as intra-agency material in a manner consistent with judicial precedent. With respect to §87(2)(b), although you cannot engage in an invasion of your own privacy, records identifiable to others, such as complainants, witnesses or others offering information during an investigation, may in my opinion be withheld in this instance on the ground that disclosure would constitute an unwarranted invasion of their privacy.

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: Sherry P. King
Michael Luzzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 94/08

162 Washington Avenue, Albany, New York 12231
(518) 474-2516
Fax (518) 474-1927

April 3, 1996

Mr. Kenneth G. Pavel
90-C-1235
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-2500

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

Dear Mr. Pavel:

I have received your letter of March 16 in which you wrote that you have had "considerable problems" in obtaining to responses to requests for records from the freedom of information officer at your facility.

While this office does not have the resources to conduct an investigation or the authority to compel agency to comply with the Freedom of Information Law, in an effort to assist you, a copy of this opinion will be forwarded to the freedom of information officer.

With regard to your complaint, I note 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)].

As you may be aware, the person designated by the Department of Correctional Services to determine appeals is counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sam Spurgeon, Freedom of Information Officer
Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9409

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

April 4, 1996

Mr. John L. Graham
[redacted]

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. Graham:

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

As I understand the matter, you requested copies of tape recordings of certain meetings of the Richmondville Town Board. In response, the Town Clerk indicated that she does not have the equipment needed to copy the tapes and that she cannot relinquish custody of the tapes, because they are the property of the Town. However, she offered to enable you "to either listen to them and/or tape them by setting your recorder in front of [hers]." In your letter to me, you wrote that you "do not have the capabilities of making copies of recordings", and do not feel that the Clerk's statement represents "a valid reason for being denied copies of the tapes requested."

From my perspective, if indeed the Town does not maintain the equipment necessary to prepare duplicates of the tapes, the Clerk's response served as a reasonable offer to accommodate you. If you have a tape recorder that can be used to listen to the Clerk's tapes, it is likely that you have the ability to do as the Clerk suggested, i.e., duplicate the Town's tapes by placing your recorder next to hers. If your recorder cannot duplicate the tapes in that manner, perhaps you could borrow a tape recorder that would meet your needs. Alternatively, as she also suggested, you could listen to the tape at the Clerk's office.

With respect to the custody of the tapes, I direct your attention to Article 57-A of the Arts and Cultural Affairs Law, which deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §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 on the foregoing, records cannot be destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been reached.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Margaret A. Wohlfarth, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2592
FOIL-AO 9410

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

April 4, 1996

Mr. Michael Piccolo
[redacted]

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, unless otherwise indicated.

Dear Mr. Piccolo:

I have received your letter of March 22 and the correspondence attached to it. Your inquiry concerns your right to obtain a copy of tape recording of a meeting of the Richmondville Town Board. In addition, you questioned your ability as "a private citizen" to use a tape recorder at Town Board meetings and added that the Town Supervisor has refused permission to do so to all but the Town Clerk.

In this regard, the issue involving the right to obtain a copy of the tape recording was recently considered. It is my understanding that the Town Clerk has asserted that she does not have the equipment needed to copy the tapes and that she cannot relinquish custody of the tapes, because they are the property of the Town. However, she offered to enable you to either listen to them and/or tape them by setting your recorder next to hers.

From my perspective, if indeed the Town does not maintain the equipment necessary to prepare duplicates of the tapes, the Clerk's response served as a reasonable offer to accommodate you. If you have a tape recorder that can be used to listen to the Clerk's tapes, it is likely that you have the ability to do as the Clerk suggested, i.e., duplicate the Town's tapes by placing your recorder next to hers. If your recorder cannot duplicate the tapes in that manner, perhaps you could borrow a tape recorder that would meet your needs. Alternatively, as she also suggested, you could listen to the tape at the Clerk's office.

With regard to the use of tape recorders, it is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. There are, however, several

judicial decisions concerning the use of those devices at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough

> an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While 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 judgement annulling the resolution of the respondent board of education" (id. at 925).

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Marion E. Bernocco, Supervisor
Margaret A. Wohlfarth, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 94/11

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

April 4, 1996

Mr. Maurice Samuels
85-A-0184
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. Samuels:

I have received your letter of March 26 and the materials attached to it. I appreciate your kind words.

You have raised a series of questions concerning access to records. Some were answered in my view in my response to you of March 12. However, I offer the following comments.

First, you asked whether there is a statute that you can cite to compel a private attorney who represented you to disclose records. The Freedom of Information Law pertains to "agency" records, and a private attorney would not be required to disclose records pursuant to that statute. Whether there is another statute that would so require is unknown to me and represents a matter beyond the jurisdiction of this office.

Second, you referred to a response by an office of the district attorney in which it was stated that it could not locate certain records. You asked whether you can require an office of the district attorney to prepare an "itemized listing" of the records that it is unable to find. If the district attorney cannot find the records that you requested, I am unaware of how it could prepare an itemized listing without knowledge of the contents of a file or files. Moreover, even when an agency denies access to existing records that it was able to locate, there is no requirement that it itemize or identify each and every record that has been withheld [see Nalo v. Sullivan, 125 AD 2d 311 (1986)].

Third, you referred to records maintained by a court and court reporters. As indicated earlier, the Freedom of Information Law pertains to agency records, and the definition of the term "agency" appearing in §86(3) specifically excludes the judiciary.

Therefore, the courts and court records fall beyond the coverage of the Freedom of Information Law. Frequently, however, other provisions of law require the disclosure of court records (see e.g., Judiciary Law, §255).

Lastly, you referred to a request directed to the office of the district attorney and suggested that all of the records "could and should have been made available." As indicated in my response to you of March 12, it was held in Moore v. Santucci [151 AD 2d 677 (1989)] that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680). From my perspective, some of the records that you described as having requested from the District Attorney would likely constitute court records that the agency is not required to provide.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent W.S. Lai, Assistant District Attorney
Gary J. Galperin, Chief, Special Projects Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9412

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

April 4, 1996

Mr. George H. Waters, Jr.
82-B-2416
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 information presented in your correspondence.

Dear Mr. Waters:

I have received your letter of March 18 addressed to Mr. Bookman, Chairman of the Committee, as well as the correspondence attached to it.

By way of background, you sent a request under the Freedom of Information Law dated November 27 to the New York City Police Department. In the request, you sought certain records and identified yourself by name and a Queens County indictment number. In response to the request, you were informed that your request "is too broad in nature and does not reasonably describe a specific document" and that you could appeal. An appeal was made on November 17. Nevertheless, as of the date of your letter to this office, you had received no further response.

In this regard, I offer the following comments.

First, with respect to the request, as suggested by the Department, §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.

I am unaware of the means by which the Department maintains its records. If the records can be located on the basis of the information that you provided, I believe that your request would have met the standard of reasonably describing the records. On the other hand, if the information you provided is insufficient to enable Department staff to locate the records of your interest, the requirement that you reasonably describe the records would not have been met.

I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) state in part that an agency's records access officer has the duty of ensuring that agency personnel assist the requester in identifying the records sought, if necessary. From my perspective, if the initial information that you provided was insufficient to enable the Department to locate the records, the response should have included information that would enable you to resubmit an appropriate request that would meet the standard imposed by the law.

Second, with respect to the appeal, as you may be 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 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."

It has been held that 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. Louis Lombardi
Karen Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9413

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

April 5, 1996

Mr. Lawrence Lombardo
[redacted]

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. Lombardo:

I have received your letter of March 22 in which you sought assistance concerning delays in response to your requests for records of the Lynbrook Union Free School District. By means of example, you enclosed an acknowledgement of the receipt of a request indicating that you could anticipate a determination "within sixty working days."

In this regard, I note 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..."

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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John A. Beyrer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO: 94/14

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

April 5, 1996

Ms. Kathleen J. Cochran
[redacted]

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

Dear Ms. Cochran:

I have received your letter of March 27. You indicated that you requested the North Tonawanda School District to disclose records reflecting "all of the outgoing calls" pertaining to a particular phone line. The District provided the records relating to long distance calls, but it has to date refused to provide equivalent information concerning local calls.

In this regard, I offer the following comments.

First, all agency records are subject to rights conferred by the Freedom of Information Law, and §86(4) of 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, 179 AD 2d 763 (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. On the other hand, if an employee's duties do not generally involve calls relating to particular students, the Buckley Amendment would likely not be pertinent.

I hope that I have been of 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-9415

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

April 10, 1996

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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Kless:

I have received your letter of March 24 in which you wrote that you remain "confused" regarding the fee charged by Erie County Community College for a copy of a transcript. You asked "is the fee that E.C.C. charges $3.00 per transcript instead of $0.25 per page legal (yes or no)."

In previous correspondence, you suggested that the College generates transcripts from a computer. In this regard, I point out that the fee for a photocopy of a record up to nine by fourteen inches can be no more than twenty-five cents per photocopy. The fee for duplicates of other records (i.e., those that cannot be photocopies, such as computer generated materials) would be based on the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)]. Therefore, if a transcript is computer generated, I believe that the fee that could be charged under the Freedom of Information Law should be based on the actual cost of reproduction.

Nevertheless, it is my understanding, that a transcript is not "official" unless it bears a certification or similar mark indicating that its contents are authentic and accurate. That kind of addition to a record involves action taken separate and distinct from the requirements of the Freedom of Information Law. If a certification or authentication is added to a transcript to guarantee the accuracy of its contents, I believe that an agency may assess a fee above and beyond that authorized by the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of the President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9416

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

April 10, 1996

Mr. Jimmie L. McRae
95-B-0784
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 information presented in your correspondence.

Dear Mr. McRae:

I have received your letter of April 1 in which you indicated that you unsuccessfully requested records pertaining to your case under the Freedom of Information Law from the attorney who represented you.

In this regard, the Freedom of Information Law applies 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 or other governmental 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 is applicable to records maintained by entities of state and local government. A private attorney and the records maintained by that person would fall beyond the coverage of the Freedom of Information Law.

I hope that the foregoing enhances your understanding of the coverage 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-9417

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

April 10, 1996

Mr. Anthony Artis
84-B-0370
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. Artis:

I have received your letter of March 26 in which you sought assistance in obtaining a "case summary for the Division of Parole concerning a violation occurring last year" as well as the "whole case from 1983 if [this office has] it." You also indicated that you have no way of paying for copies.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain possession of records generally and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot provide the records in which you are interested because this office does not possess them.

Second, it is suggested that you direct a request to the "records access officer" at the Division of Parole, 97 Central Avenue, Albany, NY 12206. The records access officer has the duty of coordinating an agency's response to requests. Further, I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when you request a record, you should include sufficient detail to enable agency staff to locate and identify the records of your interest.

Lastly, an agency may charge up to twenty-five cents per photocopy when making copies available [see Freedom of Information Law, §87(1)(b)(iii)]. Moreover, I point out it has been held that an agency may charge its established fee, even if records are requested by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9418

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

April 10, 1996

Mr. Lazaro Burt
94-A-2189
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

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

Dear Mr. Burt:

I have received your letter of March 27 in which you sought assistance in obtaining DD5 reports from the New York City Police Department.

In this regard, I offer the following comments.

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

I point out that there are several inconsistent judicial decisions concerning access to DD5's [see e.g., Scott v. Chief Medical Examiner, 179 AD 2d 443 (1992); Mitchell v. Slade, 173 AD 2d 226 (1992); Woods v. New York City Police Department, Supreme Court, New York County, NYLJ, February 2, 1995]. From my perspective, based on the language of the Freedom of Information Law and what I consider to be the most compelling judicial views on the matter (see especially Woods concerning DD-5's), those records, like many others, may be accessible or deniable, in whole or in part, depending on their contents. I note that most recently, the Appellate Division, First Department, reiterated its view that DD-5's are exempt from disclosure [Johnson v. New York City Police Department, 632 NYS 2d 568, ___ AD 2d ___ (1995)]. Nevertheless, in an effort to assist you, I offer the following comments.

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, or where the request involves medical records pertaining to a person other than yourself [see §89(2)(b)(i) and (ii)].

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). I point out that ballistic tests have been found to be available, because they involve routine investigative procedures [Spencer v. NYS Police, 187 AD 2d 919 (1992)].

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 hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Pakstis, Assistant Commissioner, Civil Matters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9419

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

April 10, 1996

Mr. Lazaro Burt
94-A-2189
Auburn Correctional Facility
135 State Street
Auburn, NY 13021

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

Dear Mr. Burt:

I have received your letter of March 29 in which you referred to §89(3) of the Freedom of Information Law. When an agency acknowledges the receipt of a request because more than five business days will be needed to grant or deny access, you have asked whether the approximate date given by the agency can exceed thirty days from the date of the acknowledgment.

In this regard, 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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9420

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

April 10, 1996

Mr. Ernest Henry
84-A-7611
354 Hunter Street
Ossining, NY 10562

<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 information presented in your correspondence.</u>

Dear Mr. Henry:

I have received your letter of March 26. You have complained that the freedom of information officer at your facility has failed to respond to your request for records, and you asked that this office "investigate the matter and take corrective actions."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to investigate or compel an agency to comply with the Freedom of Information Law.

Nevertheless, 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.

Lastly, in your letter of request, you referred to 5 USC §552. That reference pertains to the federal Freedom of Information Act, which applies only to federal agency records. The Freedom of Information Law applies with respect to records maintained by entities of state and local government in New York.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roland Cote

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9421

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 10, 1996

Mr. James Rushin, Jr.
91-A-2843
P.O. Box 4580
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 information presented in your correspondence.

Dear Mr. Rushin:

I have received your letter of March 22. You indicated that you wrote to a judge in February and requested his decision and order concerning a particular case. He responded that he could not fulfill your request without an indictment number and suggested that you contact the Legal Aid Society or the Office of the District Attorney to obtain that item. Having written to both, you have received no response. You indicated that your inquiry "was not in the form of a F.O.I.L. request" and you asked what your "next step" might be.

In this regard, I offer the following comments.

Under the circumstances, I would suggest that you seek the records from the Office of the District Attorney pursuant to the Freedom of Information Law. I note that §89(3) of that statute requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records. Assuming that the assistant district attorney that you identified was the prosecutor in the case, it is suggested that the request make reference to his role.

I point out, too, 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."

Based upon the foregoing, while the Freedom of Information Law would clearly apply to an office of a district attorney, it would not apply to an entity that is not governmental, such as the Legal Aid Society, nor would it apply to the courts. Therefore, although the Legal Aid Society could provide the information sought, it would not be obliged to do so under 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-9432

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

April 11, 1996

Hon. Ronald A. Hezel
Councilman
1679 Mill Road
St. Johnsville, NY 13452-9403

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 Councilman Hezel:

I have received your letter of April 4, as well as the materials attached to it. You have sought my opinion concerning the apparent inability of yourself and other members of the St. Johnsville Town Board to obtain copies of Town records kept by the Town Supervisor either "through FOIL or more simply as an Elected Town Board Member."

Having reviewed the minutes, resolutions and related documentation that you enclosed, it appears that the Town Board, by means of resolutions approved by a majority of its members, has attempted to take steps to ensure disclosure, but that the Supervisor has resisted. While I believe that you have sought to take appropriate action, enforcement of the action taken might involve the initiation of litigation. It is my view that litigation should be unnecessary, and I offer the following comments in an effort to resolve the matter. Further, a copy of this response will be forwarded to the Supervisor.

First, from my perspective, irrespective of where records may be kept, they are kept due to and in the performance of the Supervisor's official duties and in her capacity as Supervisor. 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 contended, 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, the records would not come into the possession of the Supervisor except in her capacity as a government official acting in the performance of her duties as Supervisor. 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.

Similarly, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments. For purposes of those provisions, §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

As in the case of the Freedom of Information Law, I believe that the materials at issue would constitute a "record".

Further, §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..."

While the Supervisor may have physical possession of the records in question, I do not believe that she has legal custody of them. Section 30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision is §57.19 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share the records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or if she or someone else is so designated as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law. The same may be so in the case of yourself as a member of the Town Board. Unless the records at issue are shared with you and other Board members, you may be unable to perform your duties effectively.

Although the Town Supervisor may have certain areas of authority or responsibility, she is but one among five members of the Town Board. In my view, she is obliged to comply with rules and resolutions adopted by a majority of the Board, so long as such rules or resolutions are not inconsistent with law. I note that §64(3) of the Town Law states that the Town Board "Shall have the management, custody and control of all town lands, buildings and property of the town." Town property in my view clearly includes "records" as defined by both the Freedom of Information Law and the Arts and Cultural Affairs Law. Similarly, §63 of the Town Law provides that "Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board", and that "The board may determine the rules of its procedure."

In short, I do not believe that the records that are the subject of your correspondence are the property of Supervisor or that she has the legal authority to exercise control over the records in the manner described in the documentation.

Second, in general, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or

interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of the board 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 town board, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a board, including a supervisor, 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.

Third, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the records in question are accessible, for none of the grounds for denial would apply. Moreover, some of the records at issue are 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."

Again, in an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be sent to the Supervisor.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Rose M. Jubar, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9423

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

April 11, 1996

Ms. June Maxam
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 information presented in your correspondence.

Dear Ms Maxam:

I have received your letter of April 2 concerning a response to a request for records of the Town of Chester. In brief, the Town Attorney wrote to the Town Clerk and advised that copies of the records sought should be made available upon payment of the appropriate fee. However, you indicated that you did not request copies and asked whether an agency can "force [you] to pay for copies [you] did not request and can withhold the review of records from [you] until [you] pay the fee they are dictating."

In this regard, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there may often be situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2) of the Law. In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. However, in that case, the agency could in my opinion charge its established fee for photocopying as a condition precedent to disclosure.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel T. Smith
Bernice Roberts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9424

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

April 11, 1996

Mr. and Mrs. Carl Wistrom
[redacted]

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. and Mrs. Wistrom:

I have received your letter of April 3 and appreciate your kind remarks. You wrote that you have been "stonewalled" in your efforts in obtaining answers to questions from your school district concerning "reading methods, vandalism, reading scores of first graders, etc."

In this regard, although I am unfamiliar with your specific requests, 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 agency officials 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, school district in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive. In short, in the future, rather than seeking information or raising questions, it is suggested that you request existing records. I note that a sample letter of request appears in the brochure sent to you in January.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9435

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

April 12, 1996

Mr. Barry Le Count
94-A-7540
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 information presented in your correspondence.

Dear Mr. Le Count:

I have received your memorandum of April 4 and the correspondence attached to it.

You wrote that you have twice requested your parole folder but that your requests have been rejected. Most recently, you were informed by a senior parole officer that "[a]ccording to specific rules set forth in the Freedom of Information Law, you are only eligible to review parole documents within two months of your scheduled board appearance."

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

First, there is nothing in the Freedom of Information Law that limits your right to request records to a certain time period. In my view, you have the right to request records from an agency pursuant to the Freedom of Information Law at any time.

Second, the foregoing is not intended to suggest that all of the records that you requested must necessarily be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In consideration of the nature of the records that you requested, it is likely in my opinion that at least two of the grounds for denial would be pertinent.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of

personal privacy." That provision might be asserted, for example, with respect to witness statements or references to persons other than yourself.

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.

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

> "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 for the Division of Parole is Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: K. Graham, Senior Parole Officer
Ann Horowitz, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9426

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

April 12, 1996

Mr. Dan Giblin
[redacted]

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. Giblin:

I have received your letter of April 6, and the materials attached to it. You have sought assistance in obtaining a copy of the City of Binghamton's assessment file.

There appears to be no issue regarding rights of access to the contents of the file. Rather, the issues appear to involve the fee that the assessor seeks to charge for a copy and a delay in disclosure of the records.

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 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. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is emphasized, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that " [i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to

retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In Brownstone Publishers Inc. v. New York City Department of Buildings, the question involved an agency's obligation to transfer electronic information from one electronic storage medium to another when it had the technical capacity to do so and when the applicant was willing to pay the actual cost of the transfer. As stated by the Appellate Division, First Department:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

Further, in a more recent decision that cited Brownstone, it was held that: "[a]n agency which maintains in a computer format information sought by a F.O.I.L. request may be compelled to comply with the request to transfer information to computer disks or tape" (Samuel v. Mace, Supreme Court, Monroe County, December 11, 1992).

In short, assuming that the conversion of format can be accomplished, that the data sought is available under the Freedom of Information Law, and that the data can be transferred from the format in which it is maintained to a format in which you request it, I believe that an agency would be obliged to do so. Under those conditions, it does not appear that production would involve creating a new record or reprogramming, but rather merely a transfer of information into a format usable to you.

A third issue involves the fees that may be charged for the reproduction of records. By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

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

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

Based upon the foregoing, it is likely that a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred. If the fee referenced by the City represents the actual cost of reproduction, I believe that it would be appropriate. Otherwise, the fee should, in my view, be established in accordance with the preceding commentary.

Lastly, 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)].

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 the City of Binghamton.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Barton, City Assessor
Robert Murphy, City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2596
FOIL-AO-9427

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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April 12, 1996

Mr. J. Franklyn DeRidder
President
OMNI Electromotive, Inc.
12 Seely Hill Road
Newfield, NY 14867

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. DeRidder:

I have received your letters of March 22 and April 4, both of which reached this office on April 8. You have sought assistance in relation to a series of difficulties concerning the implementation of the Freedom of Information and Open Meetings Laws by the Newfield Central School District and its Board of Education.

It is noted that the Committee on Open Government is authorized to provide advice pertaining to the statutes referenced above. While the Committee is not empowered to enforce the law, it is my hope that the contents of this opinion, which will be forwarded to the Board, will serve to educate, persuade and to enhance compliance with and understanding of open government laws.

First, you complained that requests for records are not answered in a timely fashion. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency, such as a school district, 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 all agency records, and §86(4) of that statute defines the term "record" expansively to mean:

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

Based on the foregoing, any information "in any physical form whatsoever" maintained by or produced for the District would constitute a record, irrespective of its function or origin. Floor plans, for example, produced for the District, or copies of materials distributed at open meetings that are kept by the District would in my view clearly be records that fall within the framework of the Freedom of Information Law.

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

Next, since several areas of your remarks involve meetings of the Board and minutes of its meetings, I direct your attention to the Open Meetings Law.

By way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1)] has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

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.

Every meeting must be convened as an open meeting, and §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. Consequently, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Although it is used frequently, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session often relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns.

However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when one or more of the topics listed in §105(1)(f) are considered.

When a discussion concerns matters of policy, such as the manner in which public money will be expended or allocated, I do not believe that §105(1)(f) could be asserted, even though the discussion relates to "personnel". For example, if a discussion involves staff reductions or layoffs, the issue in my view would involve matters of policy. Similarly, if a discussion of possible layoffs relates to positions and whether those positions should be retained or abolished, the discussion would involve the means by which public monies would be allocated. On the other hand, insofar as a discussion focuses upon a "particular person" in conjunction with that person's performance, i.e., how well or poorly he or she has performed his or her duties, an executive session could in my view be appropriately held. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (<u>Doolittle v. Board of Education</u>, Supreme Court, Chemung County, October 20, 1981).

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail,

neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1)(f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of

Monticello, 620 NY 2d 573, 575; 205 AD 2d 55, 58 (1994)].

You also allege that the Board held a "secretive telephonic meeting." In this regard, it has been advised that public bodies cannot conduct meetings by phone. Section 102(1) 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". 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 that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Commission. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at a remote location by telephone, it has consistently been advised that a member of a public body cannot cast a vote unless he or she is physically present at a meeting of the body.

The Open Meetings Law does not preclude members of a public body from conferring individually or by telephone. However, a series of telephone calls among the members which results in a decision or a meeting held by means of a telephone conference would in my opinion be inconsistent with law. Similarly, I believe that the absence of a member from a meeting, a physical convening of a majority of a public body's membership, precludes that person from voting. In short, the absent person is not part of the "convening."

It is noted that 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. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. 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 duly held upon reasonably notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a majority of the total membership has convened.

Lastly, 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.

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.

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information and Open Meetings Laws in detail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9428

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

April 12, 1996

Mr. Arthur Bender
National Judgment Recovery
1078 Rte. 112, Suite 116
Port Jefferson Station, NY 11776

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. Bender:

I have received your letter of April 3 and the correspondence attached to it.

According to the materials, you were refused access to court files because you could not identify the files of interest by means of an index number or the name of a plaintiff or defendant. The County Clerk reiterated that response. Further, although you sought the assistance of the County Attorney, citing the Freedom of Information Law, you had received no answer from him as of the date of your letter to this office.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of this office, 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

As you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. In this instance, the documents in question are clearly court records that fall outside the coverage of the Freedom of Information Law. As such, I do not believe that I can offer assistance in the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9429

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

April 12, 1996

Mr. Jose L. Colon
92-B-0610
Eastern Correctional Facility
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 information presented in your correspondence.

Dear Mr. Colon:

I have received your letter of April 5. Your inquiry involves appeals made under §89(4)(a) of the Freedom of Information Law, and you asked whether an agency's appeals officer conducts a hearing, "take[s] evidence into account, consider[s] facts, listen[s] to both sides of the litigants' arguments."

In this regard, an appeal under the Freedom of Information Law is not reflective of litigation; it is administrative in nature. There is no requirement that a hearing be held or that an appellant be given an opportunity to present an oral argument, for example. From my perspective, the primary function of the appeals officer is to carefully review the records that are the subject of the appeal in order to determine the extent, if any, to which the records may properly be withheld in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law. In some instances, in an effort to reach an appropriate determination, the appeals officer might consult with others familiar with events relating to the records or who may be aware of the effects of disclosure. In short, the procedure is not analogous to an evidentiary proceeding in which there are guarantees of due process and an opportunity to be heard.

I hope that the foregoing serves to clarify 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-9430

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

April 16, 1996

Mr. Robert I. Reed
93-B-1119
Coxsackie Correctional Facility
Box 999
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 information presented in your correspondence.

Dear Mr. Reed:

I have received your letter of March 30, which reached this office on April 11. You have sought assistance in obtaining information concerning complaints filed against judges and attorneys in Chemung County.

In this regard, §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.

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.

Similarly, the records of the agency that reviews complaints concerning judges, the Commission on Judicial Conduct, are generally confidential. Section 45 of the Judiciary Law pertains to the Commission on Judicial Conduct and provides in relevant part that "...all complaints, correspondence, commission proceedings and transcripts thereof, other papers and data and records of the Commission shall be confidential and shall not be made available to any person..."

I hope that the foregoing serves to enhance your knowledge 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-9431

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

April 16, 1996

Mr. Genrikh Vapne
[redacted]

Dear Mr. Vapne:

Your correspondence addressed to Lieutenant Governor Betsy McCaughey Ross has been forwarded to the Committee on Open Government. As you are aware, the Lieutenant Governor is a member of the Committee. I note that the staff of the Committee is authorized to respond on behalf of its members.

The matter relates to your unsuccessful efforts to obtain information from the New York City Housing Authority. By means of a letter addressed to the Authority's records access officer, you sought a variety of information by raising a series of questions. In response to your inquiry, you were informed that the Authority is not required to provide "information."

In this regard, in an effort to offer clarification, 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 agency officials 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 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.

In short, the Authority in my view would not be obliged to provide the information sought by answering questions or preparing new records in an effort to be responsive.

In the context of your inquiry, technically, I agree with the records access officer's response. In the future, rather than seeking information or raising questions, it is suggested that you request existing records. For instance, instead of asking "how many projects NYCHA has in Brooklyn and Queens", it is suggested that you request records identifying NYCHA projects in Brooklyn and Queens.

I would conjecture much of the information that you requested does not exist in the form of a record or records. For instance, you asked "how many offers were made by NYCHA to immigrants from Russia in 1995", as well as the names of projects offered in Brooklyn, the number of offers rejected by immigrants from Russia, and the "typical reasons" for refusal. If indeed the Authority has prepared figures or "typical reasons" reflective of the information sought, I believe that those materials would be available under the Freedom of Information Law. Nevertheless, if the Authority does not maintain records identifiable to persons by means of their ethnicity, the Freedom of Information Law would not apply, and the Authority would not be required to prepare records or conduct research on your behalf in order to respond to your questions.

Enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Hon. Betsy McCaughey Ross

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2598
FOIL-AO-9432

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

April 17, 1996

Hon. Linda H. Mitchell
Village Clerk
Village of Sands Point
P.O. Box 188
Port Washington, NY 11050

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

Dear Ms. Mitchell:

I have received your letter of April 9 in which you referred to an article that appeared in the Port Washington News. In the article includes a comment that "since the Port Washington Fire Department is federated and incorporated under a unique central district, they are not required to hold public budget meetings." You have asked whether "it is true" that Port Washington Fire District is exempt from the coverage of the Freedom of Information and Open Meetings Laws.

In this regard, it is likely in my view that the Port Washington Fire District is required to comply with both statutes.

The Open Meetings Law pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean:

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

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

a fire district in my view is clearly a public body subject to the Open Meetings Law.

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."

Again, a fire district is a public corporation. Consequently, I believe that it is an "agency" required to comply with the Freedom of Information Law.

While I am unfamiliar with the specific entity to which the article refers, I point out that §66 of the General Construction Law includes a series of definitions and states that:

> "3. A 'district corporation' includes any territorial division of the state, other than a municipal corporation, heretofore or hereafter established by law which possesses the power to contract indebtedness and levy taxes or benefit assessments upon real estate or to require the levy of such taxes or assessments, whether or not such territorial division is expressly declared to be a body corporate and politic by the statute creating or authorizing the creation of such territorial division.
>
> 4. A 'public benefit corporation' is a corporation organized to construct or operate a public improvement wholly or partly within the state, the profits from which inure to the benefit of this or other states, or the people thereof."

In addition, subdivision (1) of §66 defines the phrase "public corporation" to include "a municipal corporation, a district corporation, or a public benefit corporation." If the entity in question is a district corporation or a public benefit corporation, it would constitute a "public corporation" that clearly falls within the coverage of the open government laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9433

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

April 18, 1996

Mr. Joseph C. Peterson
[redacted]

Dear Mr. Peterson:

As you know, I have received your letter of April 3 in which you described difficulties in obtaining information from the New York State Department of Transportation.

Having reviewed your correspondence, it is unclear exactly what had been requested from or withheld by the Department. My attempt to reach you involved an effort to elicit information concerning the nature of records that you believe to have been withheld in order that I could prepare an appropriate and useful advisory opinion. Nevertheless, I was informed that you left a message indicating that you are not accepting telephone calls and prefer to communicate in writing. That being so, I cannot offer significant assistance or guidance.

Notwithstanding the foregoing, I offer the following brief comments.

First, it is noted that the title of the Freedom of Information Law is somewhat misleading. That statute is not a vehicle that requires government agencies or officials to provide information *per se*; rather it pertains to existing records. Therefore, while agency officials may provide information by responding to questions, they are not required to do so by the Freedom of Information Law. Similarly, §89(3) of the Law provides in part that agencies are not required to create a record in response to a request. Therefore, insofar as information sought does not exist in the form of a record or records, an agency would not be obliged to prepare new records on behalf of an applicant.

Second, on the basis of your correspondence, it appears that you asked that the Department make records available during a period other than regular business hours. In short, while an agency is required to produce records during regular business hours (see 21 NYCRR §1401.4), I do not believe that it is required to accommodate those who cannot inspect records during regular

business hours. I note, too, that copies of accessible records can be mailed upon payment of the appropriate fees.

If you would like to contact me, either orally or in writing, to describe the kinds of records that might have been withheld by the Department of Transportation, I would be pleased to attempt to offer advice. Until then, however, I do not believe I can be of additional assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert W. Seymour

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2599
FOIL-AO-9434

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

April 19, 1996

Ms. Susan Bisha
[redacted]

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 Ms. Bisha:

I have received your letter of April 11, as well as the materials attached to it.

In your capacity as associate news editor of the Stylus, the campus newspaper at SUNY College at Brockport, you wrote that you cover the weekly meetings of the Board of Directors of the Brockport Student Government (BSG). At a recent meeting, however, you were "ordered" by the chairperson to leave, even though there was neither a motion made to enter into executive session nor an indication of the subjects to be discussed. You indicated that students pay a mandatory activity, that they elect the members of the BSG, and that board of the BSG "spends student fee money on behalf [of] the students.

You have asked whether the BSG "is a public body covered by the state open meeting and open records laws." In my opinion, based on the language of those laws and their recent judicial interpretation the BSG is required to comply with both the Freedom of Information Law and the Open Meetings Law. In this regard, I offer the following comments.

For purposes of the Freedom of Information Law, the question is whether the BSG is an "agency". Section 86(3) of that statute define 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."

Here I refer to Carroll v. Blinken [957 F.2d 991 (2d Cir. 1992), cert. denied, 113 S.Ct. 300 (1972)] in which it was held that a State University of New York student government's allocation of mandatory activity fee monies to a particular organization constituted a "state action." The Carroll decision, which pertains to Polity, the student government body at SUNY/Stony Brook, indicates that "the allocation of activity fee money to [a campus organization] NYPIRG" was a justifiable exercise of State action and that the allocation of funds constitutes official action because the SUNY Trustees require all SUNY students pursuant to §355 of the Education Law to pay a mandatory student activity fee each semester. "Those who fail to pay the fee...are not allowed to register" (id. at 993). Further, BSG's disbursement of these assessed funds is mandated and controlled by regulations promulgated by the State University, 8 N.Y.C.R.R. §302.14. According to Carroll, the regulation determines the manner in which the "student association budget" may allocate funds, and eleven permissible categories of expenditures are defined. As stated in that decision, "once the Student Government completes its budget" allocating funds to various campus groups, SUNY's President must then certify that the student government funds have been spent in one of the eleven ways recognized by the regulation.

In my view, the BSG is clearly involved in performing a governmental function for, on behalf of or in conjunction with the State University. In a decision that involved what may be characterized as an adjunct of a public institution of higher education, it was held that a community college foundation, a not-for-profit corporation, and its records are subject to the Freedom of Information Law. As stated by the court:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various

> educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, 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" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the Foundation in Eisenberg, BSG would not exist but for its relationship with the SUNY College at Brockport. Due to the similarity between the situation at issue and that presented in Eisenberg, I believe that BSG and its records are subject to the Freedom of Information Law.

I note there is precedent indicating that a not-for-profit corporation may be an "agency" required to comply with the Freedom of Information Law. 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).
>
> 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].

More recently, the Court of Appeals again determined that a certain not-for-profit corporation constituted an "agency" subject to the Freedom of Information Law. In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court determined that:

> "The BEDC, a not-for-profit local development corporation, channels public funds into the community and enjoys many attributes of public entities. It should therefore be deemed an 'agency' within FOIL's reach in this case" (id., 492).

It was also stated that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy

> dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

In this instance, there is substantial government control over BSG, for the administration at a SUNY institution is also "inextricably involved" in the operation of a student government organization. The regulations promulgated by SUNY, 8 NYCRR §302.14, specify the relationship between a student government organization, such as Polity, and SUNY. Where mandatory fees are paid, as in this case, §302.14(c)(1) provides that:

> "The representative student organization shall prepare and approve a budget governing expenditures from student activity fees in accordance with the constitution and by-laws of the student organization, and consistent with the principles of equal opportunity, prior to registration for each term. Allocations included in the budget shall fall within programs defined in paragraph (3) of this subdivision. The approved budget shall thereafter be presented to the chief administrative officer prior to the registration for each term for his review and certification that the allocations are in compliance with the provisions of paragraph (3) of this subdivision. In the event that the chief administrative officer, or his designee, concludes that a particular proposed allocation may not be in compliance with the provisions of this Part, he shall refer such proposed allocation to a campus review board composed of eight members of whom four shall be appointed by the representative student organization and four appointed by the chief administrative officer, or his designee. The campus review board shall study the proposed allocation and make a recommendation with respect to it. The chief administrative officer, or his designee, shall thereafter make the final decision. Any proposed allocation which is determined not be in compliance with the provisions of these regulations shall be excluded from the budget. Upon determination by the chief administrative officer, or his designee, that the approved budget is in compliance with these regulations, he shall so certify, and such certification shall authorize the collection of the fee at registration."

Paragraph (3) of subdivision (c) states that "[f]unds which are collected under provisions of this section which require every student to pay the prescribed mandatory fee shall be used only for support of the following programs for the benefit of the campus

community", and thereafter identifies the kinds of programs eligible for funding. As in Eisenberg, supra, in which it was held that a not-for-profit foundation was an "agency", for its purpose was to further the functions of a community college, Polity can use monies only "for the benefit of the campus community." Similarly, as in the case of Buffalo News, there is substantial oversight, if not control, by the parent entity. Paragraph (4) of §302.14(c) of the regulations states that fiscal commitments of proceeds of student activity fees by a student organization "shall have been approved by the chief administrative officer or his designee", that '[f]inal determination for approval of the compliance with this section of any fiscal commitment shall rest with the chief administrative officer or his designee", that "[f]iscal and accounting procedures prescribed by the chancellor...shall be adopted and observed by the representative student organization", and that "such procedures shall include...provisions for an annual audit."

Perhaps most importantly, a decision rendered earlier this year dealt with the status of a student government body, the Student Polity Association at SUNY/Stony Brook, which was created as a not-for-profit corporation, following a denial of a request by the campus newspaper for its records. In The Stony Brook Statesman v. Associate Vice Chancellor for University Relations (Supreme Court, Ulster County, January 22, 1996), it was determined that "Polity" is an "agency" required to comply with the Freedom of Information Law. In the decision, it was stated that:

> "Polity has refused disclosure solely on the grounds that it is not subject to FOIL since it is not a state agency as that term is defined in Public Officers Law Section 86(3). Given the fact that Polity is responsible for spending mandatory student activity fees under supervision of SUNY-Stony Brook and pursuant to and in accordance with Education Law Section 355 and 8 NYCRR 302.14, respondents' position is simply not tenable. In reaching this conclusion, the Court adopts the reasoning set forth in the opinion letter from the Committee on Open Government to petitioner dated May 17, 1995..."

In sum, it is clear in my view that BSG falls within the coverage of the Freedom of Information Law and must disclose its records in accordance with that statute.

With respect to the Open Meetings Law, the issue is whether BSG is a "public body." Section 102(2) defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an

> agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

In a recent decision, Smith and Maitland v.City University of New York (Supreme Court, New York County, January 25, 1996), it was held that the LaGuardia Community College Association, Inc., which is the College's student government body and analogous to the BSG, is a public body subject to the Open Meetings Law. The court rendered its decision during oral arguments, and reference will be made to a series of judicial pronouncements appearing in the transcript of the proceeding. Specifically, the judge stated that:

> "The association is performing a governmental function, it's making a final decision. It's not an advisory. Therefore, it is subject, I find that it is subject to the Open Meetings Law, and that is my ruling...This entity is not an advisory committee. Therefore, the reasoning which is set forth in these opinions of the Committee on Open Government, I concur with....they are logical, and I concur with those reasons; because, it's really substituting for governmental function, it's exercising a function of the government; and it's no different whether it's incorporated or not incorporated. It's making decisions for the government. And the government would have to make those decisions if it didn't.
>
> "And on all these other things, issues that you are raising, this is private money of the students, it's collected as part of the students- it's a student activity fee. It's mandatory. It's collected by the sovereign, if you want. The fact that it's put into an account of the association doesn't change it's character. It's still governmental function and it's subject to the Open Meetings Law."

Later in the proceeding, the judge determined that:

> "The Petitioners are entitled to a declaration that the Respondents acted in violation of the New York State Open Meetings Law by the conducting of the meeting of the college association on March 30, 1994 in which students and their attorney, right, and the reporter were denied access to attend the meeting. I don't think there is any contest about that...my reading of and my interpretation of this law is that it applies to the association just as the FOIL applies to

> the association. It's exercising a governmental function."

As a public body, BSG must conduct its meetings open to the public, unless there is a basis for entry into an executive session. It is emphasized 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.

In an effort to enhance compliance with and understanding of the Freedom of Information Laws, copies of this opinion will be forwarded to the BSG and the College President.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brockport Student Government
President, SUNY College at Brockport

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9435

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

April 26, 1996

Ms. Alice Frankl
[redacted]

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, ,unless otherwise indicated.

Dear Ms. Frankl:

I have received your letter of April 9 in which you referred to a request made some time ago for records of the Office of Mental Health (OMH).

As I understand the matter, you sought copies of site inspection reports and complaints made by patients at the Maimonides Community Health Center in Brooklyn. Although the site inspection reports were made available, patient complaints were withheld, and you questioned why the complaints were not disclosed after names of patients were "blacked out." Further, you referred to an appeal that had not been answered.

In this regard, having contacted Pamela Tindall-O'Brien of OMH in an effort to obtain additional information concerning the matter, she indicated that she has received no correspondence from you since the preparation of her response to you of November 16. I note that in that response, Ms. Tindall-O'Brien specified that your prior communication was treated as an appeal. As such, I believe that her letter of November 16 served as a determination of your appeal.

Further, Ms. Tindall-O'Brien indicated to me that she believed that OMH disclosed the records sought to you to the extent required by law, and in her letter to you, she contended that "[a]lthough names might be redacted, there could be sufficient information in the complaints to make identification of the complainant possible." From my perspective, if the deletion of personally identifiable details serves to preclude the public from having the ability to know the name of a complainant, the remainder of a complaint should be disclosed. On the other hand, however, if a recipient of a copy of a complaint could ascertain the identity of a complainant even

after identifying details have been deleted, I believe that the complaint could be withheld in its entirety.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Pamela Tindall O'Brien

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9436

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

April 29, 1996

Mr. Robert Ward
94-A-1357
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Ward:

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

You have sought assistance concerning a denial of access to records by the Town of Vestal Police Department. The records relate to your arrest and apparently your eventual conviction, but they were withheld on the basis of §87(2)(e)(i) of the Freedom of Information Law on the ground that disclosure "would interfere with an ongoing law enforcement 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 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). If the records relate to an arrest that culminated in your conviction, and if the investigation leading to your arrest and conviction has ended, I do not believe that §87(2)(e)(i), the basis for denial offered by the Police Department, could be justified.

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, it is noted that the denial attached to your letter failed to refer to your right to appeal. Here I point out that §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" (§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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. W.E. Hague

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9437

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

April 29, 1996

Mr. Gregory Parker
95-A-2330
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 information presented in your correspondence.

Dear Mr. Parker:

I have received a copy of your correspondence of March 12 with the Chief Clerk of Kings County Supreme Court. You wrote that the letter, a request made under the federal Freedom of Information and Privacy Acts, as well as the New York Freedom of Information Law, was your second request and that you had received no reply.

In this regard, the statutes that you cited are not applicable. The federal acts to which you referred pertain only to records maintained by federal agencies. The New York 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 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 fall beyond the coverage of the Freedom of Information Law. This is not to suggest, however, that court records may not be available to the

public. On the contrary, court records are often available pursuant to different provisions of law (see e.g., Judiciary, §255). Rather than seeking court records pursuant to the federal acts that you cited or the State Freedom of Information Law, it is suggested that you renew your request, citing an applicable provision of law.

I hope that the preceding commentary serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gabriel J. Plumer, Chief Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9438

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

April 29, 1996

Mr. Eric Smokes
87-B-1652
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Smokes:

I have received your letter of April 5, which reached this office on April 12.

You referred to a somewhat recent judicial decision, Baez v. Lai and Galperin (Supreme Court, New York County, December 12, 1994). While I have no familiarity with the decision, you wrote that it involved "whether failure to file timely FOIL appeal could be overcome by a duplicate FOIL request" and indicated that the "answer" by the judge "is alleged to have been 'No'." You have sought my views on the issue.

In this regard, judicial interpretations pertinent to the matter appear to reach somewhat contrary conclusions. In one decision, although a petition was dismissed on the ground that it was not timely commenced, it was held that a petitioner was not barred from seeking the records again under appropriate procedures (Matter of Mitchell, Supreme Court, Nassau County, NYLJ, March 9, 1979). In that situation, if the applicant renewed his or her request and appealed a denial of access, that person would have been able to seek judicial review of the denial within four months of the agency's determination. On the other hand, a proceeding was found to have been time barred when a challenge to a second denial of access was made on the same basis as an initial denial, and there was no change in circumstances [Corbin v. Ward, 160 AD 2d 596 (1990)].

In my view, due to the structure of the Freedom of Information Law and the fact that the grounds for withholding records are frequently based on the effects of disclosure, because those effects may change, an initial request for a record might properly

be denied, but a second request might have to be granted due to changes in circumstances. For purposes of illustration, such changes may occur in a variety of situations. For instance, if a matter is currently under investigation, disclosure of records might interfere with the investigation and be withheld under §87(2)(e)(i) of the Freedom of Information Law. However, when the investigation has concluded, the records that were properly withheld in the first instance may become accessible, for disclosure would no longer result in any interference.

From my perspective, if an individual chooses not to initiate an Article 78 proceeding within four months after an agency's denial of his or her appeal, the choice not to do so should not forever preclude that person from seeking the records. There may be changes in circumstances, judicial precedents that could put an issue in a different light, an acquisition of records from other sources that might diminish an agency's capacity to justify a denial, or a change in one's financial ability to initiate a lawsuit. For those reasons, I do not believe that an agency may in every instance deny a second request on the basis of mootness.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Vincent W.S. Lai

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9439

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

April 30, 1996

Ms. Marla G. Simpson
Counsel to the Borough President
NYC Office of the President of the
Borough of Manhattan
Municipal Building
New York, NY 10007

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

Dear Ms. Simpson:

I have received your letter of April 17, as well as the correspondence relating to it. In your capacity as Counsel to the Manhattan Borough President, you have sought an advisory opinion concerning a denial of a request made by the Borough President for records of the New York City Community Development Agency.

According to the materials, the request involved the "recent Immigration Initiatives RFP", and the Borough President sought the names of organizations that applied, those with which contractual agreements have been reached, and the "Tier One and Tier Two scores." The request was denied because the contracts are not "final and binding" and "have not yet been registered with the Comptroller."

If, as you suggested, the contracts "have been awarded and executed", and they are "merely pending registration by the Comptroller", I would agree that there would be no basis for a denial of access.

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, 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.

In this case, if I correctly understand the situation, negotiations relating to the RFP's have been completed, and the parties to which contracts will be or have been awarded have been selected. If that is so, I do not believe that there would be a basis for withholding, for disclosure would not in any way "impair" the contracting process. I point out, too, that it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information

Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. While the cited decision involved bids and related documents, I believe that it is implicit that the agreement itself had been made public or would be an accessible record.

In short, if indeed an agreement has been reached and only registration with or approval by the Comptroller is needed to complete the process, it is difficult to envision how disclosure at this juncture would constitute any "impairment."

Lastly, with respect to the Tier One and Tier Two scores, it is assumed that records containing those scores consist of evaluations and rankings of the proposals. If that is so, §87(2)(g) of the Freedom of Information Law would be relevant in ascertaining 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.

In a judicial decision dealing with ratings relating to RFP's, it was held that:

> "The contract award was based on an evaluation of criteria and ratings made by the committee members. Backup factual and statistical data to a final determination of an agency is not exempt from disclosure (*see also, Church of*

> *Scientology v State of New York,* 54 AD2d 446, 448-449, *affd* 43 NY2d 754). The individual members of the DOH committee were required to rate the response to the criteria of the RFP and accord it a numerical value. The rating given each category reflects the voting which determined the contract award (*see, supra*). Although the rating sheets are subject to disclosure, however, the subjective comments, opinions and recommendations written in by committee members are not required to be disclosed and may be redacted" [Professional Standard Review Council of America, Inc. v. NYS Department of Health, 193 AD 2d 937, 939-940 (1993)].

Copies of this opinion will be forwarded to Diane McGrath-McKechnie, Commissioner of the Community Development Agency, and Matthew W. Daus, General Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9440

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

April 30, 1996

Mrs. Helen Wistrom
[redacted]

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 Mrs. Wistrom:

I have received your letter of April 8, which reached this office on April 18. You have questioned the reason for a denial of a request that you directed to the Auburn Enlarged School District.

According to the form attached to your letter, you requested "CAT scores 1960 to present" pertaining to "the scores of first graders in the middle of the year in reading, before whole language and after whole language was instituted." In response, you were informed that the request involves a "[r]ecord which is not maintained by the school district."

In this regard, I offer the following comments and suggestions.

First, as indicated in the previous opinion addressed to you, the Freedom of Information Law pertains to existing records and does not require that an agency prepare a record in response to a request. I am unaware of whether "CAT" tests have been given since 1960, or whether those examinations are "administered to first graders in the middle of the year in reading." In short, it is possible that the District does not maintain records containing exactly the information that you requested, and if that is so, it would not be obliged to prepare records containing the information sought on your behalf.

Rather than including the qualifiers described in your request, it is suggested that you seek CAT scores of first graders pertaining but not limited to a certain period of tiem. It is also suggested that you contact the records access officer in an effort to ascertain the extent to which the kinds of records in which you are interested may exist.

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. If statistics reflective of test scores are maintained by the District, I believe that they would be accessible, for §87(2)(g)(i) requires that intra-agency materials consisting of "statistical or factual tabulations or data" be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2601
FOIL-AO-9441

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

April 30, 1996

Mrs. Antonia Rowcliffe
[redacted]

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, unless otherwise indicated.

Dear Ms. Rowcliffe:

As you may be aware, a variety of materials have been forwarded to the Committee on Open Government by the State Education Department concerning your complaint sent to the New York State Commission of Investigation. The Committee, a unit of the Department of State, is authorized to offer advisory opinions pertaining to the Open Meetings and Freedom of Information Laws.

By way of background, in your capacity as a member of the Caledonia-Mumford Central School District Board of Education, you indicated in a letter to the Commission "that four, sometimes five, Board members have had secret, unannounced meetings without minutes being taken" and added that "two Board members...are intentionally not notified of the meetings to obstruct [y]our participation." You also wrote that members of the Board have "admitted to these illegal meetings." It is my understanding, based on the materials, that the Board consists of seven members.

In this regard, I offer the following comments.

It is noted at the outset that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that

so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

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

The court also dealt with the characterization of meetings as "informal," stating that:

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

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law.

However, in order to constitute a valid meeting, I believe that all of the members of a public body must be given reasonable notice of a meeting. Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. The cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a public body, such as a 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 duly held upon reasonable notice to all of the members. Therefore, if, for example, five of seven members of a public body meet without informing the other two, even though the five represent a majority, I do not believe that they could vote or act as or on behalf of the body as a whole; unless all of the members of the body are given reasonable notice of a meeting, the body in my opinion is incapable of performing or exercising its power, authority or duty. If challenged, I believe that action purportedly taken by a majority of a public body that met without giving reasonable notice to all of the members would be found to be a nullity, i.e., that no action was validly or effectively taken.

A second issue involves your inability as a member of the Board, and also as a member of the public, to gain access to records reflective of District expenditures, particularly those pertaining to payments made to attorneys retained by the District.

Here I refer to 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 §87(2)(a) through (i) of the Law. Contracts, bills, vouchers and similar records reflective of payments by an agency are typically available, for none of the grounds for denial could appropriately be asserted.

With specific respect to payments to a law firm, the judicial interpretation of the Freedom of Information Law indicates that the information sought must be disclosed. A recent decision involved a request for "the amount of money paid in 1994" to a particular

law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (Orange County Publications v. County of Orange, Supreme Court, Orange County, June 15, 1995). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'." The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Only if such descriptions can be demonstrated to rise to the level of protected communications, can respondent's position be sustained.
>
> "In this regard, the Court must make its determination based upon the established principal that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, as the Court determined in Matter of Priest v. Hennessy, supra,
>
> > [a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged.
>
> Id. at 69.

> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 135 Misc.2d 126, 127-128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De Law Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..."

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "...in order to uphold respondent's denial of the FOIL request, the Court would be compelled to conclude that the descriptive material, set forth in the law firm's monthly bills, is uniquely the product of the professional skills of respondent's outside counsel. The Court fails to see how the preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, can be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 [Sup. Ct. Kings Ct. 1984]). Therefore, the Court concludes that the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "However, the Court is aware that, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by

> respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §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.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion,

> respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra."

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible. As I understand your requests, they are not as detailed as the request at issue in Orange County Publications. It appears that your requests involve amounts expended. In my view, those aspects of the records would clearly be available.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be sent to the Board of Education. Copies will also be forwarded to the State Education Department and the Commission of Investigation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Luis E. Pacheco
Jerome Lightfoot

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9442

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

April 30, 1996

Hon. Frank Kaplan
Town Supervisor
Town of Fallsburg
Railroad Plaza South
South Fallsburg, NY 12779

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, unless otherwise indicated.

Dear Supervisor Kaplan:

I have received your letter of April 17 and the materials attached to it. You have sought guidance concerning requests by Mr. David Paige for a variety of information concerning expenditures by the Town of Fallsburg. You wrote that "[n]early all of this information is in [y]our accounting department, but enormous research is needed to patch it together", and that the Town's "small staff would need to work at this for weeks."

In this regard, I offer the following comments.

First, I have spoken to Mr. Paige, who indicated that he is conducting a "comparison study" of municipalities in the region. He also said that the breakdowns that he requested are based on the format of the Town's budget and that neighboring communities have been able to provide him with the figures that he has requested from the Town of Fallsburg. Whether you readily have the ability to make similar disclosures in my view relates to the manner in which the Town maintains its records.

From my perspective, a primary issue involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals 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)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and 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.

While I am unfamiliar with the Town's recordkeeping systems, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. If, for example, records relating to budgeted items can be located in conjunction with the format of a budget document or documents, it would appear that the request would reasonably describe the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing hundreds of records individually in an effort to locate those falling within the scope of the request, to that extent, the request may not meet the standard of reasonably describing the records.

Second, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create or prepare a new record in response to a request. For instance, several aspects of the request refer to "total" expenditures in certain areas. If no records exist reflective of totals, I do not believe that Town staff would be obliged to prepare totals on behalf of an applicant. 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 some fifteen 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)].

While I am unaware of the extent to which the Town maintains information 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)].

Often, however, information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. In my view, if electronic information can be extracted or generated with reasonable effort, an agency would be required to do so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Paige

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2602
FOIL-AO-9443

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 1, 1996

Mr. Hal Travis
[redacted]

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. Travis:

I have received your letter of April 23 in which you seek an advisory opinion in your capacity as a member of the City of Syracuse Board of Education. You wrote that a controversy recently arose concerning your disclosure of records pertaining to the use of cellular phones by particular school employees.

According to your letter, the administrators' union "is threatening legal action" against you due to your release of the information, for, in your words, "they consider it personnel information since it contained the names of specific school employees." You contend, however, that it is a "general business/financial record." You added that the Board's attorney has suggested that the records are "confidential" pursuant to §805-a(1)(b) of the General Municipal Law, the rules of the Board of Education, and Part 84 of the regulations promulgated by the Commissioner of Education. You indicated further that the Board intends to discuss the matter in executive session, and you questioned whether the matter could properly be considered in an executive session.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records [see definition of "record", §86(4)] 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.

Second, in my view, the term "confidential" has a narrow meaning. While I am mindful of the section of the General Municipal Law to which the Board's attorney referred, I do not

believe that it would prohibit disclosure of cellular telephone records. That provision states that "[n]o 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." From my perspective, which is based on the language of the Freedom of Information Law and its judicial interpretation, 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. Similarly, insofar as Part 84 of the regulations promulgated by the Commissioner of Education is more restrictive than a statute, the Freedom of Information Law, I believe that it is out of date and void. This not to suggest that all records must be disclosed; rather, I am suggesting that records may in some instances be withheld, but only in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any claim of confidentiality based on a regulation, policy or local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

Records often may be withheld under the Freedom of Information Law, even though they are not "confidential." A memorandum prepared by a member of staff at an agency in which he or she offers an opinion or advice to his or her supervisor *may* be withheld under §87(2)(g) of the Freedom of Information Law, for the opinion would constitute "intra-agency" material; home addresses of public employees *may* be withheld under §89(7), but it was held that an agency, a city school district, *could* disclose those addresses, notwithstanding objections by a union [Buffalo Teachers Federation v. Buffalo Board of Education, 549 NYS 2d 541, 156 AD 2d 1027

(1990)]. In short, even though an agency may have the authority to withhold records, the State's highest court has held that there is no obligation to do so [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. The only instance in which an agency is obliged to withhold would involve those cases in which records are specifically exempted from disclosure by statute.

Third, in a related vein, 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.

Next, I point out 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. In my opinion, three of the grounds for denial may be relevant with respect to cellular phone records.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of

statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different 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.

Also pertinent 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 cellular 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, 179 AD 2d 763 (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, may be relevant, perhaps with respect to some of the records. 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, I 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. On the other hand, if a District employee does not routinely use a cellular phone to contact parents of students, the Buckley Amendment would be inapplicable.

In sum, in my opinion, it is likely that the records that you disclosed would be accessible under the Freedom of Information Law to any person, except to the extent that the records might identify a particular student or students.

With respect to the Open Meetings Law, like the Freedom of Information Law, that statute is based on a presumption of openness. Meetings of public bodies must be conducted open to the public except to the extent that there is a basis for entry into an executive session. The grounds for entry into executive session are specified and limited to the subjects appearing in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

In the context of your inquiry, if, for example, the issue involves the extent to which the kinds of records that you disclosed are public or should not have been disclosed, it does not appear that there would be any basis for entry into an executive session. However, if, for instance, the Board is discussing your actions and perhaps seeking your removal, §105(1)(f) might be applicable. That provision permits a public body to conduct an executive session to discuss:

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

Lastly, it is noted that like the Freedom of Information Law, the Open Meetings Law is permissive. A public body *may* enter into executive session to discuss certain subjects but it is not obliged to do so. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", it is reiterated that the term "confidential" has a narrow technical meaning. For records or for information acquired during an executive session 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 instance, 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. Again, the Family Educational Rights and Privacy Act generally prohibits an educational 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.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

While there may be no prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the purpose of an executive session is to enable members of public bodies to deliberate, to speak freely and to develop strategies in situations in which some degree of secrecy is permitted. Similarly, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. In both cases, inappropriate disclosures could work against the interests of a public body as a whole and the public generally. Further, a unilateral disclosure by a member of a public body might serve to defeat or circumvent the principles under which those bodies are intended to operate. Historically, I believe that public bodies were created to order to reach collective determinations, determinations that better reflect various points of view within a community than a single decision maker could reach alone. Members of boards should not in my opinion be unanimous in every instance; on the contrary, they should represent disparate points of view which, when conveyed as part of a deliberative process, lead to fair and representative decision making. Nevertheless, notwithstanding distinctions in points of view, the decision or consensus by the majority of a public body should in my opinion be recognized and honored by those members who may dissent. Disclosure made contrary to or in the

absence of consent by the majority could result in unwarranted invasions of personal privacy, impairment of collective bargaining negotiations or even interference with criminal or other investigations. In those kinds of situations, even though there may be no statute that prohibits disclosure, release of information could be damaging to individuals and the functioning of government.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Joseph E. LaMendola
Dr. Robert E. DiFlorio
Robert C. Allen, Jr.

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May 2, 1996

Mr. Giacomo Russo
[redacted]

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. Russo:

Your letter of April 28 addressed to Secretary of State Treadwell has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State upon which the Secretary serves as a member, is authorized to offer advisory opinions concerning the Freedom of Information Law. As indicated above, the staff of the Committee is permitted to respond on behalf of its members.

You have sought opinions concerning the adequacy of responses to requests directed to the Departments of Law and Environmental Conservation.

In the case of the former, the Records Access Officer for the Department of Law acknowledged the receipt of your request in a timely manner and indicated that "a response to your inquiry will be forwarded as soon as possible." You contend that the response should have included reference to an approximate date when the request would be granted or denied. I agree.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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 Law requires that an estimated date for granting or denying a request must be given in an acknowledgement to reflect those factors. Those kinds of considerations may often be present, particularly in large agencies that may have several units or perhaps regional offices.

With respect to the latter, Malcolm A. Coutant, Regional Attorney for Region 5 of the Department of Environmental Conservation, wrote that your request "is too general in nature and that you are seeking legal research concerning the fundamental principles of Federal and State government authority, both as it relates to private property and the individual," and that the Freedom of Information Law does not require that agencies conduct legal research. Your request states as follows:

> "I request certified copies of the following public records either produced, generated, maintained, required to be filed with or to be in the possession of that entity addressed above by either, Federal or State statutes, Municipal corporation rules, regulations, and/or ordinances:
>
> Those powers of attorney, contracts, agreements, letters of intent, permits, licenses, revocations, waivers or discharge of; Inalienable, Constitutional, Common Law Rights or of the Uniform Commercial Codes, or any other lawful instrument which either bequested, gifted, granted, surrendered, acknowledged or gave to the above identified entity the following:
>
> **A.** Title, interest, control, jurisdiction or sovereignty to, in or over my property being described as: Tax map lot #'s 217-1-29, 217-2-49 being in the town of Malta, New York and declared to be part of lot number one of the subdivision of Lot 13 of the 5th General Allotment of the Patent of Kayaderosseras, filed at the Saratoga County Clerks Office located in Ballston Spa, New York.
>
> **B.** Interest, control, jurisdiction and sovereignty to, in of and over my private

person and any and all members of my immediate family.

C. Interest, control, jurisdiction and sovereignty to, of and over my personal and privacy properties.

D. Interest, control, jurisdiction over **PRIVATE, PERSONAL, NATURAL, ABSOLUTE, SUBSTANTIVE, INALIENABLE RIGHTS** belonging to me and\my immediate family pursuant to **THE FOUNDING ORGANIC DOCUMENTS OF THIS REPUBLIC** (9th & 10th Amend.; 28 USC §1602-1611; ETC.)" (emphasis yours).

While your intent is not completely clear, it appears that you are requesting copies of records maintained by the agencies pertaining to your real property, to you, or to any member of your immediate family. If my interpretation is accurate, I believe that the primary issue involves the extent to which the requests "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. I point out that it has been held by the Court of Appeals 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)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and 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.

While I am unfamiliar with the recordkeeping systems of the agencies to which you referred, to extent that the records sought can be located with reasonable effort, I believe that the request would have met the requirement of reasonably describing the records. On the other hand, if the records are not maintained in a manner that permits their retrieval except by reviewing perhaps thousands of records individually in an effort to locate those falling within the scope of the request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records. Further, in the context of the request, a real question involves, very simply, where does an agency begin to look for records. In the case of the Department of Environmental Conservation, it is possible that records falling within the scope of your request may be maintained at both regional and main offices. Moreover, merely by means of a review of the portion of the State Directory relating to that agency, it is possible that records pertaining to your property, to you or to your family members might be maintained by a variety of units within Department. In some instances, records might be maintained by tax map lot number, in others, by name, in still others by other means. For example, correspondence between members of the public and an office within an agency might be filed by name or perhaps chronologically. In the latter case, there may be no feasible way of locating records in which names or locations of property appear.

Similarly, I am unaware of the extent to which the agencies maintain information electronically. It has been advised that if 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 is not required to create records in response to a request, 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, the issue in my opinion involves the extent to which your request met the standard of reasonably describing the records sought. It is suggested that ensuing requests be more focused and that you include additional details wherever possible in order to enable agency staff to locate and identify the records sought.

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:jm

cc: Marin E. Gibson
Malcolm A. Coutant
Alexander S. Treadwell

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May 3, 1996

Mr. Ray Beckerman
[redacted]

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, unless otherwise indicated.

Dear Mr. Beckerman:

As you are aware, I have received your correspondence pertaining to the Fort Totten Redevelopment Authority (FTRA). Your inquiry involves the status of the FTRA under the Freedom of Information and Open Meetings Laws.

By way of background, the FTRA is a "local redevelopment authority" (LRA) that was created in conjunction with the Federal Base Closure Act. Section 2918(c) of Pub.L. 103-160 as amended by Pub.L. 103-337 states that:

> "The term 'redevelopment authority', in the case of an installation to be closed under this part, means any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan."

Further, the regulations promulgated pursuant to the statute defines the phrase "local redevelopment authority" to mean:

> "Any authority or instrumentality established by state or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to the installation or for directing implementation of the plan" 32 CFR 91.3(g).

It is noted that the use of the term "authority" in this context differs from its common meaning in New York State law. Under state law, an authority is typically a kind of public corporation that is created by an act of the State Legislature. There is no particular method of creating an LRA, and an LRA clearly is not a public corporation. Further, if there is no recognized LRA, the applicable military department is authorized to proceed under pertinent "property disposal and environmental laws and regulations" [32 CFR 91.7(d)(3)(i)]. Therefore, while there is no requirement that they must exist, LRA's are created locally in order to provide the community at the site of a base closing with an opportunity to have a voice regarding the use of the base.

It is also noted that there are two kinds of LRA's. One has the power to purchase or convey real property and is characterized as an "implementation" LRA. The other has the duty of representing a community and developing a plan that must be approved by the Department of Defense, as well as other federal agencies in some instances and is known as a "planning" LRA. I have been informed that the FTRA has been recognized by the Secretary of Defense as a planning LRA. As such, it does not have authority equivalent to an implementation LRA.

I was also informed that the FTRA was created by means of a memorandum of agreement signed by the Mayor of New York City and the Queens Borough President.

With respect to its status under the Open Meetings Law, based upon a decision rendered by the Court of Appeals, it appears that the FTRA is not subject to that statute. In a decision that dealt with a "laboratory animal use committee" (LAUC) that was required to be established pursuant to federal law and was instituted at the State University at Stony Brook, it was determined that the entity in question fell beyond the scope of the Open Meetings Law.

That statute pertains to meetings of public bodies, and §102(2) defines the phrase "public body" to mean:

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

Following its reference to the definition, the Court found that:

> "It is thus evident that the Open Meetings Law excludes Federal bodies from its ambit.
>
> "The LAUC's constituency, powers and functions derive solely from Federal law and

> regulations. Thus, even if it could be characterized as a governmental entity, it is at most a *Federal* body that is not covered under the Open Meetings Law" [ASPCA v. Board of Trustees of the State University of New York, 79 NY 2d 927, 929 (1992)].

As in this instance, the LAUC was created by an instrumentality of government in New York, and its members were selected by New York government officials. Although both the LAUC and the FTRA were created by the action of New York government officials, the existence of those entities "derive[s] solely from Federal law and regulations." Due to the similarity relative to the creation and basis for existence between the LAUC and the FTRA, again, it appears that the FTRA would not constitute a "public body" required to comply with the Open Meetings Law. Additionally, having discussed the matter with federal and other officials, I was informed that there is no provision of federal law that specifies that an LRA is required to conduct its meetings open to the public.

Notwithstanding the foregoing, I believe that records involving the activities of the FTRA generally fall within the coverage of the State's Freedom of Information Law. Further, having conferred with Michael Rogovin of the Office of the Queens Borough President, it appears that efforts have been made to ensure the disclosure of records pertinent to the FTRA by that office.

The Freedom of Information Law pertains to agency records, and due to the breadth of the definition of the term "record", the application of the Freedom of Information Law is more extensive than its counterpart, the Open Meetings Law. Section 86(4) of the Freedom of Information Law defines the term "record" to include:

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

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. 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).

Similarly, in a case involving documents maintained by a city relating to a deceased mayor, it was held that the documents constituted "records" that fall within the scope of the Freedom of Information Law, even though they might have pertained to the former mayor in a personal capacity or in his capacity as political party leader [see Capital Newspapers v. Whalen, 69 NY 2d 246 (1987)].

In sum, irrespective of the status of the LRA for purposes of the Open Meetings Law, any records maintained by the Office of the Borough President or any other New York City agency would in my view constitute "records" subject to rights of access conferred by the Freedom of Information Law. In addition, since the LRA was established by a memorandum of agreement signed by New York City officials, arguably any records of the LRA might be characterized as having been kept, held or produced for an agency [i.e., the City of New York].

The foregoing is not intended to suggest that all records must necessarily be disclosed, but rather that they are 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 §87(2)(a) through (i) of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Rogovin
Joyce Shepard
Nicole Doucette
Diane Demuth

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May 6, 1996

Ms. Barbara Hodge
[redacted]

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 Ms. Hodge et al.:

I have received your letter of April 13 in which you wrote that despite your status as members of the Wyandanch-Wheatley Heights Ambulance Corporation, you have had difficulty in relation to meetings of its Board of Directors.

In some instances, meetings are not held when they are scheduled, executive sessions "are never voted on at an open meeting", notice is not posted, meetings are held in a small room, minutes are not prepared and voting records are not maintained.

In this regard, I offer the following comments.

First, the Open Meetings Law pertains 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."

While there is no judicial decision of which I am aware dealing with the status of the board of directors of an ambulance corporation, assuming that it is a volunteer organization, it would appear to be subject to the Open Meetings Law.

In general, the Open Meetings Law does not apply to meetings of the governing bodies of not-for-profit corporations. However,

in construing the counterpart to the Open Meetings Law, it was found by the state's highest court that a volunteer fire company is an "agency" required to comply with the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)]. In addition, more recently it was determined that a volunteer ambulance corporation is also covered by the Freedom of Information Law because it performs its duties solely for an ambulance district and a town [see Ryan v. Mastic Volunteer Ambulance Corp., 622 NYS 2d 795, 212 AD 2d 716 (1995)]. If the ambulance company in question is similar in nature, I believe that the board of directors would constitute a "public body" required to comply with the Open Meetings Law. Based on that assumption, I offer the following comments regarding your remarks.

First, I point out that every meeting must be convened as an open meeting, and that §102(3) of the Open Meetings Law defines the phrase "executive session" to mean a portion of an open meeting during which the public may be excluded. As such, it is clear that an executive session is not separate and distinct from an open meeting, but rather that it is a part of an open meeting. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Second, 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. If, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Further, notice must be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Third, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six 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 date of such meeting."

In a related vein, 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. 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)].

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. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Next, although the Open Meetings Law does not specify where meetings must be held, §103(a) of the Law states in part that "Every meeting of a public body shall be open to the general public..." Further, the intent of the Open Meetings Law is clearly stated in §100 as follows:

> "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 an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of those who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, if it is known in advance of a meeting that a larger crowd is likely to attend than the usual meeting location will accommodate, and if a larger facility is available, it would be reasonable and consistent with the intent of the Law to hold the meeting in the larger facility. Conversely, assuming the same facts, I believe that it would be unreasonable to hold a meeting in a facility that would not accommodate those interested in attending.

Lastly, there is nothing in the Open Meetings Law or any other law of which I am aware that would require the preparation of an agenda prior to a meeting or its distribution at a meeting.

In an effort to enhance compliance with and understanding of the matter, a copy of this opinion will be sent to the Ambulance Corporation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wyandanch-Wheatley Heights Ambulance Corporation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9447

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

May 6, 1996

Mr. Eric Evans
95-A-1077 I-6-3
P.O. Box 500
Elmira, NY 14902

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

Dear Mr. Evans:

I have received your letter of April 6, which reached this office on April 18. You have complained that responses to your requests directed to the New York City Police Department have not been answered in a timely manner, and you asked for guidance on 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 Karen Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9448

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

May 7, 1996

Mr. Michael Patnik
[redacted]

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. Patnik:

I have received your letter of April 18, as well as the correspondence attached to it. You have sought assistance in your efforts to obtain records from the Office of the Westchester County District Attorney.

As I understand the matter, you were the defendant in Justice Court in the Village of Mamaroneck, and two documents were requested in 1995, both of which were withheld by the Office of the District Attorney. It appears that the records sought involve witness statements or similar kinds of materials. Nevertheless, the correspondence indicates that your attorney was permitted to read the records in question and take notes regarding their content. Notwithstanding that disclosure, the District Attorney has sustained denials of your request.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it would appear that the kinds of records that you requested could typically be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [§87(2)(b)] and that the records were compiled for law enforcement purposes and include confidential information [§87(2)(e)(iii)].

Second, assuming that the records sought could ordinarily be withheld with justification under the Freedom of Information Law, the question in my view is whether the disclosure to your attorney was inadvertent or intentional. It has been held that an erroneous

or inadvertent disclosure does not create a right of access on the part of the public or the person who may have seen the record [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)]. On the other hand, if the disclosure was purposeful rather than inadvertent, I believe that such a disclosure would have created a right of access on the part of your attorney and, therefore, yourself.

On the basis of the correspondence, I cannot ascertain whether the disclosure to your attorney was inadvertent or purposeful. It is suggested that you contact the District Attorney's FOIL Appeals Officer and ask that he make such a determination and perhaps reconsider his response based upon his finding. In an effort to expedite the process, a copy of this response will be forwarded to the appeals officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard E. Weill, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO 9449

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

May 7, 1996

Hon. Charles F. Savage
City Clerk
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3893

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. Savage:

I have received your letter of April 19 in which you sought guidance concerning the charge that may be assessed for providing a copy of an audio tape.

In this regard, I offer the following comments.

First, §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."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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].

Second, when a record is accessible under the Freedom of Information Law, §87(2) specifies that it is available for "inspection and copying." "Inspection" of a tape recording would, in my opinion, involve enabling a person to listen to it. Similarly, I believe that a person could copy a tape recording by using his or her equipment to reproduce the content of a tape. In those instance, I do not believe that an agency could charge a fee.

Section 89(3) of the Law obliges agencies to make copies of accessible records upon payment of the appropriate fee. With regard to fees, §87(1)(b)(iii) of the Freedom of Information Law states that an agency's rules and regulations must include reference to:

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

As I interpret the language quoted above, unless a different statute provides direction, the first clause provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be photocopied, such as tape recordings. With respect to those records, the regulations promulgated by the Committee on Open Government indicate that the actual cost of reproduction "is the average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries" [21 NYCRR §1401.8(c)(3); see Zaleski, supra]. Therefore, the actual cost of copying a tape recording would ordinarily be the cost of a blank tape.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9450

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

May 7, 1996

Mr. John P. Hynes
[redacted]

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. Hynes:

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

According to your letter, you have attempted without success to obtain records relating to a bus schedule from the New York City Transit Authority. The records sought would consist of "a list of all scheduled runs for Monday, August 28, 1995, for the Q54 bus line", including the starting and termination points of each trip. As I understand the matter, your requests and appeals have not been answered by the Authority.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if no list or other records exist containing the information in which you are interested, the Authority would not be obliged to prepare new records containing that information on your behalf.

Second, if the records sought exist, I believe that they would be available under law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant in this instance is §87(2)(g)(i). That provision specifies that insofar as intra-agency materials consist of statistical or factual information, they must be disclosed. From my perspective, the information sought would clearly be factual in nature.

Consequently, if it exists, again, I believe that the Authority would be required to disclose.

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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
E. Virgil Conway, Chairman and Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9451

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

May 7, 1996

Mr. John Uciechowski
[redacted]

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

Dear Mr. Uciechowski:

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

According to the correspondence, you submitted a request pursuant to the Freedom of Information Law to the Sullivan County District Attorney for "all papers regarding the indictment, trial, or trial by jury, and verdict" of a named defendant in a criminal proceeding, as well as the names of any attorneys who represented the defendant and the "Judges or Justices who heard this case." In response to the request, you were informed that the agency maintained "several documents" that fell within the scope of your request, but that only one would be made available. Because the District Attorney did not indicate the reasons for a denial of access to the records withheld or inform you of the right to appeal, you wrote to him again on the matter. You indicated that he wrote that "I am not obligated nor do I intend to continuing [sic] responding to your letters and faxes seeking information that you can obtain through your own searching of record."

You have asked that this office "intervene" in order that you "may view the records pertaining to this file in the District Attorney's office."

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. It is not empowered to "intervene" in the legal sense or otherwise compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

In turn, §86(1) defines 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 office of a district attorney is clearly subject to the Freedom of Information Law; the courts and court records, however, fall beyond the coverage of that statute.

I am unaware of the nature of the documents falling within the scope of your request that are in possession of the Office of the District Attorney. However, I note that it has been held that court records maintained by the office of a district attorney are not agency records, and that such records need not be disclosed in response to a request made under the Freedom of Information Law [see Moore v. Santucci, 151 AD 2d 677, 680 (1989)]. Therefore, to the extent that the records sought can be characterized as court records, rather than agency records, the District Attorney would not be required to disclose, for the Freedom of Information Law would not apply. On the other hand, insofar as the records sought are not court records, I believe that the Freedom of Information Law would be applicable and that the District Attorney would be obliged to disclose to the extent required by that statute.

Notwithstanding the technical legal remarks offered above, it is suggested that you follow the course suggested by the District Attorney, that is, that you inspect records containing the information sought maintained by the court in which the proceeding was conducted. While the courts and court records are not subject to the Freedom of Information Law, most court records are available under other provisions of law (see e.g., Judiciary Law, §255).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Stephen F. Lungen, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9452

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

May 8, 1996

Mr. Keith Harris
92-A-2305
Green Haven Corr. Facility
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 information presented in your correspondence.

Dear Mr. Harris:

I have received your letter of April 19, as well as the correspondence attached to it. You have complained that the Office of the Kings County District Attorney has failed to respond to your requests for records in a timely manner.

According to the materials, beginning in June of 1995, several requests were made and their receipt was acknowledged with statements indicating that you would receive responses at some unspecified time in the future. Most recently, in response to an appeal, you were informed that your request "has been neither actually nor constructively denied", and you were told that you could "anticipate that you will be hearing from one of this office's records access officers within the next 45 days."

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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a somewhat similar situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Melanie M. Marmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9453

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

May 8, 1996

Mr. Louis Bracero
94-A-8203 G-5-11
E.C.F. Box 500
Elmira, NY 14902-0500

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

Dear Mr. Bracero:

I have received your letter of April 16 addressed to Gail S. Shaffer. Please be advised that Alexander F. Treadwell is now the Secretary of State.

You have complained that you have encountered delays in responses to your requests for records maintained by the Office of the Bronx County District Attorney and the New York City Police Department, and you have sought guidance on 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such

request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 Police is Karen Pakstis, Assistant Commissioner Civil Matters; the person so designated by the Bronx County District Attorney is Anthony Girese, Counsel to the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Elizabeth F. Bernhardt
C. Steinberg
Lt. Joseph Cannata

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9454

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

May 8, 1996

Ms. Connie Lightner, CMC
Town Clerk
Town of Vestal
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 information presented in your correspondence.

Dear Ms. Lightner:

I have received your letter of April 25 in which you asked that I confirm in writing an opinion offer earlier during our telephone conversation.

You wrote that the Town of Vestal received a request "to look at the back of a check [you] paid a Company for repairs to [y]our Fire Trucks", and you added that the applicant for the record "is looking to apply a lien against this Company and wanted the name of the Company's Bank."

In this regard, I offer the following comments.

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

Second, 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 intended use of the records is in my opinion irrelevant.

Third, in a case involving a request for copies of both sides of a check payable to a municipal officer, although the front side of cancelled checks was found to be public, it was held that the back of the check may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy [see FOIL, §87(2)(b)]. The court found, in essence, that inspection of the back of a check could indicate how an individual chooses to spend his or her money, which is irrelevant to the performance of that person's duties(see Minerva v. Village of Valley Stream, Supreme Court, Nassau County, May 20, 1981).

In the context of the request that is the subject of your inquiry, the check does not pertain to a Town officer or employee or to a natural person. Rather, it pertains to a commercial entity. From my perspective and based upon judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the State's highest court, the Court of Appeals, that focuses upon the privacy provisions, the court referred to the authority to withhold "certain personal information about private citizens" [see Matter of Federation of New York State Rifle and Pistol Clubs, Inc. v. The New York City Police Department, 73 NY 2d 92 (1989)]. In a decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). More recently, in a case concerning records pertaining to the performance of individual

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

In short, because the record in question relates to a commercial entity, I do not believe that the provisions in the Freedom of Information Law pertaining to the protection of personal privacy could be asserted to withhold the record in question or that any other ground for denial would justify withholding the record.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL AO- 9455

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

May 9, 1996

Mr. Robert Noble, Managing Editor
Empire News Exchange
PO Box 742
Schenectady, NY 12301

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. Noble:

I have received your letter of April 23 in which you wrote that the "Empire News Exchange has been experiencing difficulty in obtaining daily log information (sometimes commonly called the 'police blotter') consisting of records of telephone calls, complaints, arrests, and other factual information from the Saratoga County Sheriff's Department." You indicated that you were informed that "because the data is only in a computer, which also contains other material to which [you] may not be entitled (names of under-age suspects, for example), that the department does not have the time and staff needed to make and review the necessary printouts."

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

First, the Freedom of Information Law pertains 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."

Based on the foregoing, irrespective of the manner in which its characterized or whether it is maintained on paper or

electronically, I believe that the daily log would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

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

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

As you may be 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, in general, based upon custom and usage. The contents of what might be characterized as a police blotter may vary from one police department to another and often police departments use different terms for records or reports analogous to police blotters. In 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 or other record is analogous to that described in Sheehan in terms of its contents, I

believe that the public would have the right to review it in its entirety.

If the logs in question are more expansive than the traditional police blotter described in Sheehan, portions might be withheld, depending upon their contents and the effects of disclosure. Several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. The following paragraphs will review the grounds for denial that may be significant.

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

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". It might be applicable relative to the deletion of identifying details in a variety of situations, such as domestic disputes, complaints that neighbors' dogs are barking, or where a record identifies a confidential source or a witness, for example.

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

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

In my opinion, a record 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 reports, such as investigative reports, would likely fall within the scope of §87(2)(e). Those records would be accessible or deniable, depending upon their contents and the effects of disclosure.

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

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

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

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

Since the logs are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, if indeed they consist of factual information, §87(2)(g) could not, in my opinion, be asserted as a basis for denial.

Further, although they 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 statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was

held by the state's highest court, the Court of Appeals, more than ten years ago that, 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)].

In sum, the possibility that some aspects of the records might properly be withheld does not enable an agency to withhold them in their entirety. Rather, I believe that an agency must disclose records, to the extent required by the Freedom of Information Law, perhaps after having made deletions in accordance with the grounds for denial appearing in the Law.

Third, as suggested earlier, when information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Since the definition of "record" includes specific reference to computer tapes and discs, it was held some sixteen 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. Because §89(3) states that an agency is not required 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)].

Under the circumstances that you described, I believe that the Department in my opinion would be required to print out the log and disclose its contents, following deletions made where appropriate pursuant to the grounds for denial appearing in §87(2) of the Freedom of Information Law. As an aside, I believe that there is software that has been developed concerning police blotter entries that segregates accessible and deniable information. For instance, if an entry pertains to a juvenile offender, it is coded and automatically removed from a printout generated later. With that kind of program, the blotter or its equivalent can be disclosed without engaging in a review of the record to determine the extent to which deletions may properly be made.

Lastly, it has been held judicially that a shortage of manpower to comply with a request does not constitute a valid basis for a denial of access to records. In United Federation of Teachers v. New York City Health and Hospitals Corporation, which involved a request for some 1,500 records, it was stated that:

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

In short, I do not believe that an agency can reject a request based on a contention that lacks the staff needed to review the records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Kathy Marchione
Sheriff James Bowen
Peter Danziger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9456

162 Washington Avenue, Albany, New York 12231
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May 9, 1996

Mr. Ira Goodman
[redacted]

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. Goodman:

I have received your letter of April 23 in which you sought "support" for your position that certain "biographical sketches" submitted to the Racing and Wagering Board must be disclosed to you.

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, pertinent to the matter are §§87(2)(b) and 89(2)(b), which enable an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy". While I cannot conjecture as to the content of the information that has been deleted or withheld, it is important noted that there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities. One such case involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal

> farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of

> children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

Based on the foregoing, to the extent that redactions were based on the privacy provisions of the Freedom of Information Law and pertain to persons in a business or professional capacity, they might not have appropriately been made. Conversely, insofar as the redactions involved personal information that does not relate to persons in their business capacities, it would appear that the agency acted appropriately.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Robert A. Feuerstein
Gale Berg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9457

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 9, 1996

Mr. Alfred Otto Kowalewsky Kuhnle
PO Box 110330
Cambria Heights, NY 11411-0330

Dear Mr. Kuhnle:

I have received your letter of April 18 in which you wrote that you have been "stonewalled" by Jay Fremont of the State Retirement System with respect to your requests under the Freedom of Information Law.

In an effort to learn more of the matter, I contacted Jeffrey Gordon, the records access officer for the Office of the State Comptroller, which houses the State Retirement System. Mr. Gordon informed me that having searched his files and contacted Mr. Fremont, there is no record of the receipt of any request from you. Consequently, it is suggested that you transmit a new request to Mr. Gordon. I note that an agency's records access officer has the duty of coordinating the agency's response to requests.

In addition, having reviewed your request, I point out that you sought information by raising a series of questions. In this regard, 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, in a technical sense, the agency in my view is not obliged to provide the information sought by answering the questions raised in the request. Nevertheless, in conjunction with the general thrust, intent and spirit of the Freedom of Information Law, it is likely that it maintains records reflective of some of the information sought, and that it can disclose "information" derived from existing records.

In any ensuing requests, it is suggested that you seek existing records rather than attempting to elicit information by asking questions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Jeffrey Gordon
Jay Fremont

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9458

162 Washington Avenue, Albany, New York 12231
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May 13, 1996

Mr. Daniel G. Annutto
All County Taxpayer's Association
P.O. Box 172
Ilion, NY 13357

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

Dear Mr. Annutto:

I have received your letter of April 25 in which you sought an advisory opinion concerning the status of the Mohawk Valley Economic Development District, Inc. (MVEDD) under the Freedom of Information Law.

MVEDD is a not-for-profit corporation which, as I understand the matter, receives grant monies from various entities of government and provides economic development services to the business community.

In my view, the issue is whether the MVEDD is an "agency" required to comply with the Freedom of Information Law. For purposes of that statute, the term "agency" is defined 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" [§86(3)].

Of potential relevance to your inquiry is a recent decision rendered by the Court of Appeals, the State's highest court, in which it was held that a not-for-profit local development corporation is an "agency" required to comply with the Freedom of Information Law [Buffalo News v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)]. In so holding; the Court found that:

> "The BEDC seeks to squeeze itself out of that broad multipurposed definition by relying principally on Federal precedents interpreting FOIL's counterpart, the Freedom of Information Act (5 U.S.C. §552). The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus the BEDC is a 'governmental entity' performing a governmental function of the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

Based on the foregoing, if the relationship between the MVEDD and one or more governmental entities is similar to that of the BEDC and the City of Buffalo, the MVEDD would likely constitute an "agency" required to comply with the Freedom of Information Law. Nevertheless, having discussed the matter with Michael Reese, MVEDD's executive director, I was informed that there is virtually no government control over MVEDD. Unlike the BEDC, government has no control over the designation of MVEDD's membership or directors, and it appears to physically and fiscally operate outside of government. If that is so, it is unlikely in my view that MVEDD would constitute an "agency" required to comply with the Freedom of Information Law.

If you have additional or different information on the mat
please feel free to contact me.

I hope that the foregoing serves to clarify your understanding of the coverage of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael Reese

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9459

162 Washington Avenue, Albany, New York 12231
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May 13, 1996

Mr. Tony DiNapoli
[redacted]

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. DiNapoli:

I have received your letter of April 25, as well as the materials attached to it.

You have sought an opinion concerning a rejection of your request made under the Freedom of Information Law directed to the Town of Richmondville. By way of background, a report prepared by an engineering firm as a consultant to the Town apparently supported the Town Board's desire to create a new water district. The reports states in part that "[M]ore than a dozen homes have had wells go entirely dry..." You requested a list of the names and addresses of owners of the homes whose wells have gone dry. The Town Clerk denied access for the following reasons:

> "1. The material sought, if it exists at all, cannot be readily located and found.
>
> 2. The material sought, if it exists, and if disclosed, would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of Article Six of the Public Officers Law."

In response to your appeal, the Town Supervisor indicated that because the Town Clerk wrote that any such list, "if it exists at all", could not be readily located and that, therefore the response was not a denial of your request. She added that she concurred that if such a list did exist, it could be withheld on the ground that disclosure would constitute "an unwarranted invasion of privacy." In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if no list containing the information sought exists, the Town would not be required to prepare such a list on your behalf.

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

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [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, it is unclear whether a list exists. Further, I am unaware of the means by which the Town's records are maintained. If a list or its equivalent can be located based upon the Town's filing system, I believe that your request would meet the standard of reasonably describing the records sought. On the other hand, if, in order to locate the record, Town officials must review perhaps hundreds or thousands of pages or

entries, it seems that the request would not reasonably describe the records.

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

As indicated in the correspondence, §87(2)(b) permits 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. If indeed disclosure of records identifying those whose wells have run dry would cause them personal or economic hardship, I would agree that the Town could deny access on that basis [see §89(2)(b)(iv) and (v)].

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: Maggie Wohlfarth, Town Clerk
Betsy Bernocco, Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9460

162 Washington Avenue, Albany, New York 12231
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May 13, 1996

Mr. John E. Anderson, 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 information presented in your correspondence.

Dear Mr. Anderson:

I have received your letter of April 26. Attached to the letter are copies of tax bills issued by Columbia and Nassau Counties. The former is quite brief, while the latter includes a breakdown indicating the manner in which tax dollars are to be expended. Your question "is should [your] county tell us what we are paying for like other county?"

In this regard, the Committee on Open Government is authorized to offer opinions concerning public access to government records under the Freedom of Information Law. I am unaware of the requirements concerning the form and content of county tax bills. To acquire information on that subject, it is suggested that you contact the Office of the State Comptroller.

Nevertheless, every county is required, on request, to disclose information indicating the manner in which tax dollars are allocated or spent in response to a request made under the Freedom of Information Law. It is suggested that you seek the information of your interest by contacting the County's "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. Often at the county level, the person so designated is the clerk of the county legislative body.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 County's budget, which is clearly available under the Freedom of Information Law, includes the kind of breakdown to which you referred, in substantial detail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9461

162 Washington Avenue, Albany, New York 12231
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May 13, 1996

Mr. George Cruz
93-A-0076
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. Cruz:

I have received your letter of April 21 in which you questioned the propriety of a denial of your request for your pre-sentence report by the New York City Department of Probation.

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 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 AD2d 488 (1987)] in my view confirmed that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

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

cc: Louis Gelormino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9462

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

May 13, 1996

Ms. Florence Gioia
[redacted]

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, unless otherwise indicated.

Dear Ms. Gioia:

As you are aware, I have received your letter of April 23, as well as a variety of material relating to it. My understanding is that you are attempting to acquire information concerning expenditures made by the City of Batavia involving the maintenance of bridges from December of 1973 to December of 1993.

In an effort to learn more of the matter, I contacted the City Clerk. In short, she informed me that the City has disclosed to you all of the records that it maintains on the subject. She also indicated that any authorization to expend monies regarding the bridges requires approval by the City Council, and minutes indicating any such expenditures have been disclosed to you.

I note that the Freedom of Information Law pertains to existing records and that §89(3) of that statute states in part that an agency is not required to create a record in response to a request. The City Clerk informed me that there is no particular record or series of records that would relate solely to transactions involving maintenance of bridges. Rather, information about the bridges is maintained in a series of records that have been prepared over the course of twenty years. Because the City maintains no summary of activities involving the bridges or similar kind of records pertaining to the bridges only, it is not required to prepare a new record or records in an effort to provide a package of information on your behalf dealing with the particular subject of your interest.

In sum, I believe that the City has disclosed the records that you have requested to the extent that they exist and in accordance with the manner in which the records are maintained.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rebecca Chwatt, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9463

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

May 13, 1996

Mr. George Freeman
The New York Times Company
Legal Department
229 West 43 Street
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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Freeman:

As you are aware, I have received your letter of April 25. You have sought an advisory opinion concerning a request made by the New York Times for records of the New York City Departments of Investigation and Buildings relating to the suspension of 42 elevator inspectors employed by the Department of Buildings. Specifically, the Times has requested the names of the those suspended and the reasons for the suspensions.

According to your letter and related materials, an investigation led by the U.S. Attorney will determine whether criminal charges will be brought, and I have received a letter from Richard W. Mark, First Deputy Commissioner of the Department of Investigation, explaining the City's position and its rationale for the blanket denial of the Times' request.

Mr. Mark has contended that "[r]elease of the requested documents would interfere directly with an ongoing criminal investigation, and with ongoing disciplinary proceedings." Citing judicial decisions rendered under the federal Freedom of Information Act, he added that:

> "Courts have upheld the assertion of the law enforcement exemption to deny requests for records that, if disclosed, could reveal the direction of an investigation, show the priority accorded to different investigative steps, identify entities assisting in the investigation, or would give potential subjects a basis for interfering in the continuing investigation."

In his letter to me, Mr. Mark specified that his agency "will not comment on or describe the nature of the ongoing criminal investigation involving the elevator inspectors" and asserted that "[n]o reading of FOIL would require an agency to release any law enforcement records in the midst of a pending investigation." He also indicated that no charges have yet been determined or initiated with respect to the suspended elevator inspectors, and he has contended that advisory opinions rendered by this office support his position.

I would agree with Mr. Mark's contention that records compiled for law enforcement purposes that would interfere with an investigation if disclosed may be withheld. The Times, however, did not request the kinds of records which if disclosed would interfere with an investigation, and in fact, you specified in your letter that the "[T]imes acknowledges that it is not entitled to documents which would interfere with law enforcement investigations." Nevertheless, I disagree with Mr. Mark's statement that "no reading" of the statute "would require an agency to release any law enforcement records in the midst of a pending investigation." Law enforcement records are frequently disclosed to the public during law enforcement investigations. Often disclosures concerning investigations are made to the public and the news media in an effort to acquire information or assist in the course of an investigation. Often arrests are made and the names of those taken into custody are disclosed, even though those matters may relate to a continuing investigation. In short, in view of its breadth, I believe that Mr. Mark's assertion is inaccurate.

The language of the Freedom of Information Law itself indicates that the ability to withhold records is based upon the harm that could arise as a result of disclosure. Nothing in that language suggests that all law enforcement records relating to an ongoing investigation may justifiably be withheld. The key provision, §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."

Only to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) can an agency justify withholding records pursuant to §87(2)(e). As we agreed during our initial conversation of the matter and as you indicated in your letter, those who have been suspended are fully aware of their suspensions. If a matter is under investigation and premature disclosure would enable possible lawbreakers to evade detection or flee, I would agree that disclosure would interfere with the investigation. However, in this instance, it is clear that New York City agencies have contacted the individuals involved and have informed them of the action taken against them, as well perhaps as the reasons for that action. Based on a Times article, there has been disclosure of the general nature of misconduct in which the suspended employees engaged. According to the article:

> "'The nature of the misconduct was not to pretend that it was safe when it was falling down,' one official said. Instead, the case involved inspectors who extorted money from building contractors by citing the buildings with minor infractions and offered to help cut through the city bureaucracy in exchange for cash payments...
>
> "The suspensions are a result of a three-year investigation involving a sting operation in which city investigators posed as contractors who would offer bribes to elevator inspectors, law enforcement officials said. On Wednesday night, agents from the Federal Bureau of Investigation and the city's Department of Investigation fanned out across the city to question some of the inspectors. Yesterday morning, the 42 inspectors were suspended when they went to work."

Based on the foregoing, general information about the investigation has been disclosed. Disclosure of equivalent information, including the names of those suspended, could not in my view interfere with the investigation. Similarly, if the reasons for the suspensions have been made known to those suspended, it is difficult to envision how disclosure of that information would have an adverse impact upon the criminal investigation that is currently being led by the United States Attorney.

Mr. Mark has also contended that disclosure of the identities of those suspended and the reasons for their suspensions would constitute "an unwarranted invasion of personal privacy" pursuant to §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. 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,

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].

Also relevant to an analysis of the matter is §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.

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]. When charges have not yet been determined or did not result in disciplinary action, the records relating to the 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)].

In the context of the issue at hand, I must admit that I am somewhat confused by Mr. Mark's statements. While Mr. Mark referred to the possibility of some further administrative disciplinary proceedings, he specified that no charges have been initiated to date. Nevertheless, disciplinary action, i.e., the suspensions, has in fact occurred and reflects final agency determinations. Those determinations are administrative in nature and are separate and distinct from any determinations of criminal charges that might later ensue. From my perspective, it is not unusual that records reflective of disciplinary action taken against public employees are disclosed even though criminal proceedings relating to the same events may later follow. In my view, if there are written reasons for the suspensions that have been made known to those suspended, those records constitute final agency determinations which must be disclosed [see §87(2)(g)(iii)] and would not, if disclosed, constitute an unwarranted invasion of personal privacy. On the other hand, in situations in which charges have been initiated but no action, i.e., a suspension, or determination regarding the charges has been made or taken, I believe that the charges may be withheld.

In a related vein, you contended that "a suspension is a governmental action undeserving of privacy protection." I generally agree. Although a suspension in some instances might not reflect an agency's final determination of a matter, a suspension would in my view represent factual information that must be made available under §87(2)(g)(i). Further, with respect to privacy, it has been established that attendance records of public employees must be disclosed. In Capital Newspapers v. Burns [109 AD 2d 292, aff'd 67 NY 2d 562 (1986)], it was held that records indicating days and dates of sick leave claimed by a particular police officer must be made available. On the basis of that decision, which was reached unanimously by both the Appellate Division and the Court of Appeals, it is clear in my opinion that time sheets, attendance records and similar documentation, including those elements that indicate the reasons for absences, must be disclosed. In this instance, I believe that an enterprising reporter or member of the public could request and obtain the attendance records of all elevator inspectors employed by the City and ascertain from those records the identities of those who were suspended. That being so, I do not believe that disclosure of the identities of those suspended would constitute an unwarranted invasion of personal privacy.

It is noted, too, that in an early decision rendered under the Freedom of Information Law in which it was determined that the

names of police officers who were reprimanded must be disclosed, it was stated that "Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let be known, by implication, which others were not censured. Disclosure of the written reprimands will not harm the overall public interest" [Farrell, supra, 908-909]. In the case of matter at hand, since 42 of the 58 elevator inspectors employed by the City were suspended, disclosure of the identities of those suspended will provide the public, also by implication, with information as to those who have performed their duties appropriately.

Mr. Mark referred to the possibility of disciplinary proceedings that may be conducted pursuant to §75 of the Civil Service Law and wrote that the City is "properly protecting the confidentiality of any pending proceeding." Again, there is no indication in any of the materials that charges have been initiated or that such proceedings may be commenced. Moreover, there is nothing in §75 that specifies that hearings must be held in a confidential manner. On the contrary, the Court of Appeals has found that administrative and quasi-judicial proceedings are presumptively open to the news media [see Herald Co., Inc. v. Weisenberg, 59 NY 2d 378]. While the decision cited above did not deal with a disciplinary proceeding of a public employee, I believe that it stands for the principle that administrative proceedings must be conducted open to the public, unless there is a "compelling reason" for closure [id. at 383].

Lastly, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

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 sum, it is my view that the names of those suspended and the reasons for the suspensions, if they have been disclosed to the employees, must be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard W. Mark
Anthony Coles

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9464

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

May 13, 1996

Mr. Jose Ramos
93-A-6730
Pouch #1
Woodbourne, NY 12788

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

Dear Mr. Ramos:

I have received your recent letter and the correspondence attached to it. You referred to a request that was initially denied, but which, pursuant to your appeal, was granted in part. Despite the determination by Anthony J. Annucci, Counsel to the Department of Correctional Services, the Superintendent of the Mohawk Correctional Facility had not disclosed the records as of the date of your letter to this office.

In this regard, 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 compel an agency to grant or deny access to records. However, in an effort to assist you, I offer the following comments.

First, §87(3)(b) of the Freedom of Information Law requires that each agency maintain a record identifying every officer or employee of the agency by name, public office address, title and salary. Therefore, I agree with Mr. Annucci's determination that those elements of your request must be made available.

Second, when an appeal is made pursuant to §89(4)(a) of the Freedom of Information Law, an agency has "ten business days" either to either "fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." As such, based on the determination rendered by Department Counsel, you should have received the records sought to the extent indicated in the determination.

To encourage compliance with the determination and the Freedom of Information Law, a copy of this response will be sent to Superintendent Reynolds. In addition, in order to inform Counsel

of the delay in implementing the determination, a copy will also be forwarded to Mr. Annucci.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent Reynolds
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9465

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

May 13, 1996

Mr. James J. Bell
Citizens for Fiscal Responsibility
62 Griswold Street
Walton, NY 13856

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. Bell:

I have received your letters of April 17, as well as a variety of related correspondence. The issue involves the timeliness of disclosures of records by the Walton Central School District in response to your requests made under the Freedom of Information Law.

In this regard, as you are 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..."

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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George F. Mack, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9466

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

May 14, 1996

Mr. John L. Kirkpatrick
Kirkpatrick & Kirkpatrick, P.C.
P.O. Box 350
Fort Plain, NY 13339

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. Kirkpatrick:

I have received your letter of April 30, as well as the materials attached to it. In your capacity as Village Attorney for the Village of Fort Plain, you referred to requests for records directed to the Village concerning HUD Block Grants. You have sought guidance in the matter and asked whether the determination rendered in Tri-State Publishing, Co. v. City of Port Jervis (Supreme Court, Orange County, March 4, 1992) serves as precedent or whether it has been modified or overruled.

In this regard, to the best of my knowledge, Tri-State Publishing was not appealed and in fact is the only judicial decision rendered in New York that pertains specifically to the kinds of records at issue.

As you are aware, the decision includes excerpts from an advisory opinion that I prepared in 1991, and I believe that the court essentially agreed with the thrust of that opinion. Because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Conversely, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must be disclosed.

It appears that there may be concern with respect to what the court characterized as a "hybrid situation" in which "a landlord owns one or more multiple dwellings where less than all units in each building are Section 8 units." The court determined that in that kind of situation, "it may reasonably be said that a

subsidized tenant's identity would not be readily ascertainable." Based upon that finding, the court determined that the names of landlords and the addresses of multiple dwellings, as well as related information must be disclosed. It is your contention that in a municipality as small as Fort Plain, "even to divulge the addresses or the Landlords' names will in effect be divulging information on tenants." I appreciate your concern and note that the court wrote that:

> "While certain of the information ordered disclosed could indirectly permit as astute and industrious individual to research the identity of Section 8 recipients, the speculative liklihood and remoteness of this occurrence especially in light of the statement of Petitioner that it is not interested in the names of the recipients, must be balanced against the presumption in favor of disclosure."

As I interpret the passage quoted above, disclosure in accordance with the court's order would not preclude an individual or firm from learning of the identities of section 8 tenants if such persons or entities demonstrated significant effort in attempt to gain such information. At the same time, the court recognized that the names of tenants were not requested by or of interest to the applicant, a newspaper.

From my perspective, in view of the court's recognition of the absence of any intent on the part of the applicant to ascertain the names of section 8 tenants and in view of the small size of the Village of Fort Plain, I believe that the Village may withhold records to the extent that disclosure would identify section 8 tenants, including the addresses, irrespective of whether a multiple dwelling unit is occupied by section 8 tenants as well as others. In a municipality of less than 3,000 with few if any large housing units, it would seem that disclosure of a tenant's address would render that person's identity readily traceable.

Nevertheless, in my opinion, the identity of a landlord must be disclosed, for payments are made by governmental entities to the landlord, irrespective of the landlord's income and financial standing. Other details, however, which if disclosed would make a tenant's identity reasonably ascertainable, could in my view be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9467

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 14, 1996

Mr. Anthony J. Ardito
[redacted]

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. Ardito:

I have received your letter of April 28. In brief, due to a dispute between yourself and a lender, in September of last year you requested records pertaining to your account from the New York State Higher Education Services Corporation (NYHESC). Soon after, you were informed that the records would be provided within four weeks. You wrote, however, that despite several contacts with the agency, you still do not have the records. You have sought assistance in the matter.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to records under the Freedom of Information Law. Although the Committee cannot intervene in the legal sense or compel an agency to grant or deny access to records, it is my hope that the ensuing comments, which will be forwarded to NYHESC, will be useful to you.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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."

Under the circumstances, I believe that you may appeal on the ground that your request has been constructively denied. I have been informed that the person designated to determine appeals at NYHESC is Deborah Damm, Counsel.

Finally, it has been held that 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah A. Damm
John Fraser

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9468

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 14, 1996

Mr. George A. Mayes
[redacted]

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. Mayes:

I have received your note, which appears on a letter of April 27 addressed to the Warrensburg Town Clerk. You raised the following question: "Can the town clerk's office refuse to process FOI requests because the town clerk is absent?"

In this regard, in my view, an agency's records access officer is not required to be present or participate personally with respect to every facet of dealing with a request made under the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) 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."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests. As such, the records access officer may designate staff to carry out functions associated with the implementation of the Freedom of Information Law.

Section 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."

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

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

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, the need to review records to determine which portions should be disclosed or denied, or perhaps the absence of a key employee, the estimated date for granting or denying a request indicated in an acknowledgement should reflect those factors.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Donna Combs, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9469

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

May 14, 1996

Mr. Henry J. Bartosik
[redacted]

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. Bartosik:

I have received your letters of April 28, both of which pertain to requests for records of the Ellenville School District.

The first concerns payroll records, but you did not ostensibly seek advice or an opinion. Moreover, if I understand your commentary, the substance of the matter was considered in an opinion addressed to you on March 14, 1995.

The other pertains to a request for attendance records that was denied by the District "as confidential and unavailable." You added that "[t]hese records merely show each incident of absence, by date and nature, as S for sick, L or P for personal leave, perhaps also Leave without pay, C for conference, etc." Based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the records in question are clearly available. In this regard, I offer the following remarks.

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. 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).

Perhaps most 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 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, the dates and times of attendance or absence, or the category of leave time used or accumulated 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 as you described its contents.

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 leave time by category, must be disclosed under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Ferrara, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9470

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

May 15, 1996

Mr. Albertus Brown
88-A-1422 G3-314
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. Brown:

I have received your letter of May 1. You have asked that I clarify "what exactly constitutes intra-agency and inter-agency materials."

In this regard, §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 that definition, inter-agency materials would involve those communications between or among agencies; intra-agency materials would include communications within an agency or between an agency and consultants that it retains [see Xerox Corporation v Town of Webster, 65 NY 2d 131 (1985)].

When that provision is applicable as a basis for withholding, the contents of the materials determine the extent to which they 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 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).

You also asked that I send "50 of your newest advisory opinions", particularly those involving inter-agency and intra-agency material and DD-5's. Because the advisory opinions are written concerning a variety of subjects, rather than sending the latest 50, enclosed are the most recent opinions dealing with inter-agency and intra-agency materials and DD-5's. In addition, enclosed is a copy of the Committee's latest index to advisory opinions.

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-9471

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

May 15, 1996

Mr. Max S. Eagelfeld
[redacted]

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. Eagelfeld:

I have received your letter of April 26, as well as a variety of related materials. In brief, you have questioned the propriety of denials of access by the Mamaroneck School District.

I am unaware of the contents of the records in which you are interested, and some of the ensuing remarks may be repetitive of information sent to you in the past. Nevertheless, having reviewed the correspondence, I offer the following comments.

First, a primary issue appears to involve the application of §87(2)(g) of the Freedom of Information Law and the authority to withhold "inter-agency and intra-agency materials." I note that §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 that definition, inter-agency materials would involve those communications between or among agencies; intra-agency materials would include communications within an agency or, as you may be aware, between an agency and consultants that it retains [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)]. Therefore, communications between the School District and members of the public or business entities that are not consultants would

not constitute inter-agency or intra-agency materials and could not be withheld under §87(2)(g) of the Freedom of Information Law.

When that provision is applicable as a basis for withholding, the contents of the materials determine the extent to which they 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 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" (Xerox, supra 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.

A second issue involves records used in or related to litigation. In this regard, 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 (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.

However, potentially relevant to the matter is §87(2)(a) of the Freedom of Information Law, which authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." From my perspective, although §3101(c) and (d) of the Civil Practice Law and Rules (CPLR) authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Section 3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable." The other provision at issue pertains to material prepared for litigation, and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)].

It is also noted that it has been determined judicially that if records are prepared for multiple purposes, one of which includes eventual use in litigation, §3101(d) does not serve as a basis for withholding records; only when records are prepared solely for litigation can §3101(d) be properly asserted to deny access to records [see e.g., Westchester-Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)].

Lastly, one aspect of your request involves entries in a phone log by a District employee. Assuming that those entries consist of a factual rendition of what might have been said, it would appear that the entries would be available under §87(2)(g)(i). Nevertheless, perhaps more important is whether a request for the log entries meets the standard that an applicant "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law. If records or entries in records can readily be located based upon the means by which an agency maintains its records, I believe that a request would reasonably describe the records. On the other hand, if a phone log is maintained chronologically rather than by subject matter, for example, and if the location of particular entries involves a review of each and every entry prepared over a period of months or years, I do not believe that the request would have reasonably described the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sherry P. King, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9472

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

May 15, 1996

Mr. Brison Hamilton
AKA Butch Miller
80-A-0966
Sullivan Correctional Facility
Fallsburg, NY 12733

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

Dear Mr. Hamilton:

I have received your recent letter and the materials attached to it. You have asked whether, in my view, you have a right to obtain the "Unusual Occurrence Reports and Addendums" relating to your case.

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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9473

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

May 15, 1996

Mr. Al Blanche
88-A-6605
135 State Street
Auburn, NY 13021

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

Dear Mr. Blanche:

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

The thrust of your complaint involves repeated failures on the part of the Department of Correctional Services to provide access to Tier 2 or Tier 3 hearing tapes in a timely manner. You indicated that the tapes are needed to enable you to use them effectively in judicial proceedings.

In this regard, I do not believe that an agency is required to make records available under the Freedom of Information Law in order to accommodate the needs of a person who may be involved in litigation on a related but different matter. Nevertheless, 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)].

As you are likely aware, the person designated to determine appeals by the Department of Correctional Services is Counsel to the Department, Anthony J. Annucci.

Since your correspondence also refers to a request for a copy of your pre-sentence report maintained by the Department of Correctional Services, I note that although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a

> probation department within this state 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 [see Matter of Thomas 131 AD2d 488 (1987)].

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

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9474

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

May 15, 1996

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 information presented in your correspondence.

Dear Mr. Kane:

I have received your letter of April 30, as well as the materials attached to it. You have sought an advisory opinion relating to your request for a record that you directed to the Fulton County Industrial Development Agency. You wrote that the Agency's appeals officer indicated "that it was not an IDA record and it was not in the possession of the FCIDA."

In this regard, I offer the following comments.

First, as you are aware, 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).

Most recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" (see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, ___ NY 2d ___, December 27, 1995). Therefore, if a document is kept or held by or for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency. If that is so in this instance, I believe that the document in question would fall within the coverage of the Freedom of Information Law.

Second, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent

search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Fulton County Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9475

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

May 15, 1996

Mr. Edwin Rivera
95-A-2992
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 information presented in your correspondence.

Dear Mr. Rivera:

I have received your note of April 20, which appears on a copy of a request for records sent to the New York City Police Department. You complained that it represented your second request, and that the first had not been answered.

Based on a review of your letter, I offer the following comments.

First, you cited the federal Freedom of Information and Privacy Acts, as well as the New York Freedom of Information Law as the bases of your request. In this regard, the federal acts pertain only to records maintained by federal agencies; they do not apply to records maintained by entities of state and local government.

Second, 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)].

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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9476

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 17, 1996

Hon. David Bishop
Legislator
County of Suffolk
276 N. Wellwood Avenue
Lindenhurst, NY 11757-3708

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, unless otherwise indicated.

Dear Legislator Bishop:

I have received your letter of April 11 in which you sought an opinion concerning the propriety of a denial of a request for records of the State Department of Labor.

You wrote that "[e]very year Suffolk County provides tens of millions of dollars in tax breaks to dozens of selected companies on the belief that these companies create jobs", but that you were informed by the Department of Labor that you are "not entitled to know the number of employees actually working at these companies." The Department has denied access on the basis of §537 of the Labor Law.

In this regard, as you may be aware, the Committee on Open Government is authorized to offer advisory opinions concerning the Freedom of Information Law. While the Committee does not have jurisdiction to interpret or advise with respect to the Labor Law, the issue in this instance in my view involves which statute governs access, the Freedom of Information Law or §537 of the Labor Law. If the former applies, it is likely that the records sought would be available; if the latter applies, however, the records would be confidential.

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, information in any physical form whatsoever maintained by or for an agency, such as the Department of Labor, would constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

Relevant to the matter 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 §537 of the Labor Law, which is entitled "Disclosures prohibited", and which states in subdivision (1) that:

> "[I]nformation acquired from employers or employees pursuant to this article shall be for the exclusive use and information of the commissioner in the discharge of his duties hereunder and shall not be open to the public nor be used in any court in any action or proceeding pending therein unless the commissioner is a party to such action or proceeding, notwithstanding any other provisions of law. Such information insofar as it is material to the making and determination of a claim for benefits shall be available to the parties affected and, in the commissioner's discretion, may be made available to the parties affected in connection with effecting placement."

To the extent that the records sought fall within the scope of §537, they would be confidential, unless they are "material to the making and determination of a claim for benefits" or the Commissioner of Labor asserts his discretionary authority to disclose records for the purpose of effecting placement in a job.

As suggested earlier, the question involves the extent to which §537 of the Labor Law indeed prohibits the disclosure of records. I have attempted to obtain information regarding the intent of §537 of the Labor Law and have reviewed various judicial determinations rendered pursuant to or in conjunction with that statute. There is no information that I could find in the nature of legislative history (i.e., bill jackets) that indicates the

specific purpose of §537 of the Labor Law. However, its language and judicial interpretation in my view indicate that its thrust involves an intent to protect the privacy of both employers and employees that submit information to the Department of Labor. The statute itself refers to parties to actions or proceedings and to information "material to the making and determination of a claim for benefits." The records that you seek apparently do not contain any information regarding proceedings or claims, nor do they identify any particular person or persons. Further, in the only judicial decision that I could locate that pertains to the intent of §537 of the Labor Law, which had been §524 of the Labor Law, it was found that:

> "...section 524 of the Labor Law prohibits the use of such records in the courts unless the Industrial Commissioner is a party to the action or proceeding. While the act does not disclose the object of the Legislature, it undoubtedly was to prevent exposure to public gaze of the names of applicants who are receiving benefits under the auspices of the statute and under which the employer bears the burden. This is a reasonable objective" [Andrews v. Cacchio, 35 NYS 2d 259, 260; 264 App. Div. 791 (1942)].

Although Andrews, supra, was decided in 1942, there is no decision of which I am aware that indicates a different intent than that quoted above. Moreover, the Andrews decision has been cited as recently as 1982 [see Clegg v. Bon Temps., Ltd., 452 NYS 2d 825 (1982)].

The only item of legislative history regarding what had been §524 involves a memorandum to Counsel to the Governor regarding Chapter 117 of the Laws of 1936 in which it was stated that §524 "makes formal changes in order to comply with the provisions of the federal Social Security Act."

In order to determine whether federal law prohibits disclosure of the records that you are seeking or records analogous to those sought, I have contacted the U.S. Department of Labor. Having spoken today with an attorney for the Department of Labor, I was informed that no provision of federal law would prohibit the disclosure of the records in question. It was, however, stated that, depending upon the circumstances, such information might be considered a trade secret that could be withheld under the federal Freedom of Information Act, 5 U.S.C. §552(b)(4).

While the New York Freedom of Information Law contains a basis for withholding concerning trade secrets, it is unlikely in my view that it could justifiably be cited in this instance. Section 87(2)(d) states that an agency may 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..."

From my perspective, it is difficult to envision how the records in question could be characterized as trade secrets or how disclosure could cause substantial injury to the competitive position of a firm.

In sum, if indeed §537 of the Labor Law is intended to protect personal privacy, I do not believe that it is applicable to the records that you are seeking, for there are no privacy considerations present.

I point out that, in an effort to learn more of the Department's position, I contacted the attorney for the Department who responded to your request. Notwithstanding my contentions, it is his belief that the information in question falls within the prohibition imposed by §537 of the Labor Law. While several judicial decisions were cited by Mr. Redmond, none in my opinion clearly pertains to the matter at hand. Closer to the situation in my view is the Andrews decision, which although rendered more than fifty years ago, has not, based on my research, been reversed or modified.

As Mr. Redmond indicated in his response to you, you may appeal a denial of a request to the Commissioner. The right to appeal a denial of access is conferred by §89(4)(a) of the Freedom of Information Law, which states in relevant that:

> "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..."

Since more than thirty days have elapsed since the denial of the request, if you want to continue to pursue the matter, it is suggested that you begin the process again with a new request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerome Tracy
Robert W. Redmond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9477

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 17, 1996

Mr. George Rand
[redacted]

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. Rand:

I have received your letter of May 1, as well as the materials attached to it. You have sought my views concerning your efforts to obtain data from the Lynbrook Union Free School District under the Freedom of Information Law. Previously, similar data had apparently been expeditiously disclosed. With respect to your recent request, however, you were informed that the District "anticipate[d] being able to respond within sixty working days..."

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 provide "information", 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 generally need not create a record in response to a request. Therefore, if, for example, the District does not maintain a list of administrators and their duties, it would not be required to prepare a new record containing that information.

Based upon the foregoing, in a technical sense, the District in my view is not obliged to provide the information sought by preparing new records. 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 not all of the information sought, and that it can readily disclose "information" derived from existing records.

Second, some of the information sought must be maintained in the form of a record. Again, 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.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS

664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as 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.

Similarly, I believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. 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. 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).

Third, 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 some fifteen 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, 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 the information that you seek cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest. Often, however, information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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, 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 would conjecture that most of the data in which you are interested, whether maintained on paper or electronically, is readily retrievable. If that is so, it would appear that a delay in disclosure of up to sixty days would be inconsistent with the intent of the Freedom of Information Law. I point out that the Law's legislative declaration, §84, indicates that:

> "As state and local government services increase and public problems become more sophisticated 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John A. Beyrer, Assistant Superindentent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO 2610
FOIL-AO 9478

162 Washington Avenue, Albany, New York 12231
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May 20, 1996

Ms. Lisa J. Bero
[redacted]

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 Ms. Bero:

I have received your letter of May 8 in which you sought an opinion concerning access to certain records of the Massena Memorial Hospital.

According to your letter, your requests for minutes of meetings of the Hospital's Board of Managers have been verbally denied. You also requested the vacation schedule and "operating room call schedule" pertaining to a particular physician. In response, you were informed that you must use the Hospital's request form, and that no operating room call schedule exists. You have questioned the veracity of that statement.

In this regard, I offer the following comments.

First, I believe that the Board of Managers constitutes a "public body" for purposes of the Open Meetings Law [see §102(2)] and an "agency" for purposes of the Freedom of Information Law [see §86(4)], and that it is required to comply with both statutes. Section 127 of the General Municipal Law pertains to the establishment of public hospitals by units of local government and the designation of boards of managers. Section 128 details the powers and duties of such boards. On the basis of those provisions, it is clear that a board of managers is a governmental entity that is required to comply with the Open Meetings and Freedom of Information Laws.

Second, with respect to minutes of meetings, the Open Meetings Law offers direction on the subject, and §106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist

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

Based upon the foregoing, minutes of open meetings must be prepared and made available within two weeks. Although minutes reflective of action later during executive sessions must be prepared and made available within one week, it is noted that such minutes need not include information that is not required to be disclosed under the Freedom of Information Law.

I point out, too, that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

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

Perhaps most 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 you seek.

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 work schedules or attendance records, including those concerning the use or accrual of leave time, must be disclosed under the Freedom of Information Law.

Fourth, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification. Since you questioned the veracity of a response, while I am not suggesting that it applies, §89(8) of the Freedom of Information Law states that: "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

Lastly, 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 an effort to enhance compliance with and understanding of the Freedom of Information Laws, copies of this opinion will be forwarded to the Board of Managers and the Hospital's Administrator.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Managers
James Watson, Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9479

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

May 22, 1996

Mr. Philip McIntyre
[redacted]

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. McIntyre:

I have received your letter of May 7 in which you sought an advisory opinion concerning the Freedom of Information Law.

By way of background, on a form apparently prepared by the Panama Central School District, a request was made on December 15 for "Treasurer's receipts for period of Jan. 1, 1989 to present." Printed on the form above the space used to describe requested records is the following phrase: "I hereby apply to inspect the following records." You have contended that the District prepared copies of the records in question that you did not request. The District, however, is refusing to permit you to inspect the records until you pay for copies.

In this regard, when records are available in their entirety under the Freedom of Information Law, any person may inspect the records at no charge; an agency may assess fees only when copies of records are requested [see Freedom of Information Law, §§87(1)(b)(iii) and 89(3)].

There are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2) of the Freedom of Information Law. For example, a payroll record pertaining to a public employee might include his or her social security number. Since disclosure of a social security number would constitute "an unwarranted invasion of personal privacy" [see Seelig v. Sielaff, 607 NYS 2d 300, 201 AD 2d 298 (1994)], an applicant would not have the right to inspect the record, even though the remainder of the record must be disclosed. In that event, in order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions

of the records after having made appropriate deletions from a copy of the record.

I am unaware of whether the circumstance described in the preceding paragraph is pertinent to the matter. If it is, I believe that the District should have informed the applicant of the need to make copies of the records and the assessment of a fee prior to preparing copies.

If the records are available in their entirety and the District made copies even though copies were not requested, it is my view that, despite an apparent mistake on the part of the District, the records should be made available for inspection free of charge.

A final scenario involves the possibility that copies were requested by means of additional oral or written communications between the applicant and the District. If, by means of any such communication, it is clear that copies were requested, the District in my view could impose a fee for copies to the extent permitted by law.

If I have misunderstood the facts, please feel free to contact me.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Ireland
Robert E. Zimmerman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9480

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

May 22, 1996

Mr. Jeffrey Brown
94-A-3950
Bare Hill Correctional Facility
P.O. Box 20
Cady Road
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 information presented in your correspondence.

Dear Mr. Brown:

I have received your letter of May 2 in which you requested assistance in obtaining a "jail time certificate." As I understand the matter, you sent several requests to the staff at Rikers Island for a copy of the record, but they have not been answered.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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. While I believe that the person in receipt of your requests should have responded in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to Ms. Thomas Antenen, Records Access Officer for the New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Second, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correction is Ernesto Marrero, Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9481

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

May 23, 1996

Mr. Larry DeBerry
78-A-0370 A2-13B
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

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. DeBerry:

I have received your letter of April 29, which reached this office on May 7. You have sought assistance in obtaining records concerning property that belonged to your deceased mother. The correspondence makes reference to the Abandoned Property Bureau and Surrogate's Court.

In this regard, I offer the following comments.

First, the courts and court records are not covered by the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines 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, the Freedom of Information Law is inapplicable to records of a surrogate's court. This is not to suggest that court records are not accessible to the public. In

many instances, other statutes provide substantial rights of access. Records maintained by a surrogate's court are referenced in Article 25 of the Surrogate's Court Procedure Act, and it is suggested that you review those provisions.

Second, if you believe that there may be abandoned property in the nature of bank accounts, stocks, bonds and the like, records concerning that subject are maintained by the Office of Unclaimed Funds, which is part of the Office of the State Comptroller. That agency is located at 270 Broadway, New York, NY 10007.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9487

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

May 23, 1996

Mr. Maurice Samuels
85-A-0184
Drawer B
Stormville, NY 12582

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

Dear Mr. Samuels:

I have received your long and thoughtful letter of April 30. In brief, you described the FBI's Counter Intelligence Program (COINTELPRO) and your view of its effects. It is your belief that the FBI enlisted the aid of state and local law enforcement agencies in implementing COINTELPRO and you questioned your right to gain access to your "COINTELPRO files" from the New York City Police Department and the Office of the New York County District Attorney.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Since COINTELPRO was initiated many years ago, it is possible that records of your interest might have been discarded. To the extent that the materials in question do not exist, the Freedom of Information Law would be inapplicable.

Second, §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 staff to locate and identify the records. I am unaware of the means by which the agencies to which you referred maintain any existing records relating to COINTELPRO. If, for example, files are kept alphabetically, by the names of individuals who are the subjects of the files, it may be relatively easy to locate the records concerning an individual, such as yourself. On the other hand, if records are kept chronologically, through descriptions of particular events or by some other method, it may be nearly impossible to locate those identifiable to an individual. In that circumstance, a request for records pertaining to yourself likely

would not reasonably describe the records as required by the Freedom of Information Law.

Lastly, assuming that records within your area of interest continue to exist and that an agency can locate them pursuant to a request that reasonably describes the 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 §87(2)(a) through (i) of the Law. From my perspective, it is likely that two of the grounds for denial would be significant in determining rights of access to any such records.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While you could not invade your own privacy, it is possible that the records include reference to persons other than yourself. To that extent, it is likely the records could be withheld based upon considerations of privacy.

The records would also likely fall within the scope 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, those 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9483

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

May 23, 1996

Mr. Constantine Jackson
93-B-0074 C-1-7
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

Dear Mr. Jackson:

I have received your letter of May 10, which is postmarked May 21 and reached this office today. You have requested criminal history records regarding a particular individual from this office.

In this regard, the Committee on Open Government is authorized to provide guidance concerning access to government records under the Freedom of Information Law. The Committee does not maintain records generally and has no authority to compel an agency to grant or deny access to records. In short, I cannot make the records in question available, because this office does not maintain them. Nevertheless, I offer the following comments.

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 arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Another possible source of records concerning convictions is the record of commitments and discharges kept at the County jail. Section 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."

Based on the foregoing, although you may be unable to obtain an individual's complete arrest and conviction record, the commitment and discharge record described above includes a variety of information, including the "number of previous convictions."

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-9484

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

May 23, 1996

Mr. Michael J. Cuddy, Jr.
Director of Human Resources
Niagara Wheatfield Central School District
P.O. Box 309
Sanborn, NY 14132-0309

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. Cuddy:

I have received your letter of April 30, which reached this office on May 6. You have sought advice as to "whether a school district may refuse to comply with a request...for a copy of a 'confidential' settlement agreement."

More specifically, you wrote that:

> "...a written agreement is made between a school district and a member of the district's teaching staff against whom charges had been preferred under Section 3020-a of the Education Law. The agreement provides, among other things, for the payment of a lump sum cash payment in excess of $50,000, for the withdrawal of disciplinary charges against the teacher, and for the resignation of the teacher from employment in the district. In addition, the agreement stipulates that the settlement agreement would remain confidential."

Based upon your description of the record and the judicial interpretation of the Freedom of Information Law, I believe that the record, including the name of the subject of the settlement agreement, 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.

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. Both of the grounds for denial to which you alluded are relevant to an analysis of the matter; neither, however, could in my view serve to justify a denial of access.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, as you are aware, §89(2)(b) provides a series of examples of unwarranted invasions 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. 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].

The other 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 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].

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.:

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

Another 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 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 variety of 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)].

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the

> agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], the Appellate Division, Second Department, dealt with a case that appears to be similar to the situation that you described. Charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be

characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

In sum, based on judicial decisions involving issues analogous to those that you raised, I believe that the record in question, including the identity of the employee, must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9485

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

May 24, 1996

Mr. Crombia Ruth
90-T-1733
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Ruth:

I have received your letter of May 1, which reached this office on May 10. You have sought assistance in obtaining copies of court records.

In this regard, the courts and court records are not covered by the Freedom of Information Law. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines 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, the Freedom of Information Law is inapplicable to court records.

It is recommended that you follow the course of action suggested by the Law Secretary to Judge Lange by sending a representative to copy the records sought on your behalf.

If you continue to want copies and have no capacity to authorize a person to copy the records on your behalf, and if the court will not make copies despite your offer to pay, it is suggested that you raise the issue with the Office of Court Administration. That agency oversees the court system.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9486

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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May 24, 1996

Mr. Todor Macordov
[redacted]

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. Macordov:

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

You wrote that you were the victim of several crimes and that you filed several complaints with the Town of Fallsburg Police Department. Having requested copies of "accusatory instruments" that you signed, the Town denied access on the ground that the records "are classified as 'confidential'." Further, the response to the request failed to make reference to your right to appeal the denial. You have asked that I "advise the Town of Fallsburg that they are acting in violation of the law by not advising to whom an appeal should be directed."

In this regard, I offer the following comments.

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

From my perspective, since you signed and are familiar with the records that you requested, ordinarily I believe that they should be accessible, for none of the grounds for denial would apply. The only circumstance under which a denial would be justified in my view would involve a situation in which charges initiated against an accused have been dismissed in favor of that person. When that is so, §160.50 of the Criminal Procedure Law prohibits disclosure and requires sealing of the records relating to the charge.

Second, notwithstanding the foregoing, an agency is required to inform a person denied access of the right to appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Haaf

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9487

162 Washington Avenue, Albany, New York 12231
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May 24, 1996

Mr. Mathew A. Tallman
[redacted]

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. Tallman:

I have received your recent letter, which was transmitted to this office on May 9. You have sought an opinion concerning your right to obtain a "police log" from your local police department insofar as it pertains to you. You suggested that the log might include reference to your request for assistance.

Based on your brief description of the incident, it is likely that you should have the right to gain access to those portions of the log relating to you. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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."

Based on the foregoing, irrespective of whether a document is characterized as a police blotter or a log or whether it is maintained on paper or electronically, I believe that it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

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

Third, the phrase "police blotter" is not specifically defined in any statute. It is my understanding that it is a term that has been used, more than anything else, based upon custom and usage. Further, the contents of what might be characterized as a police blotter may vary from one police department to another and often police departments use different terms for records or reports analogous to police blotters. In 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 or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review it.

If the records maintained by the department in question are more expansive than the traditional police blotter described in Sheehan, portions of such reports might be withheld, depending upon their contents and the effects of disclosure. Several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. The following paragraphs will review the grounds for denial that may be significant.

The initial ground for withholding, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". In brief, when a statute exempts particular records from disclosure, those records may, in my view, be considered "confidential". For instance, an incident report 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).

iii. final agency policy or determinations; or

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

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

Since the records in question are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, insofar as they consist of factual information, §87(2)(g) could not, in my opinion, be asserted as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9488

162 Washington Avenue, Albany, New York 12231
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May 24, 1996

Mr. Earl Philip King
91-A-5926
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. King:

I have received your letter in which you sought my advice concerning your request of May 5 sent to the Department of Motor Vehicles for your "driving history."

In short, I believe that your driving history would be available to you pursuant to the Freedom of Information Law, the Personal Privacy Protection Law, and/or the Vehicle and Traffic Law. It is noted, however, that not every aspect of a driving history must be kept throughout the period of one's license. As such, certain elements of a driving history may be expunged after a period of years.

Additionally, fees charged for copies of many of the records maintained by the Department of Motor Vehicles are assessed on the basis of §202 of the Vehicle and Traffic Law, rather than the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9489

162 Washington Avenue, Albany, New York 12231
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May 24, 1996

Ms. Catherine Kozak
Staff Writer
The Virginian-Pilot and
The Carolina Coast
P.O. Box 10
Nags Head, NC 27950

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 Ms. Kozak:

I have received your letter of May 9 in which you sought an advisory opinion concerning the propriety of a denial of a request for records by the Lakeland Central School District.

In a letter of April 23 citing the federal Freedom of Information Act, you requested copies of the "employee records" of a named individual, particularly records relating to the termination of his employment, as well as his resumé complaints or charges that might have been filed against him. The request was denied in its entirety.

Before addressing the substance of the matter, I note that the federal Freedom of Information Act applies only to records maintained by federal agencies. Each state, however, has enacted a law dealing with access to government records. In New York, the primary statute that governs rights of access is the State's Freedom of Information Law.

While I am unfamiliar with the contents of the records in question, I believe that a blanket denial of your request was inconsistent with the Freedom of Information Law. In this regard, I offer the following comments.

It is emphasized 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.

With regard to an employee's resumé or application, 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 resumé; it is likely, however, 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., Seelig v. Sielaff, 201 AD 2d 298 (1994); 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, 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 view, 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 resumé 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 or dates 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.

With respect to records relating to discipline or termination, in addition to the provisions concerning personal privacy, 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 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]. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In 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 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.

More recently in Anonymous v. Board of Education for the Mexico Central School District, [616 NYS 2d 867 (1994)], it was held that a settlement agreement must be disclosed, and the Court found that:

> "Public Officers Law §87(2) provides that access to records may be denied if such records are specifically exempted from disclosure by state or federal statute, or if disclosure would constitute an unwarranted invasion of personal privacy under §89(2). This court rejects petitioner's argument that Education Law §3020-a specifically exempts the agreement in question in this case from disclosure. There is simply no such exemption in that statute, which provides as part of the procedure for hearings that they shall be public or private at the discretion of the employee. Petitioner's request for a private hearing does not cloak his negotiated settlement with a statutory secrecy and exemption from disclosure under the Freedom of Information Law. Moreover, it is disingenuous for petitioner to argue that public disclosure is permissible under Education Law §3020-a only where an employee is found guilty of a specific charge..."(id., 870).

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Superintendent
Sandra A. Graff, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2613
FOIL-AO- 9490

Committee Members

William Bookman, Chairman
Peter Delaney
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Executive Director

Robert J. Freeman

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May 24, 1996

Ms. Eileen Herkes
[redacted]

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 Ms. Herkes:

I have received your letter of April 30, which reached this office on May 9. Your inquiry concerns your right to gain access to records and attend meetings of the Economic Opportunity Commission of Rockland County, Inc.

In this regard, most not-for-profit corporations are not governmental in nature and, therefore, fall beyond the coverage of those statutes. If, however, the entity in question is a community action agency that functions in accordance with the Federal Economic Opportunity Act of 1964, I believe that it would be required to disclose many of its records and conduct its meetings, in great measure, open to the public.

The New York Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute

"governmental entities" or, therefore, are agencies subject to the Freedom of Information Law.

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 my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to §201 of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [§201(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [§201(b)].

When community action agencies are designated, §211 indicates that they perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure

> full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency." The federal Law also evidences an intent to authorize scrutiny of the governing body of a community action agency, for it refers to "reasonable access to information, including but not limited to public hearings."

In short, whether the Freedom of Information and Open Meetings Laws clearly apply to the records and meetings of a community action agency is somewhat unclear, I believe that the language of the federal enabling legislation indicates an intent that a community action agency be accountable by offering reasonable public access to proceedings and records. It has been suggested that the provisions of those statutes serve as a guide with respect to disclosure to the public. For instance, records reflective of a community action agency's policies or finances should generally be available, while those identifiable to individuals who participate in programs based upon income eligibility requirements could justifiably be withheld based upon considerations of personal privacy. Similarly, meetings held to discuss matters of policy or budget should be open, while discussions focusing on specific individuals, particularly in relation to personal financial or employment information, might justifiably be conducted in executive session.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Directors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9491

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

May 28, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of May 10 in which you requested an advisory opinion concerning a response to a request under the Freedom of Information Law.

Based upon the correspondence, you requested a variety of records from the New York City Department of Law. Insofar as the records exist, you were informed that they would be available for inspection or for copying at the rate of $.25 per page. Due to the volume of the materials, it was suggested that you might want to review the documents at the offices of the Law Department. However, you were also told that you "must respond within ten days to arrange for either an appointment or for payment of the copies, otherwise your request will be deemed withdrawn." You wrote that you "beg to differ" with that response.

In my opinion, when an agency determines that it maintains requested records and has retrieved the records sought, it is reasonable for the agency to indicate that the applicant must respond in some manner as to his or her preference, schedule, or desire to pay a fee for copies within a reasonable time. Situations have arisen in which applicants have requested records, an agency has retrieved them, and the applicants have failed to either review the records or pay fees for copies. From my perspective, an agency is not required to keep on hand requested records interminably, and it has been advised that an agency may inform an applicant that he or she may inspect records or pay for copies of records within a reasonable time, and that failing to receive a response from the applicant, the request will be deemed withdrawn by a date certain. Consequently, in view of the response by the Department of Law and the options made available to you, i.e., to arrange "either an appointment or the payment of the copies" within ten days by contacting a particular individual who

is identified by name and phone number, I believe that the Department acted reasonably.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Michael D. Sarner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9492

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

May 28, 1996

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 information presented in your correspondence.

Dear Mr. Leeds:

I have received your letter of May 10 in which you requested an advisory opinion concerning the Freedom of Information Law. You have asked whether the CUNY School of Law at Queens College is required to release redacted transcripts of its graduates. You indicated that the transcripts include the number of credits at graduation as well as several items which in your view may be redacted, such as the "name, address, ID # (AKA Social Security Number)."

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, the introductory language of §87(2) refers to the ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. As such, there may be elements of a record that may justifiably be withheld, while the remainder must be disclosed.

Second, as you are aware, the Family Educational Rights and Privacy Act (FERPA; 20 U.S.C. §1232g) authorizes an educational agency to withhold "personally identifiable information" pertaining to students, unless the students consent to disclosure. Similarly, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, CUNY may withhold any aspect of a transcript which if disclosed would be personally identifiable to a student based upon the provisions of both FERPA and §87(2)(b) of the Freedom of Information Law.

If the information sought includes the courses taken as well as the number of credits earned, it is possible in my view that the identification of courses taken would represent an unwarranted invasion of personal privacy or an infringement of FERPA. In Lipsman v. Bass (Supreme Court, New York County, NYLJ, October 1, 1991), it was held that a request for 65 graduate school transcripts pertaining to students enrolled in a particular degree program was properly denied due to the limited number of students and the uniqueness of the program. In short, even after redactions, it would have been possible, due to the small number of students, to identify particular students, even after names and other identifying details were withheld. I note that the regulations promulgated under FERPA 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).

While I am unfamiliar with the size of a graduating class at CUNY School of Law, it is possible that an indication of courses taken would render students' identities "easily traceable." If that is so, reference to courses taken could also be withheld. However, assuming that your request does not involve an indication of courses taken but rather only the number of credits earned, it would appear that the information must be disclosed following appropriate deletions.

I hope that I have been of 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 9493

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

May 28, 1996

Ms. Brenda L. Child
[redacted]

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 Ms. Child:

I have received your letter of May 8, as well as the correspondence attached to it. You have sought guidance concerning a request for records of the Town of Angelica.

Specifically, you wrote that for several months you have attempted without success to obtain telephone bills relating to a telephone located in Town Hall, and that you have never been given a reason, either oral or in writing, in which the basis for a failure to disclose the records has been offered. You added that the phone is not generally used by the Town Justice or law enforcement personnel.

From my perspective, it is likely that the bills must be disclosed. In this regard, I offer the following comments.

First, all agency records are subject to rights conferred by the Freedom of Information Law, and §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

It is noted that the State's highest court, 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. The denial appearing in §87(2) refers to the capacity to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. In my opinion, the phrase quoted in the preceding sentence indicates that a single record may be both accessible or deniable in whole or in part. I believe that the quoted phrase also imposes an obligation on agency officials to review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld.

Second, in my view two of the grounds for denial are likely relevant to the issue.

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

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

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

If the records were produced by a telephone company and sent to the Town, I do not believe that §87(2)(g) would apply, because a telephone company would not be an "agency" [see Freedom of Information Law, §86(3)]. Even if they were produced by the Town,

in view of their content, they would apparently consist of statistical or factual information accessible under §87(2)(g)(i) unless another basis for denial applies. As such, §87(2)(g) would not, in my opinion, serve as a basis for denial.

The other ground for denial that is relevant is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

When a public officer or employee uses a telephone in the course of his or her official duties, bills involving the use of the telephone would, in my opinion, be relevant to the performance of that person's official duties. On that basis, I do not believe that disclosure would result in an unwarranted invasion of personal privacy with respect to the officer or employee serving as a government official.

Since phone bills often list the numbers called, the time and length of calls and the charges, it has been contended by some that disclosure of numbers called might result in an unwarranted invasion of personal privacy, not with respect to a public employee who initiated the call, but rather with respect to the recipient of the call.

There is but one decision of which I am aware that deals with the issue. In Wilson v. Town of Islip, one of the categories of

the records sought involved bills involving the use of cellular telephones. In that decision, it was found that:

> "The petitioner requested that the respondents provide copies of the Town of Islip's cellular telephone bills for 1987, 1988 and 1989. The court correctly determined that the respondents complied with this request by producing the summary pages of the bills showing costs incurred on each of the cellular phones for the subject period. The petitioner never specifically requested any further or more detailed information with respect to the telephone bills. In view of the information disclosed in the summary pages, which indicated that the amounts were not excessive, it was fair and reasonable for the respondents to conclude that they were fully complying with the petitioner's request" [578 NYS 2d 642, 643, 179 AD 2d 763 (1992)].

The foregoing represents the entirety of the Court's decision regarding the matter; there is no additional analysis of the issue. I believe, however, that a more detailed analysis is required to deal adequately with the matter.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call. An indication of the phone number would in most circumstances disclose nothing regarding the nature of a conversation. Further, even thought the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. In short, I believe that the holding in Wilson is conclusory in nature and lacks a substantial analysis of the issue.

This is not to suggest that the numbers appearing on a phone bill must be disclosed in every instance. Exceptions to the general rule of disclosure might arise if, for example, a telephone is used to contact recipients of public assistance, informants in the context of law enforcement, or persons seeking certain health services. It has been advised in the past that if a government employee contacts those particular 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 justifiably be deleted pursuant to §87(2)(f) of the Freedom of Information Law.

I would conjecture that, in the case of calls made by a town clerk or town supervisor, phone calls may be made to a great variety of persons in a broad variety of contexts. Unlike the caseworker who routinely phones a class of persons having a particular status (i.e., recipients of public assistance), it is likely that the calls made by a clerk or supervisor would involve an array of issues and persons who do not fall within any special identifiable class or status. If my assumption is accurate, disclosure of a phone number would not alone signify a personal detail involving a recipient of a call. Further, as indicated previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose the nature of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that the records sought should in my opinion be disclosed under the Freedom of Information Law.

Lastly, I note 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 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Richard Reynolds, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9494

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

May 30, 1996

Mr. Willie Frank Nelson
94-B-2135 C-3-23
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 information presented in your correspondence.

Dear Mr. Nelson:

I have received your recent letter, which reached this office on May 14. You have asked whether you have the right to obtain laboratory test results and expert opinions maintained by the Rochester Police Department relating to a rape. Additionally, you questioned whether the Freedom of Information Law provides you with the right to obtain information that can be used to exonerate you.

In this regard, the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, 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 or litigant, and the nature of the records or their materiality to a proceeding. In short, while there may be obligations in the context of a criminal proceeding to disclose exculpatory information, those obligations are separate and distinct from the requirements of the Freedom of Information Law.

With respect to rights of access conferred by 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 §87(2)(a) through (i) of the Law.

Reports prepared by an agency would fall within §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.

Perhaps most significant to an analysis of the matter is §87(2)(e) which authorizes an agency to withhold records that:

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

It is likely that subparagraph (iv) would be most pertinent, for it has been 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 enforcement 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, 187 AD 919 (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).

It seems unlikely that the disclosure of scientific or laboratory test results would in most instances enable potential lawbreakers to evade detection or encourage criminal activity. However, to the extent that those kinds of results could arise by means of disclosure, the records in question could in my opinion 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9495

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

May 30, 1996

Mr. David McCullough
95-B-2598
Box 500
Elmira, NY 14902-0500

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

Dear Mr. McCullough:

I have received your letter of May 6, which reached this office on May 14. You have sought guidance in using the Freedom of Information Law to obtain records from your trial attorney, a newspaper, the commissioner of jurors and, in addition, you asked whether the Freedom of Information Law could be used to obtain trial transcripts, grand jury minutes and the like.

In this regard, it is emphasized that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to mean:

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

Based upon the language quoted above, the Freedom of Information Law is applicable to records maintained by entities of state and local government. Further, the definition excludes the judiciary (ie., courts) from its coverage. Consequently, rights conferred by the Freedom of Information Law would not apply to records maintained by a private attorney or a newspaper, nor would they extend to the courts or court records.

This is not to suggest that court records may be withheld in every instance. On the contrary, many court records must be

disclosed under a variety of provisions of law [see e.g., Judiciary Law, §255).

Lastly, since you referred to grand jury related records, it is my view that those records could be withheld if requested from an agency 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 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."

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.

I hope that the foregoing serves to enhance your understanding of the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9496

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

May 30, 1996

Hon. Joan L. Gallaer
Village Clerk
Incorporated Village of Garden City
351 Stewart Avenue
Garden City, NY 11530

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

Dear Ms. Gallaer:

I have received your letter of May 14, as well as the materials relating to it. You have sought my advice regarding two requests made under the Freedom of Information Law directed to the Village of Garden City.

The first involves records prepared by a consultant retained by the Village and correspondence between the Village and the consultant. 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.

Second, based upon the judicial interpretation of the Freedom of Information Law, records prepared for an agency by a consultant may be treated as "intra-agency" materials that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

In a discussion of the issue of consultant reports, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, a report prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox

a recommendation. In construing §87(2)(g), McAulay v. Board of Education involved predecisional materials prepared by an advisory panel designated to review and unsatisfactory rating of a teacher and which was later affirmed by the Court of Appeals. In McAulay, the Appellate Division stated that:

> "The Freedom of Information Law, as recently amended (L 1977, ch 933, eff Jan. 1, 1978), specifically exempts intra- and inter-agency materials which are not: statistical or factual tabulations or data; instructions to staff that affect the public; or final agency policy or determination (Public Officers Law, §87, subd 2, par [g]. Petitioner contends that the subject documents represent the application of agency policy and rules to a specific case and that to deny disclosure would allow appellants to perpetuate their tradition of maintaining a body of 'secret agency law' in this area. Appellants, on the other hand, contend that the subject documents represent precisely the kind of predecisional information which is prepared in order to assist the decision-making process and, hence, exempt from disclosure. We agree with appellants. The hearing panel documents or report sought are not final agency determinations or policy. Rather, they are predecisional material, prepared to assist an agency decision maker (here, the Chancellor) in arriving at his decision. Only the latter has the legal authority to decide whether the rating should stand. The panel's recommendations and reasoning are not binding upon him and there is no evidence that he adopts its reasoning as his own when he adopts its conclusion" [61 AD 2d 1048, aff'd 48 NY 2d 659 (1978)].

Additionally, in Miracle Mile Associates v. Yudelson, it was found that:

> "While the purpose of the exemption is to encourage the free exchange of ideas among government policy-makers, it does not authorize an agency to throw a protective blanket over all information by casting it in the form of an internal memo..The question in each case is whether production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects..." [68 AD 2d 176, 182-183; motion for leave to appeal denied, 48 NY 2d 706 (1979)].

The second issue involves a request for "any document, writing or communication...confirming or memorializing distribution of the Village Code of Ethics" to certain persons. You responded that the persons were not deemed to be officers or employees of the Village and were not required to comply with the Code of Ethics. The applicant thereafter wrote that your answer was not responsive to his request, and he asked for a "simple declarative, yes or no," as to whether documents exist that confirm that copies of the Code of Ethics were distributed to the persons in question and whether there was ever public disclosure made by those persons pursuant to the Code of Ethics. Here I note that the Freedom of Information Law pertains to existing records and that it does not require agency officials to answer questions. However, in my opinion, it would be appropriate simply to indicate that the Village maintains no such records if indeed that is so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9497

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May 30, 1996

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 information presented in your correspondence.

Dear Ms. Goldblatt:

I have received your letter of May 9 in which you sought assistance in obtaining information from the Northport-East Northport School District.

You referred to the following request made in June of 1992: "During the 1991-1992 school year, 47 students were sent to BOCES programs. What was the cost of their transportation?" You were informed soon after that "Record is not maintained by this Agency." However, in a previous response, it was stated that "The information you have requested, specifically, the cost of bussing students to BOCES special education programs is not readily available." You contend that "not readily available" and "Record not maintained by this Agency" are "contradictory statements."

The issue in my view is whether the information sought exists in the form of a record or records. 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. While the District might have the ability to review its records and prepare computations in order to arrive at an answer to your question, it would not be legally obliged to do so. On the other hand, if a record exists that contains the information sought, I

believe that it would be available under the Freedom of Information Law, for "statistical or factual tabulations or data" must generally be disclosed [see Freedom of Information Law, §87(2)(g)(i)].

Second, it is possible that the information in which you are interested can be generated electronically by the District. Although it is reiterated that the Freedom of Information Law pertains to existing records, it is also emphasized that §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 some fifteen 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, 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) 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)].

Often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend

to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. In my view, if electronic information can be extracted or generated with reasonable effort, an agency would be obliged to do so.

I hope that I have been of 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-9498

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May 30, 1996

Mr. Aramis Montalvo
86-A-2453
Pouch No. 1
Woodbourne, NY 12788

<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 information presented in your correspondence.</u>

Dear Mr. Montalvo:

I have received your letter of May 10 and the correspondence attached to it. You have asked whether certain records that pertaining to your case that are maintained by the Office of the Bronx County District Attorney must be made available to you.

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 are familiar with your own confession, I believe that a videotape or a transcript of the confession would be available to you, if they exist and if you are able to pay the appropriate fees for copying, for none of the grounds for denial would apparently apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2615
FOIL-AO- 9499

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May 31, 1996

Mr. James J. Markowski
[redacted]

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, unless otherwise indicated.

Dear Mr. Markowski:

I have received your letter of May 15. In your capacity as a member of the Bedford Central School District Board of Education, you have raised a variety of questions relating to a series of events involving the development of a voter survey to be used in the District. I note in good faith that the District's attorney, Phyllis Jaffe, contacted me soon after the receipt of your letter, and that the President of the Board, Karen Akst Schecter, has forwarded her view of the facts to me.

It is also emphasized that the Committee on Open Government is authorized to advise with respect to the Open Meetings and Freedom of Information Laws. Several of your questions, although they may involve the disclosure of information, do not pertain to those statutes. Consequently, the following comments will be restricted to issues raised by both yourself and Ms. Schecter that fall within the scope of the Committee's advisory jurisdiction.

By way of background, two District residents were designated to prepare a survey to be distributed to voters on the day of the Board elections and the budget vote. Ms. Schecter wrote that "it was understood" that the draft exit survey "was to be kept confidential until the Board reviewed it and until the voters saw it for the first time" on the day of the election. Nevertheless, the draft was given by one of those who prepared it to another resident, who in turn distributed it to other members of the community. Some considered the disclosure to be improper and the Board entered into an executive session, apparently characterized as "a specific personnel matter", to discuss whether the person who initially disclosed the draft survey should be asked to "step down." In addition, the draft survey was also reviewed and revised during an executive session.

The initial key issue is whether the Board had the authority to discuss the activities of resident who disclosed the draft in an executive session. It appears from my perspective that both you and Ms. Schecter have fallen into what I have come to call "the personnel trap." I believe that the Board had a proper basis for discussing the matter during an executive session, even though it did not involve a past, present or perhaps future District officer or employee.

As a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the 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.

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, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

In the context of the situation at issue, insofar as the discussion involved a matter leading to the dismissal or removal of the person who disclosed the draft survey, I believe that there was a proper basis for conducting an executive session.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this

> must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

A second involves the propriety of discussing the content of the survey in private. Based on a review of the grounds for entry into executive session, I do not believe that there would have been a basis for reviewing or revising the draft survey during such a session. I point out in a related vein 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).

Although the draft survey was not sought under the Freedom of Information Law, you asked whether it was a "confidential document." In this regard, an assertion or claim of confidentiality, unless it is based upon a statute, is generally 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, again, 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, there would have been no statute specifying that the record in question could be characterized as confidential. Rather, it is likely in my view that the record would have been available, if it had been requested, under 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 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, the citizens who prepared the draft survey are not agency employees, and it has been found 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, the citizens would not have performed a governmental function, and they would not be part of an agency. 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 citizens are apparently not part of an agency, the draft survey 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, based on the information provided, none of the other grounds for denial would be applicable.

I hope that the foregoing serves to clarify both the Open Meetings and Freedom of Information Laws, and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Akst Schecter, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO - 9500

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May 31, 1996

Ms. Janet G. Bell
[redacted]

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 Ms. Bell:

I have received your communication of May 15 in which you sought an opinion concerning a denial of a request made under the Freedom of Information Law to the Village of Scarsdale.

As I understand the matter, one of the documents sought is a lease between the Village and Kids B.A.S.E.; the other involves what the Deputy Village Manager characterized as information "relating to the fair market value of a rental of the American Legion property." He denied access to the former on the ground that the lease is in draft "and is still being negotiated" and to the latter because it is "confidential."

In this regard, I offer the following comments.

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

Second, with respect to the lease, it would appear that the only ground for denial of significance is §87(2)(c), which enables an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." In my opinion, the key word in the provision quoted above is "impair", and the issue involves the extent to which disclosure would preclude the Village from engaging in an optimal agreement on behalf of the taxpayers.

I am unaware of the nature or details of the negotiations. If there are no other parties involved or potentially involved in the lease negotiations, it is questionable in my view whether disclosure would "impair" the contracting process. In a case

involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, if the Village and Kids B.A.S.E. are the only potential parties to the negotiations and both are familiar with the records at issue, disclosure would likely not place either at a disadvantage in the negotiations and disclosure in that event would not likely impair the capacity of the Village to negotiate an optimal agreement. On the other hand, if other parties are or may potentially be involved, it is possible that premature disclosure would impair the process and that, therefore, the record could be withheld under §87(2)(c).

With respect to the second matter involving the fair market value of a rental, again, I have no specific knowledge of the facts in the matter. However, I point out that §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)]. Unlike the situation involving the draft lease, in the case of an appraisal or similar records known only to an agency, there would be an inequality of knowledge, and 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.

Also potentially relevant would be §87(2)(g). That provision permits an agency to withhold:

> "are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 appraisal prepared by or for an agency would in my view constitute intra-agency material that would fall within the scope of §87(2)(g) and depending upon the effects of its disclosure under §87(2)(c).

Lastly, I point out that an assertion or claim of confidentiality, unless it is based upon a statute, is generally 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, again, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: John N. Crary

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9501

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May 31, 1996

Mr. John Uciechowski
[redacted]

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

Dear Mr. Uciechowski:

I have received your letter of May 13 in which you again referred to a refusal on the part of the Sullivan County District Attorney to inform you of the reasons for a denial of access and to whom you may direct an appeal. You indicated that the court records regarding the case in which you are interested have been sealed. For the following reasons, I believe that such a response is likely relevant to the matter.

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 §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 §160.50 of the Criminal Procedure Law (CPL). Specifically, subdivision (1) of §160.50 states in relevant part that:

> "Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been

> sealed. Upon receipt of notification of such termination and sealing...
>
> (c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, typically when charges are dismissed in favor of an accused, records of or relating to the charges would be sealed in conjunction with the provisions quoted above.

Assuming further that the case did not involve a juvenile or youthful offender, but rather an adult, the only rationale with which I am familiar that would authorize the sealing of records would involve §160.50 of the CPL. If my assumptions are accurate, the District Attorney has no choice but to deny the request.

In most instances, the District Attorney is the head of an agency and an appeal is made to that person or his designee. If indeed the District Attorney, as the head of the agency, is the appeals person for the purpose of the Freedom of Information Law, it would appear that the only means of seeking review of his determination would be through a judicial proceeding initiated under Article 78 of the Civil Practice Law and Rules.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Stephen F. Lungen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9502

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

May 31, 1996

Mr. Kevin Echols
91-A-5806
Pouch No. 1
Woodbourne, NY 12788

<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 information presented in your correspondence.</u>

Dear Mr. Echols:

I have received your letter of May 10 in which you sought advice concerning access to records.

You asked whether you have the right to know if there was an informant in your case. According to your letter, while at a bar, the police arrested a patron who sat next to you, and soon after, you were arrested as well. You indicated that you later found out that the other man was seen buying drugs outside the bar, and you contend that the police mistakenly arrested you as his supplier. You added that he pleaded guilty, and you asked whether you are entitled to records containing his confession or admission.

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 primary significance in my view is §87(2)(e), which authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The ability to assert the provision quoted above is based upon a finding that the harmful effects of disclosure described in subparagraphs (i) through (iv) would arise. Frequently, records identifying informants may be withheld under §87(2)(e)(iii), for they involve a confidential source or confidential information relating to a criminal investigation.

However, if your co-defendant made a confession or an admission, it would appear that those kinds of statements, under the circumstances that you described, would be accessible. In short, because he pleaded guilty and the proceeding has been completed, disclosure of a confession or admission would apparently not result in the kinds of harmful effects envisioned in §87(2)(e).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC AO 2618
FOIL AO 9503

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

June 3, 1996

Mr. Michael F. McKeon
Corporation Counsel
City of Auburn
Memorial City Hall
24 South Street
Auburn, NY 13021-3885

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. McKeon:

I have received your letter of May 14 in which you requested an advisory opinion concerning the following questions:

> "1. With respect to Executive Session minutes, are the handwritten notes releasable under FOIL?
>
> 2. Is there any requirement under FOIL that handwritten notes be kept as a record?"

You added that it has been the practice of the secretary to prepare minutes on the basis of her handwritten notes, and to discard the notes after the minutes have been officially printed and filed with the City Clerk.

In this regard, I offer the following comments.

First, by way of background, §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.

Again, 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 notes might be available or deniable.

Second, while the Freedom of Information Law does not address the issue, §57.25(2) of the Arts and Cultural Affairs Law deals

with the retention and disposal of records maintained by local governments. That provision states that:

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

I believe that the retention schedule indicates that notes, tape recordings and similar materials used as aids in preparing minutes of meetings must be retained for a minimum of four months following the drafting of minutes. However, to be sure, it is suggested that you confer with the City's records management officer (see Arts and Cultural Affairs Law, §57.19), who should have a copy of the schedule. Alternatively, inquiry could be made to the State Archives and Records Administration, which can be reached at (518)474-6926.

I hope 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-9504

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

June 3, 1996

Mr. Ed Robinson
Ed Robinson & Associates
703 First Street
Liverpool, NY 13088

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. Robinson:

I have received your letter of May 14 in which you sought my comments concerning a denial of access to a proposal to combine the police forces of the City of Syracuse and the Village of Liverpool. The request was denied on the basis of §87(2)(g) of the Freedom of Information Law.

From my perspective, while some aspects of the proposal may justifiably be withheld, it is likely that others must be disclosed. In this regard, I offer the following remarks.

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, while the record or records in question fall within the scope of §87(2)(g), which is one of the grounds for denial, due to the structure of that provision, it often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

Lastly, while the City and the Village may have the authority to withhold portions of the records at issue, they are not required to withhold them or to deny access. Although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Roy Bernardi, Mayor
Hon. Fred Bobenhausen, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9505

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

June 5, 1996

Mr. Frederic S. Goldner
Energy Management & Research Associates
49 Murdock Court - Suite 61
Brooklyn, NY 11223

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. Goldner:

I have received your letter of May 7, as well as the materials attached to it. Please note that your correspondence did not reach this office until May 17. You have sought an advisory opinion concerning a request directed under the Freedom of Information Law to SUNY at Stony Brook.

By way of background, you requested documents pertaining to SUNY at Stony Brook's "electric rate overcharge negotiations with LILCO (account # 856-99-9975-1-7), initiated as a result of the University's 'Utility Billing Auditing Services' contract." Although some documents were disclosed, others were withheld on the basis of §87(2)(g) of the Freedom of Information Law. Thereafter, citing §87(3)(c) of that statute, you asked for "a list of those materials...which you feel are exempt from the FOIL...(Ideally this list shall include the type of material, topic, author/participants, and date.)." In short, it is your view that "the University has an obligation to release a list of materials which they felt are exempt from the FOIL statute." You also suggested that even if the records fall within the scope of §87(2)(g), some aspects of the materials must be disclosed.

In this regard, I offer the following comments.

First, I do not believe that §87(3)(c) of the Freedom of Information Law relates to denials of access or the specificity of a written denial. That provision requires that every 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."

From my perspective, the so-called "subject matter list" is not intended to be an index to each and every record maintained by an agency. Rather, I believe that it is intended to represent a categorization of the kinds of records maintained by an agency. It is possible, for example, that SUNY at Stony Brook includes in a subject matter list reference to "utility negotiations" or "contract negotiations." There would be no requirement that the subject matter list identify specific records within a category.

More significant in my view is §89(4)(a) of the Freedom of Information Law, which pertains to the right to appeal a denial of access to records and agencies' responsibilities in determining rights of access following an appeal. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body 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 am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law section 87(2)(f). The failure of the respondents and the Supreme Court, Westchester County, to disclose the underlying facts contained in these documents

> so as to establish that they did not fall 'squarely within the ambit of [the] statutory exemptions' (Matter of Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75, 83; Matter of Fink v. Lefkowitz, 47 NY 2d 567, 571), did not constitute error. To make such disclosure would effectively subvert the purpose of these statutory exemptions which is to preserve the confidentiality of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

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.

Among the grounds for denial is §87(2)(g). However, as you may be aware, due to its structure, that provision may require 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. 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 State's highest court, 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 or recommendations, the statistical or

factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

Lastly, it is unclear whether the response to your request citing §87(2)(g) as a basis for denial involved communications between SUNY at Stony Brook and LILCO. Here I point out that §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 language quoted above, an "agency", in general, is an entity of state or local government. LILCO would not constitute an agency and communications between LILCO and SUNY at Stony Brook would not fall within §87(2)(g) of the Freedom of Information Law. As such, if the denial based on §87(2)(g) included communications between SUNY at Stony Brook and LILCO, I do not believe that the University could validly have relied on that provision as a means of withholding records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Hunt, Office of Vice Chancellor
Margaret Tumilowicz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9506

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

June 5, 1996

Mr. George A. Mayes
[redacted]

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. Mayes:

I have received your letter of May 21 in which you sought assistance concerning requests under the Freedom of Information Law addressed to Warren County. Although the requests were initiated in December, as of the date of your correspondence with this office, you have received neither a grant nor a denial of access.

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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Louis Tessier
Pat Tatick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9507

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

June 5, 1996

Mr. Sergio Almonte Cruz
88-A-3814
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. Cruz:

I have received your letter of May 17, in which you complained that the New York City Police Department and the Office of the District Attorney of New York County failed to respond to your request under the Freedom of Information Law 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 Karen A. Pakstis, Assistant Commissioner, Civil Matters; the person so designated by the District Attorney is Gary J. Galperin, Assistant District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9508

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

June 6, 1996

Mr. Mark Bliss
95-R-6184
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733-0116

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

Dear Mr. Bliss:

I have received your letter of May 20. You referred to earlier correspondence in which it was advised that you appeal a constructive denial of a request for records directed to the New York City Police Department. Following your appeal dated March 25, you received a reply dated May 9 and postmarked May 17 stating that:

> "This is in response to your appeal from the constructive denial by the Records Access Officer of records requested from the New York City Police Department.
>
> "The Records Access Officer's constructive denial of your request for records pursuant to the Freedom of Information Law is overturned. I have directed that a response be forwarded to you as soon as possible.
>
> "You may seek judicial review of this determination by commencing an Article 78 proceeding within four months of the date of this decision."

You have asked whether the response indicates that your request has been denied and whether you can initiate an Article 78 proceeding despite the Department's failure to determine the appeal within the time prescribed by the Freedom of Information Law.

In this regard, on the basis of the response, I cannot ascertain whether the records that you requested will be granted or

denied in whole or in part. I believe, however, that in accordance with §89(4)(a) of the Freedom of Information Law, the Department in determining an appeal is required either to grant access to the records or fully explain the reasons for further denial. The response that you received did neither but rather indicates that you will receive an additional reply, presumably granting or denying access.

Second, if the Department determines to deny access, I believe that you would have the right to initiate a proceeding under Article 78 of the Civil Practice Law and Rules. As I understand Article 78, you may initiate a proceeding within four months of an agency's final determination.

This office does not maintain materials pertaining to the means by which Article 78 proceedings may be initiated. It is suggested that your facility librarian might be able to acquire the information from other sources on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9509

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

June 7, 1996

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 information presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of May 22, as well as the correspondence attached to it. You have questioned the right of a person who provided a statement to an agency to obtain a copy of the statement from the court that maintains it.

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access

officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9510

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

June 7, 1996

Mr. Robert Gunning
[redacted]

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. Gunning:

I have received your letter of May 17 and the correspondence attached to it.

You wrote that, for several years, you have requested records from the Village of East Rockaway under the Freedom of Information Law and that the Village has responded to those requests. However, after you initiated a lawsuit against the Village and requested records, you were informed that "due to pending litigation, this office is to have no comment or communication with you or any of the plaintiffs." It is your understanding that there is case law indicating that you "are legally entitled to the information we have and may continue to request." You have sought my views on the matter.

From my perspective, neither the pendency of litigation nor your status as a litigant would have an impact on your rights under the Freedom of Information Law. In this regard, I offer the following comments.

First, as stated by the Court of Appeals, the State's highest court, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY

2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. Nevertheless, when requested records were prepared or acquired in the ordinary course of business, rather than solely for litigation, it has been determined judicially that the statute cited above would not serve to exempt the records from disclosure. It has also been held that if records were 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)].

As you requested and in an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Sandra L. Torborg

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9511

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

June 7, 1996

Mr. Todd Taylor
94-B-0144
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 information presented in your correspondence.

Dear Mr. Taylor:

I have received your letter, which reached this office on May 24.

You described a situation in which a correction officer is known to carry the HIV virus and who, in your words, "is known to have been disciplined by the D.O.C.S. for sexual misconduct." You and others are concerned that the individual in question is involved in spreading HIV and exposing inmates and perhaps others to AIDS.

Having requested a list of officers disciplined for sexual misconduct at that facility during a specific period, you were told that the information is "exempt." You added that "[t]hey even refused to given a simple yes or no answer as to the fact of the question or whether any activity of this nature occurred at that facility in 94 or 95." You sought assistance in obtaining the information in question, and in this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no "list" containing the information sought, the Department would not be obliged to prepare a list on your behalf. Similarly, Department staff would not be required by the Freedom of Information Law to answer a question by stating "yes" or "no." Rather than seeking information, it is suggested that you request records, particularly records reflective of determinations to impose disciplinary action with respect to the correction officer in question or perhaps others.

Second, in my view, if there are final determinations indicating that a correction officer or officers engaged in misconduct, those 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. In my view, three of the grounds for denial may be relevant in consideration of rights of access to the records in question.

The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §50-a of the Civil Rights Law. In brief, that statute provides that personnel records of police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. The Court of Appeals, the state's highest court, in reviewing the legislative history leading to its enactment, has held that §50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law in a context unrelated to litigation. More specifically, in a case brought by a newspaper, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held

that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

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..."

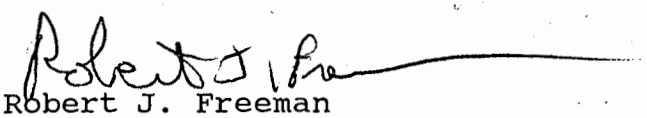
It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations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

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 which I believe would be equally applicable to correction 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 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, as suggested earlier, 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 assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-951

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

June 7, 1996

Ms. Deborah Bachrach
Kalkines, Arky, Zall & Berstein
1675 Broadway
New York, NY 10019-5820

<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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Ms. Bachrach:

I have received your letter of May 8, as well as the correspondence attached to it. You have sought an advisory opinion concerning the propriety of a denial of your request for records by the State Department of Health. The records that you requested are described as follows:

> "For each HMO and PHSP responding to the Department's Medicaid managed care RFP, a copy of the rate proposal for each premium group by county/region, its relationship to the rate range, and the rates offered by New York State, as attached to the March 22, 1996 letter from Elizabeth Macfarlane."

In response to the request, the Department's records access officer wrote that the RFP process had not been completed and that, therefore, the records could be withheld under §87(2)(c) of the Freedom of Information Law. He added that "[o]nce the RFP process is completed, access to the rate proposal portion of the HMO and PHSP bid would be denied" pursuant to §87(2)(d).

You have contended that "the portion of the RFP process which involves rate negotiations between the Department and managed care plans has now been completed", that "all rate proposals have either been accepted or rejected by both sides", and that "[t]he only remaining steps in the process are the completion of readiness reviews by the Department and the execution of contracts between plans and local social service districts." You also wrote that:

> "While a managed care plan may have had an interest in maintaining the secrecy of its rate proposal during the RFP rate negotiation process, all rates have now been finalized, and therefore the disclosure of this information would not undermine the competitive position of any managed care plan. In most cases, a plan's proposed rates are identical to the plan's final rated, which the Department has agreed to ultimately disclose."

In an effort to learn more of the matter and to acquire their perspective, I have contacted officials of the Department of Health. Consequently, some of their remarks will be referenced in the ensuing commentary.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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)(c) permits an agency to withhold records to the extent that disclosure would:

> "...impair present or imminent contract awards or collective bargaining negotiations..."

In my view, the key element of the language quoted above involves the extent to which disclosure would "impair" the ability of the Department to engage in optimal contractual relationships.

I was informed that the RFP involved a requirement that submissions be broken down into so-called "rate cells", plans for each of nine areas that are tied to cost and which in fact varied dramatically among submissions. Further, the Department established what it characterized as acceptable rate ranges relative to each of the rate cells and, after the receipt of the proposal, it offered submitters a second opportunity to accept rates within the ranges. I was told that 41 plans have been submitted that fall within the acceptable rate ranges, and that no contract has been awarded as yet.

The potential procurement in this instance involves 31 counties, as well as New York City, and the large combination of entities participating in a single proposal is apparently unprecedented. Concurrently, however, other plans in counties are negotiating individually with the Department by means of the same procedures as they had in the past. The Department has contended that if the information sought, particularly the rate ranges, are released now, those counties negotiating independently with the Department would be able to ascertain what the acceptable rates would be. As such, those plans in counties, while uninvolved in

the process relating to the records at issue, would have an advantage in negotiating with the State.

In short, the Department, as I understand its concerns, is not contending that disclosure to the respondents to the RFP would impair the process with respect to the respondents; rather, because of the ongoing separate negotiations, disclosure would adversely impact the Department's negotiating status with those other entities.

I know of no judicial decision that deals directly with the kind of contention offered by the Department, i.e., that disclosure of records would not impair the contracting process with respect to those involved in the process, but rather with respect to different concurrent and related contract negotiations. From my perspective, because the contracts into which the Department will enter involve the same substance, if indeed disclosure now would place the Department at a disadvantage in negotiating with any of the potential parties to the contracts, it would appear that a denial on the basis of §87(2)(c) would be justifiable.

With regard to the assertion of §87(2)(d), it was argued that entities within a particular geographical area might have the ability to gain a competitive advantage by knowing the figures within rate cells. While it was recognized that any competitive disadvantage would be eliminated following the consummation of contracts, Department officials expressed the view that a denial of access could be justified now on the basis of §87(2)(d). That provision enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities that have responded to the RFP.

With respect to the substance of the matter, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which

> gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury"

[Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.
>
> "Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:
>
> > Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors

> to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).
>
> "The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL" (id., 995-996).

Lastly, it is noted 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Claudia Hutton
John Kaelin

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9513

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 7, 1996

Mr. Christopher Allen
96-A_0193
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 information presented in your correspondence.

Dear Mr. Allen:

I have received your letter of May 21. In brief, you indicated that you requested records under the Freedom of Information Law from a variety of sources, particularly courts, and that you have received no response.

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255; Family Court Act, §166) may grant public access to those records in some circumstances.

I point out, too, that in Moore v. Santucci [151 AD 2d 677 (1989)] the decision specified that the respondent office of a district attorney "is not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

It is suggested that you renew your requests and that you direct them to the clerks of the appropriate courts citing applicable provisions of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2619
FOIL-AO 9514

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

June 7, 1996

Lee G. Austin
[redacted]

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 Lee Austin:

I have received your letter of May 23 in which you raised questions relating to both the Open Meetings Law and the Freedom of Information Law.

The initial issue involves a refusal by the Town of Halcott to disclose minutes until they have been approved by the Town Board. In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six 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 date of such meeting." Minutes of executive sessions must be prepared and made available, to the extent required by the Freedom of Information Law, within one week. I note that if a public body merely discusses an issue during an executive session but takes no action, minutes of the executive session need not be prepared.

There is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have 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.

You also questioned how records can be requested and whether an agency must have a fee schedule. Here I direct your attention to §89(1)(b)(iii) of the Freedom of Information Law, which 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 is the Town Board. Therefore, 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."

Based on the foregoing, a request should be made to an agency's designated records access officer. Most frequently, the records access officer in a town is the town clerk. Pursuant to §89(3) of the Freedom of Information Law, an applicant must "reasonably describe" the records sought. Therefore, when making a request you should include sufficient detail to enable agency staff to locate and identify the records of your interest.

With respect to fees, the provisions cited earlier pertaining to the Town Board's responsibility to adopt procedural rules and regulations also require that those rules include reference to fees. In brief, in accordance with §87(1)(b)(iii) of the Freedom of Information Law, an agency generally can charge up to twenty-five cents per photocopy for records up to none by fourteen inches; for the duplication of other records (i.e., computer tapes or disks, tape recordings, etc.), an agency may charge based on the actual cost of reproduction.

In an effort to enhance compliance with and understanding of the statutes under consideration, copies of this opinion will be sent to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Cindy Bouton, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9515

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

June 7, 1996

Ms. Marybeth Prendergast
[redacted]

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 Ms. Prendergast:

I have received your letter of May 14. For reasons unknown, it did not reach this office until May 29.

You have sought assistance in obtaining a record that you describe as a "factual account" given by a village employee "of a property damage incident occurring in Washingtonville." The Village has denied the request "because the record you seek is an intra-office record, which is exempt from disclosure pursuant to Section 87 (2) (G)."

From my perspective, insofar as the record in question consists of factual information, the Village is required to disclose those portions of the record to you. In this regard, I offer the 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.

Among the grounds for denial is §87(2)(g). However, due to its structure, that provision may require 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. 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 State's highest court, 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 or recommendations, 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, copies of this opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Melanie J. Lanc

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-95/6

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

June 10, 1996

Mr. Daryl Robinson
95R6366
Adirondack Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Robinson:

I have received your letter of May 24. Your inquiry pertains to your ability to obtain a copy of your pre-sentence report.

In this regard, although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state 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. It is suggested that you review that statute.

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-9517

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

June 10, 1996

Mr. Frederick T. Thompson
#83-B-0953
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. Thompson:

I have received your letter of May 22. As you requested, enclosed are copies of the Committee's latest annual report, as well as the supplement to the report. In addition, you raised questions concerning requests for records.

The first involves a situation in which the office of a district attorney does not maintain records, such as documents submitted as exhibits during a trial. In this regard, if indeed the agency does not have possession of the records, it is suggested that, alternatively, you may seek them from the clerk of the court in which the case was tried. While the Freedom of Information Law does not apply to the courts or court records, those records are generally available under other provisions of law (see e.g., Judiciary Law, §255).

You also asked what course of action may be taken when an agency fails to respond to a request. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of 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-9518

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

June 11, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of May 27 in which you referred to Chapter 705 of the Laws of 1989. You asked whether a failure to respond by an agency's records access officer or the person designated to determine appeals is considered a violation of the provision to which you referred.

In this regard, part of Chapter 705 involved the addition of §89(8) to the Freedom of Information Law. That provision states that: "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation." A companion provision was added to the Penal Law as §240.65.

As I interpret Chapter 705, it does not apply in situations in which agency officials fail to respond to requests or appeals. Rather, I believe that it would be applicable in a case in which an agency official indicates that a record sought is not maintained by an agency when the official knows that the record is maintained by the agency, or when an agency official destroys a record that has been requested in order to prevent disclosure of the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9519

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

June 11, 1996

Ms. Margaret J. Bourcy
RR2 Box 113
36599 County Rt. 4
Clayton, NY 13624-2227

Dear Ms. Bourcy:

As you are aware, your letter addressed to Attorney General Vacco has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

Based on your letter, it appears that you are attempting to obtain records from a county clerk and perhaps from other governmental entities, particularly the town where you reside. You suggested that lawyers can acquire the information in which you are interested, but that you are unable to do so.

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 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), records should be made equally available to any person. In short, an attorney, for example, has no greater rights under the Freedom of Information Law than you do.

Third, every agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests should ordinarily be directed to that person. I note 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 staff to locate and identify the 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)].

Enclosed is "Your Right to Know", a brochure that describes the Freedom of Information and Open Meetings Laws and contains a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9520

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

June 12, 1996

Mr. Anthony Swiggett
86-A-8227
Downstate Correctional Facility
Box F
Fishkill, NY 12524-0445

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

Dear Mr. Swiggett:

Your letter of June 3 addressed to Secretary of State Treadwell has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. You have complained that the Department of Correctional Services has failed to respond to your requests made under the Freedom of Information Law in a timely manner.

In this regard, the Freedom of Information Law provides guidance 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.

Lastly, you referred to requests for a variety of "statistical information." I point out that the Freedom of Information Law pertains to existing records and that §89(3) states in part that an agency is not required to create or prepare a record in response to a request. If the statistics that you seek exist in the form of a record or records, it appears that they would be accessible under the Freedom of Information Law [see §87(2)(g)(i)]. If, however, no such records exist, the Department would not be required to create such records on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9521

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

June 13, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of May 27 in which you referred to a response to a request by Sergeant Louis Lombardi, Records Access Officer for the New York City Police Department. You have asked that I contact Sergeant Lombardi to raise a variety of questions. While I will not do so directly, I will comment with respect to those questions and forward a copy of this response to Sergeant Lombardi.

First, I note that although Sergeant Lombardi's letter to you is dated May 15, it was not postmarked until May 22. I cannot explain the discrepancy, and in an agency as large as the New York City Police Department, Sergeant Lombardi may have no information and similarly no control with respect to the speed at which mail is sent.

Second, you questioned Sergeant Lombardi's response in that it indicates that it could be "anticipate[d] that a determination with respect to your request for access will be reached within approximately ninety days of the date of this letter." 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..."

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. To comply with the Law, I believe that the indication of an estimated date when records will be granted or denied should be as accurate an estimate as possible, based on the kinds of factors described above.

Lastly, you also asked why Sergeant Lombardi is responding to your requests addressed to three New York City police pension funds. It is your view that each of those entities should have designated its own records access officer. It is my understanding that the entities to which you referred are housed at One Police Plaza. As such, they are apparently physically located within the confines of the New York City Police Department. Moreover, there is nothing in any law of which I am aware that would preclude the entities in question from designating the same individual as records access officer. So long as the designated records access officer carries out his or her duties in accordance with the requirements imposed by law, I do not believe that the designation of one person to serve more than one entity would in any way be inconsistent with law, especially when those entities function in the same location.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sergeant Louis Lombardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2622
FOIL-AO 9522

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 13, 1996

Ms. Jody Adams
[redacted]

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

Dear Ms. Adams:

I have received your letters of May 29 and June 2 in which you raised a variety of questions concerning the government of the Town of Southold. Some aspects of the issues that you raised do not deal directly with the statutes within the scope of the Committee's jurisdiction. Consequently, the ensuing remarks will be restricted to issues pertaining to the Freedom of Information and Open Meetings Laws.

First, you raised questions concerning the status of committees under the Open Meetings Law, and you referred specifically to the Town's Ethics Committee. In this regard, 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."

Several 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, an advisory body such as a citizens' advisory committee would not in my opinion be subject to the Open Meetings Law.

Nevertheless, if a committee consists solely of members of a public body, or if it is created pursuant to law, as in the case of an ethics committee, a planning board or a zoning board of appeals, for example, those kinds of entities in my view could clearly constitute public bodies required to comply with the Open Meetings Law.

When the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of an ethics board, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse

United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the board consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

While I believe that an ethics committee or ethics board is clearly covered by the Open Meetings Law, as you may be aware, a public body may in appropriate circumstances enter into an executive session. Section 105(1) of the Open Meetings 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..."

With respect to the records maintained or acquired by an ethics board or committee, any such records would fall within the coverage of the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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.

You also wrote that the Town Board frequently cites "personnel", without more, as its basis for conducting an executive session. Although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session;

others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of

Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Lastly, you referred to a request for police officers' tours of duty. While it is not entirely clear which records you have sought, it would appear 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Laury Dowd

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9523

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June 13, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of May 27. You have asked that I contact Mr. David J. Cronan, Records Access Officer for the New York City Office of Management and Budget, concerning a statement that he offered in response to your request made under the Freedom of Information Law. Mr. Cronan wrote as follows: "it is unlawful to request personnel information for commercial purposes; therefore, I need a statement that your request is not for commercial purposes before I can release such information."

In this regard, I offer the following comments.

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

Second, 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 or the status of the applicant, is in my opinion irrelevant.

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."

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.

Lastly, I am unaware of the nature of the records that you requested. However, if the record is the payroll list required to be maintained pursuant to §87(3)(b) of the Freedom of Information Law, I believe that it must be disclosed, irrespective of its intended use. 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 earlier, 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, §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 its intended use. Consequently, in my view, the payroll record required to be maintained should be disclosed to any person, regardless of its intended use. I point out, too, that §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, and 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.

As you requested, a copy of this opinion will be forwarded to Mr. Cronan.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: David J. Cronan, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 13, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of May 29. Attached to your letter is a copy of an excerpt from the New York City Record stating that the Board of Trustees of the New York City Employees' Retirement System scheduled a meeting for May 28 at 9:30 a.m. at 220 Church Street. You wrote that, upon your arrival prior to the meeting, you were informed by the System's Executive Director, Mr. John Murphy, that you could not attend the meeting. Your request for an agenda was also refused. You have asked that I comment concerning "this alleged violation of the Open Meetings Law" and that I contact Mr. Murphy "so that he can send [you] a copy of the meeting's agenda as well as copies of any and all documents, etc. that were handed out at this meeting."

In this regard, I offer the following comments.

First, it is clear in my view that the Board of Trustees of the New York City Employees' Retirement System is a "public body" required to comply with the Open Meetings Law. Under that statute, §103, any member of the public has the right to attend an open meeting of a public body. The Law does not distinguish among those who enjoy such a right based upon residency, interest, or any other qualifier.

Second, every meeting must be convened open to the public. Following convening a meeting open to the public, a public body may in appropriate circumstances enter into an 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, and §105(1) of the Law requires that a procedure be accomplished during an open meeting before an executive session may be held.

Based upon your commentary, it does not appear that any attempt was made by the Board to exclude you by entering into a valid executive session or that there would have been a reason, at the time of your exclusion, for prohibiting you from attending.

Third, I choose not to ask Mr. Murphy to send you copies of an agenda and materials distributed at the meeting. You may choose to request those records pursuant to the Freedom of Information Law. I note, too, that there is no requirement that records used at a meeting by a public body be made available to members of the public in attendance during the meeting. Moreover, there are many instances in which records used or considered by public bodies at meetings include information that may justifiably be withheld under the Freedom of Information Law. For instance, in the context of the duties of a pension system, it is likely that records or portions thereof might properly be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" when they include medical information, for example, or perhaps information relating to beneficiaries [see Freedom of Information Law, §87(2)(b)].

Copies of this opinion will be forwarded to Mr. Murphy and Mr. Reuben David.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Murphy
Reuben David

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9525

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June 13, 1996

Mr. Desmond Blake
93-A-2112
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Blake:

I have received your letter of May 24 concerning your requested directed to the Department of Correctional Services and its refusal to disclose mental health records to you.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. If your correctional facility maintains the records as a facility, I believe that it would be required to disclose the records to you to the extent required by §33.16 of the Mental Hygiene Law. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Loretta A. Klein
C. Artuz

STATE OF NEW YORK
DEPARTMENT OF STATE
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June 13, 1996

Mr. Alfred Kuhnle
[redacted]

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. Kuhnle:

I have received your letter of May 28 and the materials attached to it. You have sought assistance concerning your request for records made under the Freedom of Information Law to the New York City Police Department and the response of the Records Access Officer, Sergeant Louis Lombardi.

First, I note that although Sergeant Lombardi's letter to you is dated May 15, it was not postmarked until May 22. I cannot explain the discrepancy, and in an agency as large as the New York City Police Department, Sergeant Lombardi may have no information and similarly no control with respect to the speed at which mail is sent.

Second, you questioned Sergeant Lombardi's response in that it indicates that it could be "anticipate[d] that a determination with respect to your request for access will be reached within approximately ninety days of the date of this letter." 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..."

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. To comply with the Law, I believe that the indication of an estimated date when records will be granted or denied should be as accurate an estimate as possible, based on the kinds of factors described above.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sergeant Louis Lombardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9527

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

June 14, 1996

Mr. James Bohun
[redacted]

Dear Mr. Bohun:

I have received your letter of May 29 and the correspondence attached to it.

You have sought assistance in obtaining "the rule that permits a New York City employee in one civil service title to take a leave of absence to accept an appointment to another civil service title for the duration of the probationary period in the new title." By way of background, you requested the rule from the New York City Department of Personnel and were advised that "all rules concerning the topic you requested" were made available to you. That being so, I cannot offer guidance.

It is noted that the Freedom of Information Law pertains to existing records. Similarly, §89(3) of that statute provides in part that an agency is not required to create records in response to a request. In short, it appears, based upon the response by the New York City Department of Personnel, that there may be no specific rule reflecting the kind of situation that you described.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9528

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

June 14, 1996

Mr. David Hunt
83-A-4739
Woodbourne Correctional Facility
Riverside Drive
Woodbourne, NY 12788

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

Dear Mr. Hunt:

I have received your note of May 29 in which you sought my opinion concerning a request directed to the Office of the New York County District Attorney. The request involves copies of polygraph tests and results, rap sheets, "agreements", "immunities", and related records pertaining to witnesses at your trial.

In my view, it is likely that the records sought may be withheld in great measure, if not in their entirety. In this regard, I offer the following comments.

First, the general repository of rap sheets or 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, 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.

Second, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], which involved a request made to the office of a

district attorney, may be pertinent to the matter. In Moore, it was found 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).

Based on the foregoing, insofar as witnesses' statements or other records are submitted into evidence or disclosed by means of a public judicial proceeding, I believe that they must be disclosed.

On the other hand, if the records sought have not been previously disclosed, three grounds for denial appearing in the Freedom of Information Law would appear to be relevant. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". From my perspective, the propriety of a denial of access would, under the circumstances, be dependent upon the nature of statements by witnesses or the contents of other records have already been disclosed. If disclosure of the records in question would not serve to infringe upon witnesses' privacy in view of prior disclosures, §87(2)(b) might not justifiably serve as a basis for denial. However, if the records in question include substantially different information, that provision may be applicable. Further, I believe that disclosure of polygraph tests and the results would if disclosed constitute an unwarranted invasion of personal privacy.

Also potentially relevant 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). It appears that the records in question consist of "confidential information relating to a criminal investigation."

Lastly, §87(2)(f) permits an agency to withhold records insofar as disclosure would "endanger the life or safety of any person." It is possible that the cited provision might also be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9529

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

June 14, 1996

Mr. Lamont Coles
96-A-0340
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 information presented in your correspondence.

Dear Mr. Coles:

I have received your letter of May 30 in which you sought assistance in obtaining your birth certificate and the birth papers pertaining to your siblings.

In this regard, rights of access to birth records are not governed by the Freedom of Information Law, but rather by provisions of the Public Health Law. Under both §§4173 and 4174 of the Public Health Law, birth records are available to the subjects of those records if they are eighteen years of age or older, to the "lawful representative" of the person to which the record or birth relates, or by means of court order. As such, I believe that you would be able to obtain your own birth record, but it is unlikely that you could obtain the birth records of your siblings without a court order.

Birth records are maintained by the local registrar of vital records, such as a town or city clerk, and by the Bureau of Vital Records, New York State Health Department, Corning Tower, Empire State Plaza, Albany, NY 12237.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9530

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

June 14, 1996

Mr. Chaudhri Ali
91-A-4508
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 information presented in your correspondence.

Dear Mr. Ali:

I have received your letter of June 3. You have sought my comments concerning a request directed to the New York City Police Department for records pertaining to your case.

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.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9531

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

June 14, 1996

Mr. Richard Wright
88-B-1791
P.O. Box AG
Fallsburg, NY 12733

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

Dear Mr. Wright:

I have received your letter of June 2. You referred to a fire in the City of Troy that occurred in 1986. As a result of that event, you indicated that a committee was formed by the City to investigate the matter. You have sought guidance regarding the procedure for seeking and obtaining records.

In this regard, pursuant to regulations promulgated by the Committee on Open Government (see 21 NYCRR Part 1401), 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, and requests should be directed to that person. For your information, the records access officer for the City of Troy is Mr. Mark Streb.

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 contain sufficient detail to enable agency officials to locate the records sought.

It is also noted that the Freedom of Information Law pertains to existing records. Since the fire occurred some ten years ago, it is possible that some records relating to the event might have been validly destroyed. Insofar as the records in question no longer exist, the Freedom of Information Law would not apply.

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

Enclosed is a brochure that may be useful to you, for it explains the Freedom of Information Law and includes a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9532

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

June 14, 1996

Mr. Chris Parrinello
[redacted]

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, unless otherwise indicated.

Dear Mr. Parrinello:

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

You alleged that citizens in the Village of Millbrook "have either been denied access to a copy of the existing zoning ordinance, or the proposed zoning ordinance." You added that some have found that pages or sections were missing from the records that were made available. It is my understanding that many considered their requests to have been denied and thereafter appealed. You have asked whether the Village informed this office with respect to the appeals. Additionally, you raised a series of questions involving matters beyond the jurisdiction or expertise of the Committee on Open Government. Please note that the advisory jurisdiction of this office is limited to matters involving the Freedom of Information and Open Meetings Laws, and the ensuing comments will pertain only to the Freedom of Information Law.

In an effort to learn more of the matter, I contacted Karen McLaughlin, Clerk-Treasurer of the Village. Based upon my conversation with her, insofar as the records requested exist, they were made available to those who requested them. She also said that it was explained at an open meeting that sections and pages were not missing; rather, what appeared to be missing involved provisions that had not been enacted. In short, as I understand the situation, requested records were not withheld; on the contrary, it appears that the requests were honored and their entirety.

While it does not appear that records were denied, when a denial of a request for records is appealed to an agency, the agency is required to transmit the appeal to the Committee on Open

Government. Specifically, §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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Karen McLaughlin

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9533

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

June 17, 1996

Mr. Hans Early
86-A-8011 C3-34
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821-0051

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

Dear Mr. Early:

I have received your letter of June 3 in which you complained with respect to the treatment of requests made under the Freedom of Information Law by the Department of Correctional Services. You asked whether this office can bring "sanctions" against Department officials or ensure that they comply with law.

In this regard, 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 otherwise comply with law.

Relative to your comments, however, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it

acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: D. Roberts, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9534

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

June 17, 1996

Mr. Mark Washington
80-A-0649
Southport Correctional Facility
Box 2000
Pine City, NY 14871

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

Dear Mr. Washington:

I have received your letter of June 11, in which you complained that the New York City Police Department and the Office of the District Attorney of Queens County failed to respond to your requests under the Freedom of Information Law 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the

court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 Karen A. Pakstis, Assistant Commissioner, Civil Matters; the person so designated by the District Attorney is Steven J. Chananie, Chief of the Appeals Bureau.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Steven J. Chananie

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 3623
FOIL-AO 9535

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

June 17, 1996

Ms. Patricia Villanova
[redacted]

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 Ms. Villanova:

I have received your letter of June 6 in which you raised questions involving both the Freedom of Information Law and the Open Meetings Law.

With respect to the former, you asked initially who is responsible for preparing minutes of an executive session, and in a related vein, whether a town clerk must be present "in case minutes are taken."

In this regard, while the Open Meetings Law does not specify who must prepare minutes, in the case of a meeting of a town board, §30 of the Town Law states in relevant part that the town clerk:

> "Shall have the custody of all the records, books and papers of the town. He shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..."

Based upon the foregoing, the town clerk in my opinion has the responsibility to take minutes at a town board meeting.

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. As such, a "work session" or similar gathering is a meeting subject to the Open Meetings Law in all respects.

The Open Meetings Law contains what might be viewed as minimum requirements concerning the contents of minutes. Specifically, §106 of the Open Meetings Law states that:

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

Based upon the foregoing, it is clear in my view that minutes need not consist of a verbatim account of what was said at a meeting; 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, technically I do not believe that minutes must be prepared.

Although the Town Law requires that the clerk be present at each meeting of the town board for the purpose of taking minutes, it might not be reasonable to construe §30(1) to require the presence of a clerk at a meeting during which there are no motions, proposals, resolutions or votes taken. Section 30 of the Town Law was enacted long before the Open Meetings Law went into effect. Consequently, the drafters of §30 could not likely have envisioned

the existence of an extensive Open Meetings Law analogous to the statute now in effect. I believe that §30 was likely intended to require the presence of a clerk to take minutes in situations in which motions and resolutions are introduced and in which votes are taken. If those actions clearly will not occur during a workshop, it is in my view unnecessary that a town clerk be present to take minutes.

With regard to minutes of executive sessions, §105(2) of the Open Meetings Law provides that only the members of a public body have the right to attend executive sessions, but that a public body may authorize others (i.e., a town clerk) to attend. In order to resolve what may be a conflict between §105(2) of the Open Meetings Law and §30 of the Town Law requiring that a town clerk prepare minutes, three options have been suggested. First, a town board could authorize the clerk to be present during the entirety of an executive session. Second, the board could deliberate in private and invite the clerk to enter the executive session when it is about to take action so that the clerk can then be present to prepare minutes. Or third, the town board could deliberate in private and return to an open meeting for the purpose of taking action, at which time the clerk could take minutes.

A second issue involved a request for minutes of a "budget meeting." You were informed by the clerk that minutes do not exist, for she was told by the board that her services were not required "as they were going to make any notations necessary on their budget copies." You wrote, however, that you were informed by a board member that a "vote or consensus was taken to purchase new police cars."

As I understand the budget process, public bodies often meet several times to review proposals for the purpose of reaching consensus with regard to any number of items. Typically no "vote" is taken until the process of developing a preliminary budget has been completed. If the consensus to which you referred was one among many areas of tentative agreement prior to the adoption of a preliminary budget, I do not believe that minutes would have been required.

I note that in the leading decision dealing with the notion of a consensus reached at a meeting of a public body, Previdi v. Hirsch [524 NYS 2d 643 (1988)], 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, when a public body reaches a "consensus" that is reflective of its final determination of an issue, I believe that minutes must be prepared that indicate the manner in which each member voted.

In contrast, if a "straw vote" or consensus does not represent a final action or final determination of the board, I do not believe that minutes including the votes of the members would be required to be prepared.

Lastly, you referred to a report presented to the Putnam Valley Town Board by the Putnam Valley P.B.A. containing crime statistics prepared by the Police Department covering a five year period. When you requested a copy of the report, the request was denied "on the basis that the report is the property of the P.B.A. which is a private corporation and not subject to FOIL."

In my view, the question is whether the Town has possession of the report. If it does, I believe that the report would be available to the public.

The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" broadly to mean:

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

Based on the foregoing, if the report is in possession of the Town, irrespective of its authorship, it would constitute a Town record subject to rights of access.

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. None of the grounds for denial could justifiably be asserted in my opinion to withhold such a report assuming that it is maintained by the Town.

On the other hand, if the report was merely read or referenced at a meeting, and if the Town does not maintain the report or a copy thereof, the Freedom of Information Law would not be applicable.

I hope that I have been of 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 9536

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

June 17, 1996

Hon. Cindy L. Goliber
Town Clerk
Town of Potsdam
35 Market Street
Potsdam, NY 13676

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 Ms. Goliber:

I have received your letter of June 7 and appreciate your kind words. You have raised questions involving the Freedom of Information Law relative to records kept by the Town Attorney.

Having disclosed records in response to a request by Mr. Ira Parks for materials concerning payments to the Town Attorney, he specified "that he wanted ALL of the time slips pertaining to the town bills from the dates in his initial request" (emphasis yours). As I understand the matter, the time slips originally given to Mr. Parks were created at the request of the Town Supervisor. When you contacted the Town Attorney, he "explained that he prepares time slips that are then used for billing purposes" and that "once the bills are paid, the time slips are destroyed." He added that he "keeps a daily log of all calls and office appointments" but that "this log is for his personal use." At this juncture, the time slips in which Mr. Parks is interested do not exist and "would need to be created from [the Attorney's] log."

In conjunction with the foregoing, you raised the following questions:

> "1. When the audit committee and Town Board approve a bill for payment and the bill is paid, does that voucher with the attached bill become the official Town Record?
>
> "2. If it is practice to destroy time slips after a bill is accepted by payment, and the attorney keeps information in a daily log for

> personal use by his office, is the information in this log a Town Record?"

From my perspective, the primary issue involves the application of the term "record" as it is defined by the Freedom of Information Law. That statute pertains to all 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 on the foregoing, it is clear in my view that the Freedom of Information Law encompasses not only records in the physical custody of an agency, such as the vouchers to which you referred in the first question; it also includes records kept, held or produced *for* an agency. Therefore, in my opinion, insofar as the Town Attorney maintains or produces records for the Town, they are Town records that fall within the coverage of the Freedom of Information Law.

I note that in a case in which an agency rejected a request for its attorney's itemized bills "on the grounds that the records...are neither possessed nor maintained by the agency", it was held that the attorney's "records relating to each transaction in question are the agency's records within the meaning of Section 86 of the Public Officers Law" (C.B. Smith v. County of Rensselaer, Supreme Court, Rensselaer County, May 13, 1993).

Further, in a recent decision rendered by the Court of Appeals, the State's highest court, it was determined that the broad definition of "record" in the New York Freedom of Information Law should be distinguished from the narrow construction of that term by the federal courts in construing the federal Freedom of Information Act (5 U.S.C. §552). Specifically, the Court stated that:

> "We therefore decline to adopt the narrow definition of 'records' adopted by the Federal courts and applied here by the trial court and Appellate Division. To do so would undermine the legislative objective to provide maximum disclosure by enabling a government agency to insulate its records from public access by delegating responsibility for creating or maintaining particular information to a nongovernmental entity. Rather, we conclude that information kept or held for a government

> agency...is within the embrace of FOIL's 'records'" [Encore College Bookstores, Inc. v. Auxiliary Services Corporation, 87 NY 2d 410, 418 (1995)].

It is unclear whether the attorney's personal log is a record. If it involves only notations concerning his work for the Town, I believe that it would constitute a "record" subject to the Freedom of Information Law. If, however, it involves all of his work, only some of which involves the Town, I could not advise with certainty as to the extent to which the Freedom of Information Law might apply.

Nevertheless, related to the issue is the matter of the destruction or perhaps the preservation of the time slips, as well as other records produced for or maintained by an attorney on behalf of the Town. As you are likely aware, 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..."

Based on the foregoing, Town records cannot be destroyed without the consent of the Commissioner of Education until the minimum period for the retention of the records has been reached.

I am unaware of the retention period that would apply to time slips. It is suggested that you review your retention schedule to determine the minimum retention period or, alternatively, contact the Local Records Section of the State Archives and Records Administration for guidance.

If the time slips could properly have been destroyed in accordance with the retention schedule, the Freedom of Information Law in my view would be inapplicable. However, if the time slips should continue to exist, it would appear to be equitable to provide Mr. Parks with equivalent records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9537

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

June 17, 1996

Mr. Henry Thomas
92-A-2986 Dorm 8-1
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. Thomas:

I have received your letter of June 13 in which you requested assistance in obtaining a "jail time certificate." As I understand the matter, you sent a request to Mr. Edwin Felician of the New York City Department of Correction for a copy of the record, but the request has not been answered.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to Ms. Thomas Antenen, Records Access Officer for the New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Second, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correction is Ernesto Marrero, Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9538

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

June 17, 1996

Mr. Don Thomas
93-R-0085
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. Thomas:

I have received your recent letter which reached this office on June 17. You requested assistance in obtaining a "jail time certificate." As I understand the matter, you sent a request to Mr. Edwin Felician of the New York City Department of Correction for a copy of the record, but the request has not been answered.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to Ms. Thomas Antenen, Records Access Officer for the New York City Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

Second, for future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correction is Ernesto Marrero, Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9539

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

June 17, 1996

Mr. Kerry D. Benney
[redacted]

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. Benney:

I have received your letter of June 3. You referred to a request directed to Jefferson County for records concerning the purchase of a "surface structure otherwise known as (oil stone) which was applied to County Route 179...in the summer of 1994..." Although the County disclosed a "chemical control data sheet", you indicated that you did not request that record. Rather, you requested the "design sheet" and the "New York State Oil Certification." When you were told that there were no such records, you requested a response to that effect in writing. Your request was refused.

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. Records reflective of expenditures of public monies, such as contracts, purchase orders, bills, vouchers, books of account and similar documentation are typically accessible, for none of the grounds for denial would apply. Similarly, if the County maintains the records in which you are interested, it does not appear that there would be any basis for a denial of access.

Second, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency is not required to create a record that it does not maintain in order to respond to a request. Therefore, if indeed the County does not maintain the records sought, the Freedom of Information Law would not apply.

Lastly, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Scott Schrader, Acting County Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9540

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

June 18, 1996

Mr. John C. Ptacek, III
[redacted]

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

Dear Mr. Ptacek:

I have received your letter of June 9 in which you sought advice concerning access to records of the Town of Hebron.

You referred to a meeting that you had with the Town Assessor and the Valuation Data Manager to view records that were used in determining your tentative assessment. When you could not obtain answers to your questions, you asked to see the "paperwork" on the subject. In response, you wrote that the Assessor refused, stating that all of the data consisted of her "working papers" and that you were not allowed to view them. In addition, it is your belief that the meeting was tape recorded.

From my perspective, insofar as the working papers consist of statistical or factual information, they must be disclosed. Further, if indeed the meeting was recorded, the tape recording would also be available to you. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" to 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, any materials prepared by the Assessor, including those characterized as "working papers" or a tape recording, would constitute "records" that fall within the scope of the Freedom of Information Law.

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

Relevant with respect to the working papers is §87(2)(g). Although that provision potentially represents a basis for a denial of access, due to its structure, it often requires disclosure. 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, too, that long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available, such as real property record cards [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951)] and pencil-marked data cards [Sanchez v. Papontas, 32 AD 2d 948 (1969)].

A tape recording of a conversation during which you participated would also be available to you. In short, since you were present at and participated in the meeting, I do not believe that any ground for denial could appropriately be asserted.

Lastly, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and a request may be directed to that person. In most towns, the records access officer is the town clerk. Moreover, under §30 of the Town Law, the town clerk is the legal custodian of all town records, including those in the physical custody of the assessor.

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 Assessor and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Assessor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9541

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

June 18, 1996

Mrs. V. 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 information presented in your correspondence.

Dear Mrs. Williams:

I have received your letter of June 7, in which you sought assistance in relation to a request directed to the Division of Parole.

By way of background, in a letter dated May 9 to the Division's public information officer, you requested documentation indicating:

> "any policy or guidelines to be used by the Parole Board in making parole release decisions for individuals convicted of Sex Offenses, and any and all statistical tabulations relating to parole release decisions made by the Parole Board for individuals convicted of Sex Offenses, N.Y. Exec. Law 259 (b)" (emphasis yours).

As of the date of your letter to this office, you had not received a response.

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 that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there are no "statistical tabulations" relating to parole release decisions made by the Parole Board for individuals convicted of sex offenses, the Division of Parole would not be required to review its records for the purpose of preparing a new record containing the information sought on your behalf.

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

Relevant to your request is §87(2)(g). Although that provision potentially serves as a basis for denial, due to its structure, I believe that it would require disclosure of the records that you have requested to the extent that they exist.

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.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request

> and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Division of Parole to determine appeals is Ann Horowitz, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Horowitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1197
FOIL-AO 9542

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

June 18, 1996

[redacted]

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 [redacted]:

I have received your letter of June 7 in which you sought an opinion and assistance in relation to requests made under the Freedom of Information Law to the Village of Millbrook.

By way of background, you were apparently informed that you met the requirements to hold the position of police officer for the Village, but that, in the words of Village Trustee Ronald v. Mosca, who serves as Commissioner of Police, the Village "chose three applicants that we feel will best meet the requirements for police officer in the Village of Millbrook." You characterized that response to mean that you were "not hired since three more qualified individuals were selected." While I am not sure that your interpretation of Trustee Mosca's response is accurate, you requested from the Village its "requirements for police officer", its "hiring policies and procedures", and the dates of adoption of any such requirements, policies or procedures. In response, you were informed that the Village carries out its duties pursuant to the State Civil Service Law and that its personnel functions are performed through the Dutchess County Office of Personnel. You also requested "the specific area(s) each police officer selected April 1996 was determined to be more qualified than [you]." You have contended that you have a right to the information sought under both the Freedom of Information Law and the Personal Privacy Protection Law.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law is inapplicable. That statute pertains only to state agencies and specifically excludes units of local government from its coverage [see definition of "agency" for purposes of that statute, Public Officers Law, §92(1)].

Second, the Freedom of Information Law pertains to existing agency records, and §89(3) of that statute provides in part that an agency is not required to create a record that it does not maintain in response to a request. Similarly, the Freedom of Information Law does not require agency official to prepare records providing explanations of their actions or, in the context of your request, reasons for your rejection and/or the selection of others.

To the extent that the Village has developed its own requirements concerning the position of police officer or hiring policies or procedures on the subject, certainly those records would be available [see Freedom of Information Law, §87(2)(g)(iii)]. If, however, the Village merely applies state law and performs certain of its functions through a County agency, it likely would not have developed the kinds of records that you requested. If that is so, it appears that its responses were consistent with law.

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.

The provision in the Freedom of Information Law of most significance concerning the applications of those who were hired 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].

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 records 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen McLaughlin, Village Clerk
Ronald V. Mosca, Trustee
Allan E. Rappleyea

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9543

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

June 18, 1996

Mr. Samuel Cabassa
84-A-364
Box 1187
Alden, 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 information presented in your correspondence.</u>

Dear Mr. Cabassa:

I have received your letter of June 3 in which you raised questions concerning a request made under the Freedom of Information Law.

According to your letter, you were assaulted by a correction officer in 1987, you filed a complaint thereafter and the matter was referred to the Office of the Inspector General. You have asked whether you are entitled to copies of the records prepared in conjunction with the 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 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 the Freedom of Information Law pertains to existing records. Since the events to which you referred occurred nearly ten years ago, it is possible that some records relating to the event have been destroyed. To that extent, the Freedom of Information Law would no longer apply.

Your second question involves your right to obtain a so-called "enemies list." While it is not entirely clear what the list involves, it is likely in my view that it could be withheld on the basis of either §87(2)(b) concerning the protection of person privacy or §87(2)(f) involving endangering one's life or safety.

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 9544

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

June 18, 1996

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 information presented in your correspondence.

Dear Mr. Leeds:

I have received your letter of June 5 in which you requested an advisory opinion concerning access to records maintained by the CUNY College of Law at Queens College.

You wrote that the request is based upon the use of a Texas statute which in your view is analogous to the New York Freedom of Information Law under which an applicant obtained "a list of all top scoring applicants rejected by [a] school in recent years." You have sought my views concerning the extent to which the CUNY School of Law must release:

> "...the files and related records of **REJECTED** applicants including but not limited to their applications for admission (e.g. name, addresses, telephone numbers, LSDAS/LSAT registration number) with attachments, records of reasons for rejection and records showing the names of faculty member(s) or CUNY Law School employees and their vote for or against each rejected applicant" (emphasis yours).

In this regard, I offer the following comments.

First, I am unfamiliar with the substance of the Texas statute to which you alluded. Nevertheless, in my view it is likely irrelevant, for rights of access to agency records in New York are governed by the New York Freedom of Information Law.

Second, 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, insofar as the records sought include identifying details pertaining to candidates for admission, the records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

In my view, when records identify an individual as one whose application for admission has been rejected, that fact alone involves a disclosure that would fall within the exception. Additionally, the blank application that you enclosed requires the submission of a variety of items which in my opinion, by their nature, could justifiably be withheld as an unwarranted invasion of personal privacy. Among those items would be social security numbers, resident addresses and phone numbers, dates of birth, alien registration numbers, LSDAS/LSAT registration numbers and similar personal details.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kristin Booth Glen, Dean

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9545

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

June 18, 1996

Ms. Bonnie Lichak
[redacted]

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 Ms. Lichak:

I have received your letter of June 10. You referred to your unsuccessful efforts in obtaining a copy of a legal opinion allegedly prepared for the Town of Stephentown by its attorney. You were informed that "there is no written opinion in the Town file". You have asked if there is "any action that the state takes against an official that is violating the Freedom of Information Law."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. Neither the Committee nor any other state agency is empowered to "take action" against public officials in relation to the Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing agency records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if no written opinion has been prepared, the Freedom of Information Law would not apply.

Third, §86(4) of the Freedom of Information Law defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings,

> maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Therefore, if the attorney prepared a written opinion for the Town, the opinion would constitute a "record" that falls within the coverage of the Freedom of Information Law, even if it is not in the "Town file" and irrespective of its location.

Lastly, if a written legal opinion has been prepared, it is likely in my view that the Town could validly deny 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 ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Section 3101(c) and (d) of the Civil Practice Law and Rules authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation. Those kinds of records remain confidential in my opinion so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310

> N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

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)].

Also pertinent to an analysis of the matter is a different ground for denial that would also likely authorize the Town to withhold a written legal opinion. 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.

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 9546

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

June 18, 1996

Mr. Chiari Felix
93-A-5384
Fishkill Corr. 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 information presented in your correspondence.

Dear Mr. Felix:

I have received your letter of June 3, which for reasons unknown, did not reach this office until June 17. You have sought assistance in obtaining your trial transcripts under the Freedom of Information Law.

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is

suggested that a request be directed to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

I hope that the foregoing serves to enhance your understanding of the scope 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 9547

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 18, 1996

Mr. Rick Jensen
Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Mr. Jensen:

I have received your letter of June 14 in which you requested an advisory opinion concerning the Freedom of Information Law.

Attached to your letter is a memorandum addressed to you by David Ashe, the public information officer for the City of Utica. At the end of that document, Mr. Ashe wrote that "[t]he city is responsive to news media inquiries in a measured, timely and, all things considered, impersonal manner. Be advised, with news inquiries, only fax them." You have interpreted that statement to mean "that all communications with him must be faxed." You have sought an opinion "informing the city of the proper procedures required under the state's Freedom of Information Law."

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 City of Utica, 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, §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."

Second, if indeed Mr. Ashe's statement is intended to mean that he will accept requests for records under the Freedom of Information Law only if they are faxed to him, I believe that the City would be acting in a manner inconsistent with the Law and the regulations promulgated by the Committee. Section 89(3) of the Law makes reference to an agency's obligation to respond to "a written request for a record reasonably described." Similarly, §1401.5 of the regulations states in relevant part that:

> "(a) An agency may require that a request be made in writing or may make records available upon oral request.
>
> (b) An agency shall respond to any request reasonably describing the records sought within five business days of receipt of a request."

In short, I believe that the City must accept any written request that reasonably describes the records, and that it cannot require that requests be made only by fax communication.

As you requested, copies of this opinion will be forwarded to City officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: City Council
Hon. Edward Hanna
David Ashe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9548

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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June 18, 1996

Mr. Richard Brummel, Editor
[redacted]

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. Brummel:

I have received your letter of June 10 in which you sought assistance "in creating compliance" with the Freedom of Information Law by the New York City Police Department. In brief, you complained with respect to delays in response to requests and a failure to provide access to its "index of documents."

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 is not empowered to enforce the law or otherwise compel an agency to grant or deny access to records. Nevertheless, in an effort to assist you, I offer the following comments.

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

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

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

opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 the index of documents, I note by way of background that, in general, an agency is not required to create records. Section §89(3) of the Freedom of Information Law states in part that:

> "Nothing in this article [the Freedom of Information Law] shall be construed to require any entity to prepare any record not possessed or maintained by such entity except the records specified in subdivision three of section eighty-seven..."

The record requested, however, is one of the records "specified in subdivision three of section eighty-seven". That provision states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9549

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

June 18, 1996

Mr. Michael Kilian
Metro Editor
Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

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

Dear Mr. Kilian:

I have received your letter of June 17 in which you referred to a response to a request made under the Freedom of Information Law given by the records access officer for the City of Utica. In short, he acknowledged the receipt of your request and indicated that "a response will be forthcoming within the appropriate time." You asked whether a response of that nature is consistent with the requirements imposed by law. In my opinion, the response is inadequate.

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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be

granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Ashe, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9550

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

July 9, 1996

Mr. Mitch Wright
[redacted]

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

Dear Mr. Wright:

As you are aware, I have received your letter of June 17. Please accept my apologies for the delay in response.

You referred to a request made under the Freedom of Information Law to Lee W. Conklin, Chairman of the Delaware County Board of Supervisors' Social Services Committee, in which you sought information by raising a variety of questions. As of the date of your letter to this office, you had received no response to your inquiry. You have sought assistance in the matter.

In this regard, I offer the following comments.

First, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate 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, it appears that the governing body is the Board of Supervisors. As such, 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."

Based on the foregoing, I believe that Chairman Conklin should either have responded in accordance with the Freedom of Information Law or forwarded your request to the designated 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, 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 County does not have figures or statistics that would include information that you are seeking, the County would be under no obligation to create or prepare records containing the information sought on your behalf.

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. Insofar as the information sought exists in the form of a record or records, I believe that it would be available [see Freedom of Information Law, §87(2)(g)(i)]. Again, however, it is emphasized that if no records exist containing the information in which you are interested, the County would not be required to prepare new records in an effort to respond to your inquiry.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lee W. Conklin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9551

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

July 9, 1996

Mr. Jonathan Mattocks
91-R-2823 B-2-4
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011-0501

Dear Mr. Mattocks:

As you are aware, I have received your letters of June 20 and July 1 in which you appealed a denial of access to records rendered by a senior parole officer at the Wyoming Correctional Facility.

Please be advised that 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, and it does not determine appeals.

The provision concerning the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

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

As such, an appeal should be made to the head of the agency or a person designated to determine appeals. For your information, the person so designated at the Division of Parole is Ann Horowitz, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9552

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

July 9, 1996

Mr. Patrick Morrison
83-A-3436
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Morrison:

As you know, I have received your letter of July 19. Please accept my apologies for the delay in response.

You have requested a variety of records pertaining to a particular individual from this office under the Freedom of Information Law. In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain possession or control of records generally. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, a request for records under the Freedom of Information Law should be made to the agency or agencies that you believe would maintain the records of your interest. Further, 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, and a request should be directed to that person.

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. I would conjecture that the kinds of records that you requested, if they exist, could be withheld in great measure. For instance, a letter of recommendation prepared by an assistant district attorney would likely constitute intra-agency material that could be withheld under §87(2)(g) of the Freedom of Information Law. Additionally, §87(2)(b) enables an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy, and §87(2)(e) authorizes an agency to withhold records compiled for law enforcement purposes in specified circumstances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9553

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

July 9, 1996

Mr. M. Farakesh
91-A-4487
P.O. Box 51
Comstock, NY 12821

Dear Mr. Farakesh:

As you are aware, I have received your letter of June 24. Please accept my apologies for the delay in response.

Citing the Freedom of Information Law, you requested records indicating whether or why certain courtrooms in Supreme Court, Queens County "are not posted" in the New York Law Journal "as active Court rooms."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and this office has no records concerning the subject of your inquiry.

In general, requests for records should be made to the agency that maintains the records of your interest. Further, the regulations promulgated by the Committee on Open Government require that each agency designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests and requests may be directed to that person.

It would appear that if records exist pertaining to the subject of your interest, they might be maintained by the Office of Court Administration. That being so, you might want to direct a request to the records access officer at that agency.

I note that although the Office of Court Administration is considered an agency subject to the Freedom of Information Law, the courts and court records fall beyond the coverage of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9554

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

July 10, 1996

Mr. Alex Stempien
[redacted]

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. Stempien:

As you are aware, I have received your letter of June 20. Please accept my apologies for the delay in response.

You have sought an advisory an opinion concerning a request for a copy of a tape recording of an open meeting of the Ava Town Board that is maintained by the Oneida Herkimer Solid Waste Authority. In response to the request, you were informed that the tape "can be made available for you to listen to in the Authority office during regular business hours."

In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, in accordance with §87(2), they must be made available for inspection and copying. Further, §89(3) of that statute provides that an agency is required to prepare a copy of an accessible upon payment of the appropriate fee.

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].

Based upon the foregoing, assuming that the Authority has the equipment to do so, I believe that it would be required to prepare

a copy of the tape recording upon payment of the requisite fee, which would be based on the "actual cost of reproduction" [i.e., the cost of a cassette; see Zaleski, supra; also Freedom of Information Law, §87(1)(b)(iii)]. Alternatively, if the Authority does not have the equipment needed to reproduce the tape, you could place your tape recorder next to the Authority's machine and record the sound produced by that machine.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hans G. Arnold, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9555

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

July 10, 1996

Mr. Alvin McLean, Jr.
93-A-9397
P.O. Box 500
Elmira, NY 14902

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

Dear McLean:

As you are aware, I have received your letter of June 16. Please accept my apologies for the delay in response.

It is your belief that the Office of the Queens County District Attorney possesses information needed to prove your innocence, and you asked how, after having been convicted, you can "compel" the District Attorney to disclose the material in question.

In this regard, your rights under the Freedom of Information Law my differ from rights that you might have or have had as a defendant under the Criminal Procedure Law (CPL). While I am unaware of judicial decisions that have specifically considered the relationship between the Freedom of Information Law and disclosure devices applicable 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 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 right to obtain records or exculpatory materials from the District Attorney is a matter beyond the jurisdiction or expertise of this office. Consequently, I am unaware of the extent to which you may "compel" or seek to compel the District Attorney to disclose the materials in which you are interested.

Although I have no knowledge of the nature of the records sought, should you determine to request them under the Freedom of Information Law, it is noted that that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, such a request should be directed to the designated "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records made pursuant to the Freedom of Information Law. I believe that the person so designated by the Queens District Attorney is Assistant District Attorney Nicole Bader.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9556

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

July 10, 1996

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 information presented in your correspondence.

Dear Mr. Phillips:

As you are aware, I have received your letter of June 16. Please accept my apologies for the delay in response. You have sought my views with respect to what you characterized as a "denial" of your request for records by the Enlarged City School District of Troy.

By way of background, on May 31, you requested records indicating overtime wages and the number of hours worked from 1991 through the present for employees in certain departments that you identified. In response to the request, you were informed by the District's records access officer that you could contact a named employee "to arrange a time to review these documents." The records access officer wrote that she was "requesting that you make arrangements to view the documents based upon the volume of the documents, the cost and employee time to photocopy the documents involved."

In this regard, from my perspective, it does not appear that there was an intent on the part of the District to deny access to the records. Rather, due to the volume of the materials, my understanding is that an offer was made to enable you to inspect the records in order to minimize the labor that might otherwise be expended by District staff and perhaps to eliminate the fees for copies that you might otherwise be assessed if you insist upon having copies. Unless there is a rule established by the Board that fees for copies sought by Board members such as yourself must be waived, I believe that the District would be required to produce photocopies if you agree to pay the appropriate fees in accordance with the Freedom of Information Law.

In my view, the Freedom of Information Law is intended to enable the public to request and obtain accessible records.

Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of 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, and that person could be assessed fees at the same rate as any member of the public.

Additionally, 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.

In short, assuming that you have requested the records independently and not at the direction of the Board, and assuming that there is no Board rule requiring the waiver of fees, I believe that you would have two options. You could either inspect the records at no charge as offered by the records access officer; alternatively, you could ask for copies, in which case the District in my opinion would be required to produce copies upon payment of its fee established under the Freedom of Information Law. It is suggested that you contact Ms. DeFiglio, the Records Access Officer, in an effort to reach a mutually agreeable arrangement.

You also asked that I address the issue of the award of attorney's fees in the event that an Article 78 proceeding is commenced. I point out that one must exhaust his or her administrative remedies prior to initiating a proceeding under Article 78. In order to to do so for purposes of the Freedom of Information Law, an applicant's request must be initially denied,

and the applicant then must appeal the denial in accordance with §89(4)(a) of that statute. If the appeal is also denied, the applicant then would have exhausted his or her administrative remedies and may initiate and Article 78 proceeding. Section 89(4)(c) pertains to the award of attorney's fees and states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Eva DeFiglio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9557

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

July 11, 1996

Mr. John Restivo
87-A-1969
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Restivo:

As you are aware, I have received your letter of June 17. Please accept my apologies for the delay in response.

You referred to a request to the Nassau County Correctional Center for a variety of records, including records relating to eavesdropping conducted pursuant to a warrant signed early in 1995. Some of the records sought were found to be available, but the County indicated that any documents concerning eavesdropping conduct are "exempt." You have asked whether the Sheriff's Department should have been more specific in its denial.

In this regard, I offer the following comments.

First, in my opinion, a denial as brief as that described would have been sufficient in response to an initial request. If, however, a denial is appealed in accordance with §89(4)(a) of the Freedom of Information Law, the rationale for a second denial would in my view have to be more expansive. 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."

Second, while I am not an expert with respect to eavesdropping warrants or the Criminal Procedure Law, it would appear that any disclosure of materials recorded pursuant to an eavesdropping warrant would be made in the discretion of the judge who signed the warrant. Specifically, §700.50(3) of the Criminal Procedure Law states that:

> "Within a reasonable time, but in no case later than ninety day after termination of an eavesdropping or video surveillance warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping or surveillance warrant, and of the period of authorized eavesdropping or video surveillance, and of the fact that during such period communications were or were not intercepted or observation were or were not made, must be served upon the person named in the warrant and such other parties to the intercepted communications or subjects of the video surveillance as the justice may determine in his discretion is in the interest of justice. Service reasonably calculated to give affected parties the notice required by this subdivision shall be effected within the time limits provided for herein and in a manner prescribed by the justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications or video surveillance, applications and warrants as the justice determines to be in the interest of justice."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9558

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

July 11, 1996

Mr. John McCaskell
92-A-2953
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 information presented in your correspondence.

Dear Mr. McCaskell:

As you are aware, I have received your letter of June 17. Please accept my apologies for the delay in response. You have complained with respect to delays in response to your request for records relating to your arrest by 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 by the Department to determine appeals is Karen A. Pakstis, Assistant Commissioner.

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.

Since you referred to 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 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. 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.

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". 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9559

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

July 11, 1996

Mr. Richard A. Sciaraffo
94-A-4202
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 information presented in your correspondence.

Dear Mr. Sciaraffo:

As you are aware, I have received your letter of June 19. Please accept my apologies for the delay in response.

You have sought my views concerning a denial of your request made under the Freedom of Information Law for records maintained by the Office of the Kings County District Attorney, specifically, communications sent by that agency to the Division of Parole, as well as portions of grand jury transcripts.

From my perspective, it is likely that the determinations to deny access were appropriate. 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.

With respect to 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 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. 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.

With regard to communications between the Office of the District Attorney and the Division of Parole, relevant is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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
cc: John Kenny
Yuriy Kogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9560

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

July 12, 1996

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 information presented in your correspondence.

Dear Mr. Reninger:

As you are aware, I have received your letter of June 26. Please accept my apologies for the delay in response. You have raised a variety of questions in relation to a request for records of the State Insurance Department.

You wrote that upon receipt of your request, you were advised that a determination would be made "within 30 days", but that no reason was given for the delay. You asked whether State agencies have 30 days to respond to requests for records.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Although you received some records in response to the request, you expressed the belief that the copies of certain pages supposed to have been from the same document appear to be from different documents, and you allege that "[t]he lack of a correct and truthful response appears to constitute constructive denial of access to the requested document." If indeed records other than those requested were sent to you, there might have been a constructive denial of access, or perhaps merely a mistake. It is suggested that you request that the Department certify that the copies of the records made available are true copies of the records sought in accordance with §89(3) of the Freedom of Information Law. That provision states in relevant part that the agency "shall provide a copy of such record and certify to the correctness of such copy if so requested."

Next, you referred to a denial of a request for certain records because "they are considered trade secrets." While I am unfamiliar with the records at issue, I note 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.

Pertinent to the issue is §87(2)(d), which enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

As such, 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 entity.

With respect to the substance of the matter, the concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the

conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...
>
> "As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

"Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).

"The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL" (id., 419-420).

It is noted 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)].

Next, you referred to a portion of your request involving a copy of a "prescription drug rider" issued by Empire Blue Cross Blue Shield when it excluded prescription drug coverage from major medical coverage. You indicated that the Insurance Department approval is "required for all Empire riders to insurance certificates." That being so, you assumed that the Department would have a copy of the rider. Nevertheless, you received no response to that aspect of the request. It appears that that aspect of your request was constructively denied and that you may appeal on that basis.

Lastly, you were informed that you could appeal to Sidney Glaser, and you did so. Nevertheless, it is your understanding that Mr. Glaser is the records access officer. To the best of my knowledge, Mr. Glaser is the Department's records access officer, and appeals are determined by Counsel to the Department, Mr. Paul Altruda. I note that the regulations promulgated by the Committee on Open Government state that "The records access officer shall not be the appeals officer [21 NYCRR §1401.7(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sidney Glaser
Paul Altruda
Lester Grimmell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9561

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

July 12, 1996

Mr. Tyrone Marsh
95-A-2532
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Marsh:

As you are aware, I have received your letter of June 21. Please accept my apologies for the delay in response.

You wrote that you are attempting to obtain a copy of a certain voucher concerning an item of evidence from the New York City Police Department under the Freedom of Information Law, but that the Department has failed to answer.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests for records. 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 Karen A. Pakstis, Assistant Commissioner, Civil Matters.

I note 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. From my perspective, it is likely that the voucher in which you are interested would be available, for none of the grounds for denial would apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9562

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

July 12, 1996

Mr. Christopher Ferrara
93-B-0075 V-3
P.O. Box 4580
Rome, NY 13442-4580

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. Ferrara:

As you are aware, I have received your letter of June 24. Please accept my apologies for the delay in response.

You have complained with respect to a request directed to the Superintendent of the Groveland Correctional Facility in which you sought certain documents pertaining to a former correction officer. In response to the request, you were informed that the records sought were not maintained by the facility, that if the records were maintained by the facility, they would have been denied, and that you made "a deliberate effort to conceal your identity as an inmate in the Department." You have sought an opinion concerning "what would be considered 'appropriate' when replying to a FOIL request and whether responses such as in this case be avoided or discouraged."

In this regard, I am unfamiliar with any rules or regulations that might have been adopted by the Department of Correctional Services concerning a requirement that persons identify themselves as inmates. Nevertheless, under the circumstances, it does not appear that the response that you received was inappropriate. As I understand the matter, you were informed that the facility did not maintain the records sought, and an opinion was expressed involving what your rights might have been if the facility possessed the records. While that kind of commentary might have been unnecessary, there is nothing in the Freedom of Information Law or any other law of which I am aware that would preclude an agency official from offering an opinion or observation when responding to a request. This is not to suggest that I necessarily agree with the opinion offered in the response to your request, but rather that there is nothing in the Freedom of Information Law that would prohibit the official from responding as he did.

When a request is made and records are maintained by the agency in receipt of the request, the Freedom of Information Law and the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), provide direction concerning the nature of the response. Specifically, the introductory language of §89(3) states that:

> "Each agency subject to the provisions of this article, within five business days of the receipt of a written request 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..."

Further, in the event of a denial of access, §1401.7(b) of the regulations provides that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9563

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

July 12, 1996

Mr. M. Farahesh
95-A-4487
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Farahesh:

I have received your letter of July 9 in which you requested a variety of information from this office pertaining to particular public employees.

In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law. This office does not maintain possession or control of records generally. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, a request for records under the Freedom of Information Law should be made to the agency or agencies that you believe would maintain the records of your interest. Further, 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, and a request should be directed to that person.

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 several aspects of your request involve attendance information, i.e., dates of employment, use or accrual of sick leave, vacation leave, etc., I note that those kinds of items would, according to a judicial decision, be available [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

Lastly, the Freedom of Information Law pertains to existing records, and §89)(3) of that statute provides in part that an agency is not required to create or prepare a new record in response to a request. Therefore, insofar as an agency does not maintain a record or records containing information that is

requested, it would not be required to prepare a new record in an effort to respond to a request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9564

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 12, 1996

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 information presented in your correspondence.

Dear Mr. Elentuck:

As you are aware, I have received your letter of June 20. The initial area of inquiry pertains to the standard that a request must "reasonably describe" the records and has been discussed at length in previous opinions. As such, I see no need to reconsider the issue.

You referred to proposed changes in the regulations adopted under the Freedom of Information Law by the New York City Board of Education, one of which would require that copies of an applicant's original letter of request and the Board's denial be included with an appeal. In my view, the Board could not validly impose such a requirement. Not every person who requests records keeps a copy of his or her request. Moreover, the regulations promulgated by the Committee on Open Government provide that:

> "The time for deciding an appeal by the individual or body designated to hear appeals shall commence upon receipt of written appeal identifying:
>
> (1) the date and location of requests for records;
> (2) the records that were denied; and
> (3) the name and return address of the appellant."

You referred to another proposed change in the Board's procedure that you described as a "two-level FOIL appeals process." Specifically, you wrote that under the proposed alteration:

> "If the Records Access Officer denies access, an appellant will no longer address an appeal to Mr. Gelbard, but rather to Chancellor Crew. If the Chancellor denies access on appeal, an appellant who wishes to further appeal administratively will be permitted to do so by filing the original papers, plus a copy of the Chancellor's letter of denial, with the Central Board. Upon receipt of such an appeal, the Board President will then designate two members to determine it."

In my view, the language of the Freedom of Information Law relative to the appeal process is clear [see §89(4)(a)], and the proposal as you described it would be inconsistent with the statute and prolong the time in which an applicant for records could exhaust his or her administrative remedies and/or initiate a challenge to a denial of access under Article 78 of the Civil Practice Law and Rules. I note that a similar procedure adopted pursuant to a local law was found to be invalid. In Reese v. Mahoney, the court determined that:

> "Given the scope, history and legislative declaration of FOIL, it is apparent that the Legislature has evidenced its intent to preempt the field of regulation. Additionally, the 'prerequisite additional restrictions' on rights under State law (F.T.B. Realty Corp. v. Goodman, 300 NY 140, 147-148) which Local Law NO 8-1978 imposes, namely, a two-tiered appeals procedure before Article 78 CPLR review can be had, would be sufficient to invalidate the local law (See Con Ed v Town of Red Hook, 60 NY2d 99), as being inconsistent with the state law's single tier appeals procedure. Accordingly, respondents' reliance upon the local law in support of their argument that petitioners have failed to exhaust their administrative remedies is misplaced" (Supreme Court, Erie County, June 28, 1984).

In an effort to encourage compliance with the Freedom of Information Law and the regulations promulgated by the Committee, copies of this will opinion will be forwarded to Board officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rudolph F. Crew, Chancellor
Bruce K. Gelbard, Secretary
Susan Jonides Deedy, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9565

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 12, 1996

Mr. Bruce Sanders
90-T-1424
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

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

Dear Mr. Sanders:

As you are aware, I have received your letter of June 24. Please accept my apologies for the delay in response.

As I understand your commentary, you were transferred from Camp Gabriels to the Franklin Correctional Facility, even though, to your knowledge, you were never the subject of any complaint or misbehavior report, and you are interested in obtaining records indicating the reasons for your transfer.

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. I point out that the Department's regulations specify that "personal history data" concerning an inmate is available to the inmate.

Of relevance to records relating to transfers 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 point out that a decision rendered in 1989 might have dealt with the kinds of records concerning transfers in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]). We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., it appears that they could be withheld.

I hope that 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-9566

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

July 12, 1996

Mr. Leslie Bouchereau
94-R-8939
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Bouchereau:

As you are aware, I have received your letter of June 21. Please accept my apologies for the delay in response. You wrote that you have had difficulty obtaining your medical records and an accident report, and it is your belief that you have sent your requests "to the wrong addresses." You have sought assistance in the matter, as well as brochures concerning the New York State and United States Constitutions.

In this regard, the Committee on Open Government is authorized to provide guidance concerning rights of access to government records in New York, primarily under the State's Freedom of Information Law. As such, enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request that may be useful to you. I have also acquired a copy of the State Constitution. This office, however, does not maintain any printed materials concerning the United States Constitution.

The Freedom of Information Law pertains to records of government agencies in New York. To seek records under that statute, a request should be directed to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests for records. Further, §89(3) of the Freedom of Information Law requires that an applicant for records "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

If the medical records that you requested are maintained by an agency, such as the Department of Correctional Services, the Freedom of Information Law, in my view, would likely permit that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records maintained by a provider of medical services (i.e., a physician or hospital) to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records, you may write to:

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

With respect to an accident report, if you are referring to a motor vehicle accident report, the report should be available in most instances from the local police agency that prepared the report or from the Department of Motor Vehicles. If you referred to a report involving a different kind of accident, again, a request may be made to the records access officer at the agency that possesses the report.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9567

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 15, 1996

Mr. Barry Loeb
[redacted]

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. Loeb:

As you are aware, I have received your correspondence of June 26. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a denial of access by the Port Washington Police District to "billing details of fees charged by outside providers of legal services." From my perspective, rights of access would be dependent on the specific contents of the records at issue and perhaps the degree of detail within the records. In this regard, I offer the following comments.

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

With respect to payments to a law firm, relevant is a recent decision involving a request for "the amount of money paid in 1994" to a particular law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" [Orange County Publications v. County of Orange, 637 NYS 2d 596 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the descriptive material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id., 599). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "...respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (*Ibid.*). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather '[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged' *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (*Licensing Corporation of America v. National Hockey League Players Association*, 153 Misc.2d 126, 127-128 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; *see*, *De La Roche v. De La Roche*, 209 A.D.2d 157, 158-159, 617 N.Y.S.2d 767 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by

statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is *uniquely the product of the professional skills* of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (*Brandman v. Cross & Brown Co.*, 125 Misc.2d 185, 188, 479 N.Y.S.2d 435 [Sup. Ct. Kings Co. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (*See, id.*).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or as material prepared for litigation, or both" (id., 604-605; emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §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.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "Applying these guidelines to the facts at bar, the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law § 87(2)(g). *See, Matter of Dunlea v. Goldmark, supra*, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy, will not be barred from disclosure under this exemption. *See, Ingram v. Axelrod, supra*" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were

found to be accessible. In my view, the direction provided in Orange County Publications would be applicable to the situation to which you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9568

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

July 15, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

As you are aware, I have received your letter of June 23. Please accept my apologies for the delay in response.

Your referred to a request made under the Freedom of Information Law to the New York City Department of Finance. In brief, as I understand the matter, you have questioned how the records access officer "could not figure out that he had to contact [the Department's] Director of Accounting to get copies of CPA auditor management letters as well as management responses." He had indicated that Department staff could not determine which records you had requested and asked for additional identification of the records in question.

In this regard, I am unaware of the number or nature of records maintained by the Department of Finance during the period to which you referred that fall within the scope of your request that could be characterized as management letters or management responses. If there are numerous such records, it would appear that the records access officer was merely attempting to elicit additional information in an effort to ascertain those in which you are particularly interested. It is suggested that you contact him for the purpose of discussing the matter and perhaps providing clarification.

You referred also to a portion of the response indicating that certain records would be disclosed upon payment of a deposit or the fee to be assessed in its entirety. It is your contention, however, that the Freedom of Information Law "does not state that [you] have to submit 'a 25% deposit' in order to get xeroxed copies of the materials that [you] requested." It has been advised that an agency may require payment in advance of preparing copies of records that have been requested. Moreover, it has been held

judicially that an agency may require advance payment, particularly when a request is voluminous (see Sambucci v. McGuire, Sup. Ct., New York Cty., November 4, 1982).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald S. Koszer, Records Access Officer
Jerry Rosenthal, FOIL Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9569

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

July 15, 1996

Ms. Barbara Bernstein
Executive Director
New York Civil Liberties Union
Nassau County Chapter
210 Old Country Road
Mineola, NY 11501

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

Dear Ms. Bernstein:

As you are aware, I have received your letter of June 25. Please accept my apologies for the delay in response.

You have sought an opinion on behalf of an individual who had been "stopped, questioned, and frisked" by the New York City Police Department "after an exchange of words." Following the incident, the individual requested a copy of the police report. The receipt of his request was acknowledged and he was informed that a determination would be made "within approximately ninety days of the date of this letter." It is your view that "[t]his waiting period of ninety days for a request under the FOIL runs contrary to the time limits enacted in the law itself."

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..."

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.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within ninety days" of the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, ninety days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is brief and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as ninety days. In a case in which it was found that an agency's "actions demonstrate an utter

disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Lastly, as stated earlier, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. If more than five business days is needed to locate or review records, the agency must acknowledge the receipt of the request and provide "a statement of the approximate date when such request will be granted or denied..." The Committee on Open Government, by means of regulations promulgated in 1978 pursuant to §89(1)(b)(iii) of the Public Officers Law, sought to insure timeliness of response by requiring agencies to grant or deny access to records within ten business days of the acknowledgement of the receipt of a request [21 NYCRR 1401.5(d)]. However, the court in Lecker v. New York City Board of Education, [157 AD 2d 486 (1990)] invalidated that portion of the regulations on the ground that the statute does not include a time limitation within which agencies must determine to grant or deny access to records following the acknowledgement that a request has been received. As such, the requirement in the Committee's regulations that agencies grant or deny access to records within ten business days after acknowledging the receipt of a request is apparently no longer binding.

Nevertheless, §87(1)(a) of the Freedom of Information Law states that a public corporation, such as the City of New York:

> "shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

With specific respect to New York City agencies, it is noted that the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated in 1979 and amended in 1988, state in part in §5(d):

> "If because of unusual circumstances, an agency is unable to determine within five days whether to grant, deny or otherwise respond to a request for inspection and copying, the records access officer shall, within such five day period, acknowledge receipt of the request in writing to the requesting party, stating the approximate date, not to exceed ten

> business days from the date of the acknowledgement, by which a determination with respect to the request will be made. If the agency does not make a determination with respect to the request within ten days from the date of such acknowledgement, the request may be deemed denied and an appeal may be taken to the person or body designated in the agency to hear appeals."

As such, regulations applicable to agencies within the jurisdiction of the Mayor of New York City, including the Police Department, specify the time limits for responding to requests and continue to include the ten day limitation for granting or denying a request after the receipt of a request has been acknowledged.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9570

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

July 16, 1996

Mr. Ira W. Parks
[redacted]

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. Parks:

As you are aware, I have received your letter of June 26. Please accept my apologies for the delay in response.

You have requested billing information relating to an attorney retained by the Town of Potsdam. As of the date of your letter to this office, you indicated that your request had not been addressed.

Your inquiry, as you may know, was the subject of a request for an opinion sought by Cindy L. Goliber, the Town Clerk. Rather than reiterating the substance of my remarks to her, enclosed is a copy of the opinion. If it is not responsive to your concerns, please feel free to contact me.

Since there appears to have been a 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cindy L. Goliber, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9571

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

July 16, 1996

Mr. Paul Vasquez
Clinton Correctional Facility
86-A-9437
P.O. Box 2001 (Main)
Dannemora, NY 12929

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

Dear Mr. Vasquez:

As you are aware, I have received your letter of June 25. Please accept my apologies for the delay in response. You have sought assistance in obtaining a copy of a verdict sheet under the Freedom of Information Law from a court clerk.

In this regard, the Freedom of Information Law does not pertain to courts or court records. That statute applies to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines the term "judiciary" to mean:

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

The foregoing is not intended to suggest that court records are not frequently available. Other statutes often provide broad rights of access to those records (see e.g., Judiciary Law, §255), and it is suggested that you direct your request to the clerk of the court in possession of the records, citing an applicable provision of law.

I hope that the foregoing serves to clarify 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-9572

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

July 16, 1996

Mr. Willie D. Chandler
94-B-1737
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Chandler:

I have received your letter of July 11 in which you appealed a denial of your request for a pre-sentence report by the Erie County Probation Department.

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision in that statute pertaining to the right to appeal a denial of access, §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."

Second, I note that an applicant may appeal within thirty days of denial of access. Since you indicated that the denial of your request occurred in November of 1995, the statutory time to appeal has expired.

Lastly, I believe that a statute other than the Freedom of Information Law governs access to pre-sentence reports. Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are

specifically exempted from disclosure by state or federal statute..." Relevant under the circumstances is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports.

Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state 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. It is suggested that you review that statute.

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-9573

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

July 17, 1996

Mr. John Beatty
[redacted]

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. Beatty:

As you are aware, I have received your letter, which reached this office on July 1. Please accept my apologies for the delay in response.

You have "appealed" to this office "for the disclosure of [your] full file from the Health and Hospitals Corporation of the City of New York and/or Kings County Health Center." You referred to "memos" missing from the records made available to you that apparently include opinions or observations concerning your conduct as an employee. Attached to your letter is a response to a request made last year in which the Corporation denied access to the kinds of records at issue.

From my perspective, it is likely that the records sought could properly have been withheld, at least in part. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 apparent 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.

Notwithstanding the foregoing, it is possible that you may have additional rights conferred pursuant to a collective bargaining agreement. Consequently, it is suggested that you review the agreement in an attempt to ascertain whether rights of access might exist that exceed those conferred by the Freedom of Information Law. Similarly, in your capacity as a party to a proceeding, it is possible that you may enjoy rights of access due to your status as a party. Again, that may be an avenue worth investigating.

Lastly, since you characterized your letter as an appeal, I point out that Committee on Open Government is authorized to provide advice. This office is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision in the Freedom of Information Law concerning the right to appeal, §89(4)(a), states in relevant part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Lockhart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9574

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

July 17, 1996

Mr. Keith Harris
92-A-2305
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Harris:

As you are aware, I have received your letter of June 24. Please accept my apologies for the delay in response.

You referred to a request for records of the New York City Police Department made on May 6 that had not been answered in any way as of the date of your letter to this office. As such, sought guidance concerning "your appeal procedure."

In this regard, 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 otherwise compel an agency to grant or deny access to records. Nevertheless, that statute provides direction with respect to 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 Department to determine appeals is Karen A. Pakstis, Assistant Commissioner, Civil Matters.

Lastly, since 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, a subject matter list is not required to be prepared with respect to records pertaining to a single individual. Rather than seeking a "master index" from an agency, in the future, it is suggested that you request the subject matter list maintained pursuant to §87(3)(c) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9575

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

July 17, 1996

Mr. Kenneth W. Nichelson
Niagara County Jail
Box 496
Lockport, NY 14094

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

Dear Mr. Nichelson:

As you are aware, I have received your letter of June 27. Please accept my apologies for the delay in response.

You wrote that you requested records from the Commission of Correction, and it was determined that they were accessible under the Freedom of Information Law. Nevertheless, you were informed that you would be charged twenty-five cents per photocopy, for a total of forty-eight dollars. Although you sent a certificate of indigency to the Commission, you were told that an agency is not required to waive fees for "an indigent requester." You have questioned whether the Commission's response is appropriate.

In this regard, the Freedom of Information Law does not distinguish among applicants for records. It has been held that when records are accessible under that statute, 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 NYS2d 779, aff'd 51 AD2d 673 (1976); also Farbman v. New York City Health and Hospitals Corp., 62 NY2d 75, 80 (1984)].

Although the federal Freedom of Information Act, which applies to records maintained by federal agencies, includes provisions involving fee waivers in certain circumstances, the New York Freedom of Information Law contains no equivalent provisions. Moreover, it has been held that an agency may charge its established for copies, even though records may be requested by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]. I note that §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-cents per photocopy.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Bonacquist

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9576

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

July 19, 1996

Mr. George W.J. Flevares
[redacted]

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. Flevares:

As you are aware, your letter of June 25 addressed to Attorney General Vacco was forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the New York Freedom of Information Law.

You referred to a request made under that statute to the Emerald Management Corporation and you asked what avenue you may pursue if you do not receive a response. 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 is applicable to records maintained by entities of state and local government; it does not apply to records maintained by private corporations. Consequently, in this instance, assuming that it is not a governmental entity, the Emerald Management Corporation would be obliged to disclose its records pursuant to the Freedom of Information Law.

Since the matter appears to pertain to building code requirements, it is suggested that you discuss the matter with the town clerk and perhaps the town's building inspector.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9577

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

July 19, 1996

Mr. William P. Pillmeier, Jr.
P.O. Box 603
Florida, NY 10921

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. Pillmeier:

As you are aware, I have received your letter of June 27. In addition, I recently received your letter of July 15. Please accept my apologies for the delay in response.

The matter involves requests made under the Freedom of Information Law to the Village of Florida. Although it appears that the Village is engaged in efforts to comply with the Freedom of Information Law, you questioned what action might be taken when an agency fails 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: Hon. John C. Harter, Mayor
Hon. Gloria McAndrew, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9578

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

July 19, 1996

Mr. Anthony Simmons
91-A-6201
Shawangunk Correctional Facility
P.O. Box 700
Wallkill, NY 12589-0700

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

Dear Mr. Simmons:

As you aware, I have received your letter of July 1. Please accept my apologies for the delay in response. You wrote that you have experienced difficulty in receiving replies to your freedom of information requests made to the New York City Police 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)].

For your information, the person designated by the Department to determine appeals is Karen A. Pakstis, Assistant Commissioner.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9579

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

July 19, 1996

Ms. Lynne Kampel-Abdullah
[redacted]

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 Ms. Kampel-Abdullah:

As you are aware, I have received your letter of June 26. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning a denial of access to records by the New York City Police Department relating to the arrest of your husband. The correspondence indicates that the denial of your request was based on §50-b of the Civil Rights Law.

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. 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.

Relevant with respect to some of the records sought is §87(2)(a) of the Freedom of Information Law, which provides that rights conferred by that statute do not extend to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the provision cited by the Police Department, §50-b of the Civil Rights Law, which states in relevant part that:

> "1. The identity of any victim of a sex offense, as defined in article one hundred thirty or section 255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other

documents in the custody or possession of any public officer or employee, which identifies such a victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section.

"2. The provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to:

a. Any person charged with the commission of a sex offense, as defined in subdivision one of this section, against the same victim; the counsel or guardian of such person; the public officers and employees charged with the duty of investigating, prosecuting, keeping records relating to the offense, or any other act when done pursuant to the lawful discharge of their duties; and any necessary witnesses for either party; or

b. Any person, who upon application to a court having jurisdiction over the alleged sex offense, demonstrates to the satisfaction of the court that good cause exists for disclosure to that person. Such application shall be made upon notice to the victim or other person legally responsible for the care of the victim, and the public officer or employee charged with the duty of prosecuting the offense; or

c. Any person or agency, upon written consent of the victim or other person legally responsible for the care of the victim, except as may be otherwise required or provided by the order of a court.

"3. The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section, as it deems necessary and proper to preserve the confidentiality of the identity of the victim."

Based on the foregoing, in my opinion, insofar as the records in question identify the victim of a sex offense, the Freedom of Information Law would be inapplicable; rather, any disclosure of such records would be made in accordance with the provisions of §50-b.

With respect to other records pertaining to the arrest, I believe that rights of access would be determined by the Freedom of Information Law.

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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis, Assistant Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9580

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

July 22, 1996

Mr. Alfred Kuhnle
[redacted]

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. Kuhnle:

As you are aware, I have received your letter of July 1. Please accept my apologies for the delay in response.

You referred to a denial of a request to the New York City Board of Ethics involving a "financial report" filed by a particular employee of the City. While I am not familiar with the nature of the report in which you are interested, it appears that the agency maintaining the records is the New York City Conflicts of Interest Board. Since the content of the record was not described, I cannot offer specific guidance. Nevertheless, I offer the following comments.

First, I believe that the Conflicts of Interest Board is subject to §2603(k) of the New York City Charter, which states that:

> "Except as otherwise provided in this chapter, the records, reports, memoranda and files of the board shall be confidential and shall not be subject to public scrutiny."

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 initial ground for denial, §87(2)(a), deals with records that may often be characterized as "confidential", for it enables an agency to withhold records that "are specifically exempted from disclosure by state or federal statute." It has been held by several courts, including the Court of Appeals, that an agency's

regulations or the provisions of a local enactment, such as an administrative code, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, if §2603 of the New York City Charter was not enacted by the State Legislature, it would not, based upon judicial interpretations of the Freedom of Information Law, constitute a "statute" that exempts records from disclosure. Conversely, if it was enacted by the State Legislature, the records in question would, in my view, be specifically exempted from disclosure by statute.

Assuming that the section of the Charter referenced earlier does not constitute a "statute", I believe that the records maintained by the Board would be subject to the provisions of the Freedom of Information Law. This is not to suggest that all records of the Board must be disclosed, for various records or portions thereof would likely fall within one or more of the grounds for denial appearing in the Freedom of Information Law; rather, I am suggesting that §2603(k) of the Charter would not serve as a statutory exemption from disclosure that would serve as a basis for withholding records.

Perhaps most relevant would §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, personal financial information would in many instances fall within the scope of that exception.

If you have additional information that would help to clarify the matter, please contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Davies

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9581

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

July 22, 1996

Mr. Richard Elwisser
[redacted]

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. Elwisser:

As you are aware, I have received your letter of July 3. Please accept my apologies for the delay in response. In brief, you complained that the New York City Department of Health and the Office of the Mayor have failed to answer or acknowledge receipt of numerous requests made under the Freedom of Information Law.

While I am unfamiliar with the nature of your requests or the extent to which they involve accessible or perhaps deniable records, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals.

Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I believe that the person designated to determine appeals at the Department of Health is Wilfredo Lopez, General Counsel; the person so designated to determine appeals in the Office of the Mayor is Dennison Young, Jr., Counsel to the Mayor.

In an effort to enhance compliance with the Freedom of Information Law, copies of this response will be forwarded to officials at both agencies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony P. Coles
Patricia Caruso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9582

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

July 22, 1996

Mr. James M. Segrue
[redacted]

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. Segrue:

I have received your letter of July 8, as well as the materials attached to it. You have sought my opinion concerning the propriety of responses to your requests made under the Freedom of Information Law by the City of Schenectady.

The records sought relate to a "raid" conducted on March 22 at the Next Generation and include the names of City personnel involved in the raid, their hourly wages, the hours worked by those individuals on certain dates, memoranda, press releases and other documentation "relating to the planning, execution, or summarizing results of the raid", as well as other records pertaining to the event. Your initial request, which was made on March 23, was denied on March 26 by the City Clerk, on the ground that "the documents are part of an ongoing criminal investigation" and because the City "is not required to compile a report of names of individuals..." It appears that other requests were made of a similar nature, and the City appears to have denied access on the ground that the information sought "is not maintained as a public record."

In this regard, I offer the following comments.

First, as suggested in the responses to your requests, the Freedom of Information Law pertains to existing records. Further, §89(3) of the Law states in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply. Nevertheless, it would appear that several aspects of the information in which you are interested would or must exist in the form of a record or records maintained by the City.

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.

From my perspective, the provision to which the City Clerk alluded would not apply to much of the documentation that you requested. The provision pertaining to criminal investigations, §87(2)(e), permits an agency to withhold records that:

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

Payroll and attendance records, as well as others, would be prepared in the ordinary course of business, rather than for law enforcement purposes. In those kinds of cases, §87(2)(e) in my opinion would not serve as a valid basis for withholding records. Insofar as the records sought could be characterized as having been compiled for law enforcement purposes, I believe that they may be withheld only to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Although two of the grounds for denial relate to attendance records or time sheets, payroll records and perhaps other records falling within the scope of your request, based upon the language of the Law and its judicial interpretation, I believe that many of those records are generally available.

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

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

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

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

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

As indicated earlier, 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), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

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

In a decision dealing with attendance records containing the days and dates of sick leave claimed by a police officer that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligations of any employee is to appear for work when scheduled to do so. Concurrent with this is the 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

employees and their salaries, as well as attendance records, must be disclosed.

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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 containing the days and dates of sick leave claimed by a police officer that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

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

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

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

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

Based on the preceding analysis, it is clear in my view that payroll and attendance records must be disclosed under the Freedom of Information Law.

Lastly, in view of what might have been delays in dealing with your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that 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)].

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, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carolyn Friello
Michael T. Brockbank

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9583

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

July 23, 1996

Ms. Cathie-Marie Sienkiewicz
[redacted]

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 Ms. Sienkiewicz:

I have received your letter of July 2, which reached this office on July 8. You have sought assistance in obtaining copies of the "complete file" relating to your home and particularly with respect to an inspection of the premises by the code enforcement officer/building inspector of the Town of Mamakating. Despite numerous requests, both oral and in writing, as of the date of your letter, you had not received any of the records sought.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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 for records, and requests should ordinarily be directed to that person. In the context of the situation that you described, I believe that the person in receipt of your request should have responded in a manner consistent with the requirements of the Freedom of Information Law or forwarded the request to the records access officer. In most towns, the town clerk is the records access officer, for the clerk is the legal custodian of all town records (see Town Law, §30), including those maintained by the building inspector, and in addition serves as the Town's records management officer. It is suggested that you contact the town clerk in an effort to expedite the matter.

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 §87(2)(a) through (i) of the Law.

In my view, the only relevant ground for denial would be §87(2)(g). However, that provision, due to its structure, often requires an agency to disclose. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 by a building inspector pertaining to the inspection of your property could be characterized as "intra-agency materials." However, much if not all of those records would likely consist of factual information, i.e., a factual description of what was seen, that would be available under §87(2)(g)(i), or perhaps final agency determinations, i.e., findings of violations, that would be available under §87(2)(g)(iii). The only aspects of the records in question that might justifiably be denied would involve expressions of opinion or recommendations, for example. The other kinds of records to which you referred in your request, such as permits of various kinds, would clearly be available, for none of the grounds for denial would be applicable.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Grifo, Building Inspector
Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9584

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

July 23, 1996

Mr. Paul Kairis
94-B-1499
Box 2500
Marcy, NY 13403-2500

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

Dear Mr. Kairis:

I have received your letter of June 27, which reached this office on July 8. You have sought guidance concerning gaining access to court records.

In this regard, the Freedom of Information Law does not pertain to courts or court records. That statute applies to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines the term "judiciary" to mean:

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

The foregoing is not intended to suggest that court records are not frequently available. Other statutes often provide broad rights of access to those records (see e.g., Judiciary Law, §255), and it is suggested that you direct your request to the clerk of the court in possession of the records, citing an applicable provision of law.

As you requested, enclosed are brochures that deal with the Open Meetings Law as well as the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9585

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

July 23, 1996

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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Kless:

I have received your letter of July 6, as well as the materials attached to it. Those items consist of correspondence sent to various departments within the City of Buffalo. You wrote that "the letters in red" represent requests made under the Freedom of Information Law that had not been answered. I have since received a copy of a response addressed to you on July 9 by Kathleen E. O'Hara, Assistant Corporation Counsel, that deals with some of those requests. As such, I will not address the requests to which she made reference. You indicated that you were informed that an agency has "30 days by statute to reply" to a request, and you questioned the accuracy of that statement, and you sought my views concerning whether the items that you requested must be disclosed.

In this regard, I offer the following comments.

First, in several communications with the City of Buffalo, you sought explanations of certain matters or incidents. I point out that the Freedom of Information Law does not require that agency officials answer questions or provide explanations. Rather, that statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no explanation exists in the form of a record or records, I do not believe that an agency would be required to prepare new records responsive to your inquiries on your behalf.

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..."

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 departments. 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 some situations, it would not likely be so in 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.

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.

One request involved the policy of the Police Department pertaining to the use of lights and sirens and when or when not to follow the traffic laws, i.e., you wrote "if the lights and siren are off does that mean that they are not acting as an emergency vehicle and should follow the traffic laws." From my perspective, to the extent that such policies exist in writing, they would likely be available. Section 87(2)(g)(ii) and (iii) respectively require the disclosure of instructions to staff that affect the public and final agency policy. I note that §87(2)(e)(iv) states that records compiled for law enforcement purposes may be withheld to the extent that they consist of non-routine investigative techniques and procedures. It does not appear that the kinds of records in question could be characterized as anything but routine.

Therefore, it does not appear that §87(2)(e) would serve as a basis for a denial of access.

You referred to a request for a particular variance. Assuming that the record exists and that your request reasonably described the record as required by §89(3) of the Freedom of Information Law, I believe that it would be available. In short, none of the grounds for denial would be applicable.

You also referred to a copy of a "subject matter list", and there appears to be some confusion regarding the nature of that record. As indicated earlier, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §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)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available. 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.

One request pertained to 911 calls as well reports that might have been filed concerning a particular incident. Of potential relevance with respect to records of 911 calls is §87(2)(a) of the Freedom of Information Law, which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §308(5) of the County Law, which states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another

> government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

I point out that §308 of the County Law pertains to an "E911 system"; "E" is intended to mean "enhanced", and that kind of system enables a law enforcement agency to know the location from which a call is made automatically. If the City of Buffalo participates in an E911 system, the records of E911 calls would be confidential. If the City does not operate within an E911 system, but rather an older 911 system, the records of emergency calls would fall within the scope of the Freedom of Information Law. This is not to suggest that they must be disclosed, but rather that they would be accessible or deniable in accordance with the provisions of §87(2) depending upon their specific contents and the effects of disclosure. The same kind of analysis would be used in determining rights of access to reports filed regarding the incident to which you referred.

Finally, you requested complaints made in relation to a particular house during the past two years. 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 the context of law enforcement activities, it is possible that §87(2)(e)(iii) could be asserted to withhold complainants' identities or even complaints in their entirety. That provision permits an agency to withhold records that:

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

Also, if a complaint resulted in a charge and the charge was dismissed in favor of the accused, records relating to the matter would be sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen E. O'Hara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9586

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

July 23, 1996

Mr. Todd Jones
94-B-2319
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 information presented in your correspondence.

Dear Mr. Jones:

I have received your undated letter, which reached this office on July 8. You expressed interest in gaining copies of a file concerning your arrest, which resulted in an acquittal at your trial.

In this regard, as a general matter, when charges against an accused are dismissed in favor of that person, the records relating to the proceeding become sealed under §160.50 of the Criminal Procedure Law. However, subdivision (1)(d) of that statute provides that "such records shall be made available to the person accused or such person's designated agent." Therefore, it is suggested that you seek the records from the court in which the proceeding was conducted, or that you contact your attorney. It is possible, too, that the records were made available to your attorney soon after your acquittal.

You also asked whether this office maintains "references to agencies that specialize in civil suits." Neither this office nor any other state agency serves as an attorney referral service. As such, I have no such references.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2636
FOIL-AO- 9587

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

July 23, 1996

Hon. Fred L. Pollack
Councilman
Town of North Hempstead
Town Hall
P.O. Box 3000
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 information presented in your correspondence.

Dear Councilman Pollack:

I have received your letter of July 8. You have sought an advisory opinion concerning the applicability of the Freedom of Information and Open Meetings Laws to the Port Washington Fire Department.

You wrote that Port Washington is a Fire Protection District, within which there are five not-for-profit corporations that perform firefighting or associated functions. You added that three are "fire companies", one is an ambulance service, and the fifth, the Port Washington Fire Department, "provides central leadership and coordinating services." That entity contracts with the various municipalities for services. The incorporated villages within the fire protection district "include the cost of this contract in their annual budget", and the Town of North Hempstead "imposes a separate tax on those residents of the (unincorporated) areas serviced by the Department."

From my perspective, based on the thrust of judicial decisions, the Port Washington Fire Department is subject to the Freedom of Information Law, and its governing body is required to comply with the Open Meetings Law. In this regard, I offer the following comments.

First, I believe that a fire protection district is merely a geographical area; it has no governing body or staff, for example.

Second, the primary source of guidance relates to judicial interpretations of the Freedom of Information Law. That statute 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, I believe that the entity in question is subject to the Freedom of Information Law.

The Open Meetings Law is applicable to meetings of public bodies. Section 102(2) of the Law defines "public body" to mean:

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

By reviewing the components in the definition of "public body", I believe that each would be present with respect to the governing body of the District. The governing body would presumably be an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, for reasons offered in relation to the applicability of the Freedom of Information Law, the District's governing body conducts public business and performs a governmental function. Such a function is carried out for a series of public corporations, and the term "public corporation is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" would appear to be present with respect to the governing body of the District, I believe that such body would constitute a "public body" subject to the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9588

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

July 23, 1996

Hon. Larry G. Mack
Cattaraugus County Legislature
4911 Humphrey Road
Great Valley, NY 14741

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 Legislator Mack:

I have received your recent undated letter and the materials attached to it. You have sought assistance in relation to three requests made under the Freedom of Information Law that were denied by Cattaraugus County.

The first involved a list of guns owned by the County Sheriff's Department or the Southern Tier Drug Task Force. The County Administrator indicated that the County does not maintain such a record. In this regard, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, if the County does not maintain a list containing the information sought, it would not be obliged to prepare a list on your behalf.

A second request pertained to an "operation standards manual" used by the Sheriff's Department and filed with the Division of Criminal Justice Services. The manual was withheld pursuant to §87(2)(e) and (g) of the Freedom of Information Law. While both of those provisions are relevant to an analysis of rights of access and portions of the manual might justifiably be withheld, it is likely in my view that portions of the record in question must be disclosed.

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 §87(2)(a) through (i) of the Law.

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the manual would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

The 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, 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. 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.

A third potential ground for denial is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §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.

A third request related to an investigation of the escape of a prisoner. Several provisions discussed earlier, notably paragraphs (e), (f) and (g) of §87(2), would be pertinent in determining rights of access, and it is unnecessary in my view to review them again. Also relevant might be §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." That provision might serve as a justification for withholding identifying details pertaining to witnesses, for example, or others interviewed in relation to the incident.

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: Donald E. Furman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9589

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 24, 1996

Hon. Dee A. Keller
Town Clerk
Town of Lebanon
RD #2, Box 49E
Earlville, NY 13332

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 Ms. Keller:

I have received your letter of July 11. You have requested an advisory opinion concerning a series of events in which you have been involved in your capacity as Town Clerk of the Town of Lebanon.

As I understand that matter, at the end of May, the Town's dog control officer issued appearance tickets to a dog owner and resigned soon thereafter. In June, the Town Justice contacted you and directed you to "sell two (2) years dog renewal to the dog owner." Before the owner could purchase the renewal, you were contacted with respect to a dog bite and were asked to provide information concerning the status of the dog's license and rabies. You responded by indicating that the owner had not renewed the license for two years and that you were unsure of the dog's status in relation to rabies. You also indicated that the Town Justice had been in contact with the dog owner and advised the person reporting the dog bite to contact either the police or the Justice. Shortly thereafter, you asked the new dog control officer if he was aware of the incident. He checked with the parties and indicated that the matter "had been taken care of." Following that series of events, the Town Justice wrote the following letter to the Town Supervisor and Board members:

> "A problem has come up within the Town Offices jeopardizing the Court position. The Town Clerk has devulged [sic] information on a pending case in the Town Court with other town residents. All proceedings before Court action are of confidential nature, on a need to know basis only. This relating of

> information to others with no involvement in the case is forbidden by law. This type of action has to be stopped.
>
> "I am requesting this be put on record that the Town Clerk do her own job and any information she may have of pending cases is not to be discussed. This also pertains to any other town official who may be involved, this information is not tid bits for gossip."

Earlier this month, the Town Justice asked the Board to conduct an executive session to discuss the matter. You informed the Board that you would discuss the matter in public and walked out of the executive session.

You raised a series of questions concerning the events described in the preceding paragraph, and I will attempt to address them. From my perspective, you performed your duties as Town Clerk appropriately and acted in a manner consistent with law. In this regard, I offer the following comments.

First, I am in general disagreement with the statement made by the Town Justice that proceedings before a court "are of a confidential nature" and that disclosure should be made "on a need to know basis only." As a general matter, proceedings of courts in this state are conducted in full view of the public. Section 4 of the Judiciary Law provides in relevant part that: "The sittings of every court within this state shall be public, and every citizen may freely attend the same..." Further, while the Freedom of Information Law excludes the courts and court records from its coverage, other statutes frequently require that court records be made available. In this instance, of possible significance is §2019-a of the Uniform Justice Court Act. That statute provides in part that: "The records and dockets of the court except as otherwise prescribed by law shall be at reasonable times open for inspection to the public..." Therefore, when records come into the possession of a justice court, I believe that they are generally public. The only circumstance in relation to the matter described that would require a different result would involve a situation in which a person was charged with a criminal offense and the charge was later dismissed in favor of that person. In that event, records relating to the charge typically become sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law. Those provisions, however, do not appear to be pertinent in this instance.

Second, I believe that you were obliged to disclose records pertaining to the license, or perhaps the absence thereof, in response to a request made under the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions

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

From my perspective, a dog license, or records relating to it, as in the case of other licenses, must be disclosed. It has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From an historical perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as owning a dog and ensuring that the dog is cared for appropriately. I believe that licenses and similar records are available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

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." While that standard is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives, such as medical information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to an agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

For reasons described earlier, the public has an interest in knowing who may be licensed to engage in certain activities and what the status of their license might be. Consequently, I believe that license information, including the information that you disclosed in your capacity as Town Clerk, must be made available, for disclosure would constitute a permissible, not an unwarranted invasion of personal privacy. Similar disclosures with respect to other kinds of licenses are made routinely. Certainly the status of a license or the absence of a current license would represent information accessible under the Freedom of Information Law. Similarly, information regarding whether a dog has received the appropriate preventive care, i.e., rabies shots, would constitute public information.

I point out that the Court of Appeals, the State's highest court, has held on several occasions that the exceptions to rights of access appearing in §87(2) "are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption be articulating a particularized and specific justification for denying access"

[Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, M. Farbman & Sons v. New York City Health and Hospitals Corp., 62 NY 2d 75, 80 (1984); Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

Often records prepared in the ordinary course of business, which might already have been disclosed under the Freedom of Information Law, become relevant to or used in a law enforcement investigation or perhaps in litigation. In my view, when that occurs, the character of the records does not change; if they would have been available prior to their use in a law enforcement context or litigation, I believe that they would remain available, notwithstanding their use in that kind of context. There is case law that illustrates the point and why a narrow construction of the Freedom of Information Law would be unreasonable and anomalous. In King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney, who denied access on the basis of §87(2)(e) of the Freedom of Information Law. That provision permits an agency to withhold records compiled for law enforcement purposes under specified circumstances, i.e., when disclosure would interfere with an investigation. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

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

With specific respect to a contention that records may be withheld because they relate to or may be used in litigation, I believe that an analysis of the law leads to a similar conclusion. Of potential significance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §3101(d) of the Civil Practice Law and Rules, which exempts material prepared for litigation from disclosure. It is emphasized, however, that it has been determined judicially that if records are prepared for multiple purposes, one of which may include 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 short, unless records are prepared solely for litigation, they would be subject to rights conferred by the Freedom of Information Law.

Moreover, 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)]. Based upon those decisions, the pendency of litigation would not, in my opinion, affect either the rights of a litigant or a member of the public under the Freedom of Information Law, unless an exemption, i.e., §3101(d) of the Civil Practice Law and Rules, could properly be asserted.

In short, from my perspective, you performed your duties in a manner consistent with law. I believe that the information that you disclosed would be accessible to any person under the Freedom of Information Law. Further, for reasons described in the preceding commentary, the fact or possibility that there might have been a pending judicial proceeding would have had no effect, in my view, on your duty to disclose.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John P. Palmer, Justice
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2638
FOIL-AO-9590

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 24, 1996

Ms. Nina Kim
Syracuse Herald-Journal
Clinton Square
P.O. Box 4915
Syracuse, NY 13221-4915

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

Dear Ms. Kim:

I have received your letter of July 2, which, for reasons unknown, did not reach this office until July 15.

According to your letter, in brief, the Board of Trustees of the Village of Solvay held an executive session in March to discuss hiring a consulting attorney to deal with labor negotiations. At a meeting held in May, some members of the Board contended that a consensus was reached at the March executive session not to retain the attorney. However, the Mayor apparently decided to hire him and said at a recent meeting that "an 'informal poll' was taken during the meeting and it was not necessary to take a vote in public even though the use of his services would involve village money." You wrote that the Mayor indicated that the Village Attorney advised that no public vote was necessary because retaining the attorney in question "would not change the overall legal budget of the village."

It is your view that if action is taken during an executive session, minutes must be prepared, that a voting record must be compiled that indicates how each member voted, and that "a vote by a board to hire a new person should be taken in public." I am in general agreement with your contentions. In this regard, I offer the following comments.

First, in a decision dealing specifically with the notion of a consensus reached at a meeting of a public body, [Previdi v. Hirsch, 524 NYS 2d 643 (1988)], the issue pertained to access to records, i.e., minutes of executive sessions held under the Open Meetings Law. Although it was assumed by the court that the executive sessions were properly held, it was found that "this was

no basis for respondents to avoid publication of minutes pertaining to the 'final determination' of any action, and 'the date and vote thereon'" (id., 646). The court stated that:

> "The fact that respondents characterize the vote as taken by 'consensus' does not exclude the recording of same as a 'formal vote'. To hold otherwise would invite circumvention of the statute.
>
> "Moreover, respondents' interpretation of what constitutes the 'final determination of such action' is overly restrictive. The reasonable intendment of the statute is that 'final action' refers to the matter voted upon, not final determination of, as in this case, the litigation discussed or finality in terms of exhaustion or remedies" (id. 646).

In the context of the situation that you described, when the Board reached a "consensus" that was reflective of its final determination of an issue, I believe that minutes were required to have been prepared indicating the manner in which each member voted. If indeed a consensus represents action upon which the Board relies in carrying out its duties, or when the Board, in effect, reaches agreement on a particular subject, I believe that the minutes must reflect the actual votes of the members.

Second, when action is taken by a public body, any such action must be memorialized in minutes. Section 106 of the Open Meetings Law provides that:

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

> available to the public within one week from the date of the executive session."

Subdivision (2) of §106 requires that minutes of an executive session must be prepared when action is taken during the executive session. In this instance, if indeed action was taken to retain an attorney, any such minutes would in my view clearly be accessible under the Freedom of Information Law. Further, subdivision (3) requires that minutes of executive session must be prepared and made available within one week of the executive session.

Third, 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. 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 and the Open Meetings 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)].

To comply with law, I believe that a record must be prepared and maintained indicating how each member casts his or her vote. From my perspective, disclosure of the record of votes of members of public bodies, such as the Village Board of Trustees in this instance, represents a means by which the public can know how their representatives asserted their authority. Ordinarily, a record of votes of the members appears in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Lastly, with respect to a vote to expend public money, the introductory language of §105(1) of the Open Meetings Law states that:

> "Upon a majority vote of its total membership, taken in an open meetings 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..."

Based upon the final clause of the provision quoted above, a public body may generally vote during a proper executive session; however, any vote to appropriate public monies must be taken during an open meeting. As such, there may be situations in which a discussion may be conducted during an executive session, but where a public body may be required to return to an open meeting to vote to appropriate public monies in relation to the subject previously considered behind closed doors. If the action involves an allocation or expenditure of funds that have previously been appropriated, such an action could, in my opinion, be taken during a proper executive session, for it would not involve an appropriation or an expenditure that had not been budgeted. In the context of the situation that you described, if the action involved an allocation of funds previously budgeted, I believe that the action could have been taken during an executive session, for it would not have involved an appropriation. On the other hand, if the decision involved moneys that had not been budgeted, action by the Board, in my opinion, should have been taken in public.

As you requested, and in an effort to enhance compliance with and understanding of open government laws, copies of this opinion and "Your Right to Know" will be forwarded to the Village officials that you identified.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Mario DeSantis
Hon. Leonard Costantini
Hon. William DeSpirito
Hon. Kathleen Marinelli
Hon. Anthony Modafferi
Hon. Joseph Possi
Hon. Arthur Santos
Hon. Phyllis DeFlorio
Thomas Lynch, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9591

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 24, 1996

Daniel J. Ward, Esq.
Ward, Brenon & DiVita
5330 Main Street
Williamsville, NY 14221-5377

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. Ward:

I have received your letter of July 9, as well as the correspondence attached to it. You have sought a "ruling" concerning a denial of access to records by the State Insurance Fund.

Before addressing the substance of the matter, I note that the Committee on Open Government is authorized to offer advisory opinions concerning the Freedom of Information Law [see Public Officers Law, §89(1)(b)]. While it is my hope that opinions rendered by this office are educational and persuasive, they cannot be characterized as "rulings."

By way of background, on May 21, you sent a request to the State Insurance Fund in which you sought records reflective of "[a]ll the special counsel or outside attorneys employed by the SIF, the purposes for which they were employed, and the fees they were paid." You also asked that the attorneys be identified by firm and address. In a response to the request by the Special Counsel to the State Insurance Fund, you were informed that no determination could be made until the reasons for your request were stated as required by 12 NYCRR §450.11(d). Soon thereafter, you wrote to Special Counsel and indicated that the reason for your request is "governmental research, and not for commercial or fund-raising purposes." Nevertheless, you were informed that your request would be denied because you did not indicate the nature of your research or "how the requested documentation would assist you in that research." Additionally, he wrote that some of the documents could be withheld pursuant to §87(2)(g) of the Freedom of Information Law and that others "may not be available...because of attorney-client privilege."

From my perspective, the records in which you are interested, insofar as they exist, must be disclosed in great measure, if not in their entirety. In this regard, I offer the following comments.

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

Second, the provision of the regulations promulgated by the State Insurance Fund is in my opinion inconsistent with the Freedom of Information Law and should be considered invalid to that extent. 12 NYCRR §450.11(d) is entitled "Requests for records" and states in part that an applicant must provide a "reason for request." With one exception to be discussed later, an agency cannot condition disclosure of records upon a requirement that an applicant provide a reason for a request.

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 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, they must be disclosed, irrespective of their intended use.

The only exception to the principles described above relates to the protection of personal privacy. As you may be aware, §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); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

In a case involving a list of names and addresses in which the agency sought assurances that the list would not be used for commercial or fund-raising purposes, 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 general 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.).

Based on the foregoing, while I believe that an agency may require that written assurances be given that a list of names and addresses would not be used for commercial or fund-raising purposes, I do not believe that it can require that an applicant specifically describe the purpose for which a request is made or the intended use of a list.

Notwithstanding my disagreement with the responses by the State Insurance Fund involving a requirement that you provide a reason for which you seek the records, I do not believe that the purpose for which a request is made in this instance is relevant. In short, it is my view the provision intended to protect personal privacy pertaining to a list of names and addresses is inapplicable in the context of your request.

Relevant to an analysis of the matter is the Personal Privacy Protection Law, which deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For 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)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state

agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law. Further, the foregoing in my opinion indicates that the relationship between the Freedom of Information Law and the Personal Privacy Protection Law is somewhat circular and that, consequently, the sole question in many situations is whether the disclosure of the items in question would result in an unwarranted invasion of personal privacy.

There are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities. For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another more recent decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a

clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in

> 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

The standard in the New York Freedom of Information Law, as in the case of the federal Act, is subject to conflicting points of view, and reasonable people often differ with respect to issues concerning personal privacy. In this instance, although the information in question would be identifiable to particular individuals, it would pertain solely to their roles as public employees and/or persons acting in a business capacity. 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 public employees or as attorneys or firms retained to perform professional business functions. In short, as suggested in the decisions cited above, the exception concerning privacy in my view does not extend to the kind of information at issue.

With respect to payments to attorneys or a law firm, relevant is a recent decision involving a request for "the amount of money paid in 1994" to a particular law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" [Orange County Publications v. County of Orange, 637 NYS 2d 596 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the descriptive material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id., 599). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "...respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (*Ibid.*). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather '[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged' *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (*Licensing Corporation of America v. National Hockey League Players Association*, 153 Misc.2d 126, 127-128 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; *see*, *De La Roche v. De La Roche*, 209 A.D.2d 157, 158-159, 617 N.Y.S.2d 767 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is *uniquely the product of the professional skills* of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (*Brandman v. Cross & Brown Co.*, 125 Misc.2d 185, 188, 479 N.Y.S.2d 435 [Sup. Ct. Kings Co. 1984]).

> Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (*See, id.*).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or as material prepared for litigation, or both" (id., 604-605; emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §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.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "Applying these guidelines to the facts at bar, the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law § 87(2)(g). *See, Matter of Dunlea v. Goldmark, supra*, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy, will not be barred from disclosure under this exemption. *See, Ingram v. Axelrod, supra*" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible. In my view, the direction provided in Orange County Publications would be applicable to the situation to which you referred. Further, it is clear in my opinion that those portions of records reflective of amounts paid must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marsha Orndorff
Jacob H. Weintraub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9393

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

July 24, 1996

Mr. Aramis Fournier, Jr.
96-B-0805
P.O. Box 1991
Sonyea, NY 14556

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

Dear Mr. Fournier:

I have received your letter of July 9. You have made "a formal complaint against the grievance committee for failing to comply with [your] request pursuant to the Freedom of Information Act..."

Assuming you are referring to the grievance committee that deals with the conduct of attorneys, I do not believe that the Freedom of Information Law would be applicable. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Therefore, when records are subject to §90(10) of the Judiciary Law, I believe that they may be disclosed only in conjunction with that statute, and that the Freedom of Information Law would be inapplicable. If indeed your request involved records available under §90(10) of the Judiciary Law, it is suggested that you renew the request, citing and highlighting aspects of that statute that you deem pertinent.

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-9593

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 25, 1996

Mr. Abraham Hightower
92-A-1231
Southport Correctional Facility
Box 2000
Pine City, NY 14871

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

Dear Mr. Hightower:

I have received your letter of July 9 in which you raised a variety of issues concerning records.

It is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. That statute pertains to the extent to which agencies must disclose or may withhold government records. Some of the issues that you raised do not deal with that statute or rights of access. Nevertheless, I offer the following comments.

The first issue involves a request for tapes of two hearings relating to disciplinary proceedings initiated against you in which you were exonerated. When you requested the tapes, you were told that they were "disposed of" because you were cleared of the charges. You asked whether those kinds of records must be kept for a certain period of time.

Although the Freedom of Information Law is not directly pertinent, I direct your attention to §57.05(11) of the Arts and Cultural Affairs Law. In brief, that provision deals with the functions of the State Archives, which is part of the State Education Department. Among the functions of the State Archives and the Commissioner of Education is the responsibility: "To authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by an agency." In order to carry out that function, the State Archives has developed schedules which indicate minimum periods of retention for certain categories of records. In some instances, records might be required to be kept for months or years; in others, records may be

destroyed instantly. I am unaware of the retention period concerning the records that you described. It is suggested that you contact the State Archives and Records Administration in an effort to learn more of the matter.

Second, you asked whether I can send you a list of all records maintained by prisons concerning prisoners even though they were transferred. In short, this office does not maintain the kind of record that you requested, and I have no specific knowledge concerning the kinds of records that are typically maintained concerning inmates.

Third, you have asked whether there is any "bar" to your listening to tapes of hearings conducted at other prisons "free of charge." The Freedom of Information Law provides an applicant with the right to inspect accessible records at no charge. In my view, "inspection" of a tape recording would involve listening. When a tape recording is kept at a location where you have the ability to listen to it, I believe that you could do so at no charge. However, if you do not have the ability to listen because the tape recording is kept at a different location and because you are incarcerated, I do not believe that an agency would be obliged to arrange for the transfer of the tapes so that you could listen to them at no charge. Rather, I believe that an agency could offer to provide copies of the records, in which case you could be charged a fee in accordance with §87(1)(b)(iii) of the Freedom of Information Law.

You referred to a request for a "master index of all institutional records kept on prisoners." As I understand the matter, although the Department maintains a master index, that document is not required to pertain solely to inmates. 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 should be able to ascertain the kinds of records maintained by an agency and thereafter, request records based upon your review of the list.

You indicated that you have encountered "stonewalling" with respect to your requests. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Next, you raised a question concerning "what are all of the records in the possession of the Medical Department" in addition to medical charts. As in the case of a similar inquiry addressed earlier, this office would not be the source of that kind of information. Similarly, I cannot offer advice concerning "what the exact contents" of your correspondence files might be.

You asked what is the role of the prison access officer. It is assumed that you are referring to the function of the records access officer as described in the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401). If that is so, I direct your attention to §1401.2(b) of the Committee's regulations, which 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."

As you requested, enclosed is a copy of 21 NYCRR Part 1401.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9594

162 Washington Avenue, Albany, New York 12231
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July 25, 1996

Mr. Kenneth Gaston
77-C-0591
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

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. Gaston:

I have received your letter of July 10, as well as the correspondence attached to it.

In brief, having requested records from the Office of the District Attorney of Erie County, you were informed that all of the "disclosable documents" falling within the scope of your request had been provided to your trial attorney and that the District Attorney is not obliged to redisclose the records to you. You have asked whether that position is "tenable."

In my opinion, the position taken by the Office of the District Attorney is not only tenable, but it is apparently based upon a judicial decision. Specifically, in Moore v. Santucci [151 AD 2d 677 (1989) 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" (id., 678).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kimberly A. Phelan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9595

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 25, 1996

Mr. Billy Billups
80-A-1328
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. Billups:

I have received your letter of July 11 in which you asked whether the New York Public Library falls within the scope of the Freedom of Information Law.

In this regard, as you may be aware, 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."

Based on the foregoing, in general, the Freedom of Information Law is applicable to records maintained by entities of state and local government.

It is my understanding that the New York Public Library, despite its substantial receipt of government funding, is an entity separate and distinct from government. Further, the Appellate Division has held that the New York Public Library is not a governmental or public employer within the coverage of the Taylor Law, which pertains to government employees [New York Public Library v. New York State, 357 NYS 2d 522, 533 (1974)]. As such, it does not appear that the New York Public Library is an "agency"

or, therefore, that it would be required to comply with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2639
FOIL-AO- 9596

162 Washington Avenue, Albany, New York 12231
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July 25, 1996

Mr. Robert L. Pardy
[redacted]

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. Pardy:

I have received your letter of July 10 in which you raised questions concerning both access to records and the propriety of executive sessions.

You wrote that the Board of Commissioners of the Highland Fire District appoints the chief and assistant chief, and that District regulations require the completion of certain courses in order to hold those positions. When you asked to see records in order to ascertain whether the incumbents of those positions met the necessary criteria, "with any confidential information blocked out...such as SS#", your request was refused "on the claim they were personal or personnel records." It is your view that the denial of access was inappropriate. The other issue involves executive sessions held to discuss "personnel", and you contend that the Board "should be more specific.

I concur with your contentions. In this regard, I offer the following comments.

It is noted initially that 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 §87(2)(a) through (i) of the Law.

I point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, 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).

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 records 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.

Concurrently, however, information included in a document that is irrelevant to criteria required for holding the position, such as marital status, hobbies, 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.

Like the Freedom of Information Law, the Open Meetings Law makes no specific reference to "personnel", and that term does not appear in the statute. While some personnel-related issues may clearly be considered during executive sessions, others clearly may not. Characterizing an issue as a "personnel matter" without additional description would be inconsistent with the direction provided in judicial interpretations of the Open Meetings Law.

By way of background, as you may be aware, 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.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of

Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, 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 Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, 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.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, a copy of this opinion will be forwarded to the Board of Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9596A

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July 25, 1996

Mr. Joseph Waldman
[redacted]

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. Waldman:

I have received your letter of July 15, as well as related documentation. You have sought an advisory opinion concerning the Freedom of Information Law.

According to your letter, in 1995 you asked the Orange County Human Rights Commission to investigate problems in your community, and the Commission voted to approve the commencement of an investigation of human rights issues. However, you wrote that the director of the Commission "gave to the commissioners a report that he prepared for them, this report stopped that unanimous vote of the commissioners to make an investigation of this investigation." While it is your view that the report "became final agency policy or determination" that must be disclosed, your request for the report was denied.

In this regard, I offer the following comments.

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

Second, relevant to an analysis of rights of access is the provision upon which the County relied as a basis for withholding the report, §87(2)(g). Although that provision serves as a potential basis for denying access to records, due to its structure, it may require the disclosure of certain records in whole or in part. 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.

Although you have contended that the report represents the Commission's final determination, the documentation that you provided does not contain sufficient information for me to so advise. From my perspective, to find that the report constitutes a final agency determination, there must be some indication that the advice, opinion or recommendations contained therein were adopted and became the Commission's final determination. While that is not clear in this instance, I note that judicial decisions stand for that proposition. In Miller v. Hewlett-Woodmere Union Free School District (Supreme Court, Nassau County, NYLJ, May 16, 1990), the court discussed the matter at length and found that:

> "A distinction, then, is consistently made by the Courts between predecisional intra-agency communications that debate a course to be set upon by the agency, and communications that debate a course to be set upon by the agency, and communications linked with the agency's final determination. Assuredly, the statute obliquely refers to 'final agency policy or determinations,' and gives no guidance as to determining at which stage the discussion upon which the determinations is made, becomes, itself, the agency's last or final determination, or the agency's policy. The point is that predecisional records and final agency determinations are differentiated by

> more than just temporal quantum. Predecisional records imply uncertainty and subjective assessment of a host of options. A final determinations [sic] implies the documents that support a particular decision and goes to the very heart of what FOIL is about. This is because governmental bodies are most oftenheld accountable for what they do, not for what they discuss doing...
>
> "In the matter under review, defendant has failed to meet its burden of establishing that the material sought is exempt from disclosure. Defendant has failed to specify with particularity why the document requested falls specifically within the ambit of non-final intra-agency exemptions...The Superintendent admits to replying directly on the recommendations of the Team in deciding to deny plaintiff's request for a transfer of schools within the school district. The decision was made without any intervening input from third persons. The recommendation was directly responsive to plaintiff's letter and embodies the schools' final determination and policy and was intended to be the basis for the decision...
>
> "On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Team, adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers' (Matter of Sea Crest Construction Corp. v. Strubing, 82 A.D. 2d 546, 549 [2d Dept. 1981]), but the Court bears an equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived at represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making."

Similarly, in a recent decision that dealt with a claim that a so-called "Master Memorandum" could be withheld, it was stated that:

> "The court's *in camera* reading of the Master Memorandum, together with a reading of the Molinari Memorandum, leads to the conclusion that Borough President Molinari based his actions with respect to Hagemann on the information that he received from the Master Memorandum....
>
> "In view of this adoption and incorporation, the court is not persuaded that the Master Memorandum is exempt from disclosure as a non-final intra-agency document...if, in explaining its decision, the agency 'expressly adopts or incorporates any element of...a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional'" [New York I News v. Office of the President of the Borough of Staten Island, 631 NYS2d 479, 483 (1995)].

Again, whether the report in question was adopted as the Commission's final determination is unclear based on the materials that you sent. If the facts are indeed analogous to those in the decisions cited above, it would appear that report should be disclosed. Otherwise, the denial of access to the report would apparently have been proper.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard B. Golden
Laurie T. McDermott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9592

162 Washington Avenue, Albany, New York 12231
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July 25, 1996

Mr. James Cheatham
#89-T-4312 A-6
Eastern Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Cheatham:

I have received your letter of July 3, which reached this office on July 15.

According to your letter, you sent a request for records to the New York City Police Department on November 27. Having received no response, a second letter was sent on December 18. An acknowledgement of the receipt of that letter was sent to you on January 3, and you were advised that a determination would be made within approximately ninety days. When that period had passed, you wrote again to the Department, but 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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it

acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a analogous situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 to determine appeals under the Freedom of Information Law is Karen A. Pakstis, Assistant Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: SPAA Joseph Desiderio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9598

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July 25, 1996

Ms. Tanya Mamantov
[redacted]

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 Ms. Mamantov:

I have received your letter of July 11, as well as the materials attached to it. You referred to the implementation of the Freedom of Information Law by the Katonah-Lewisboro School District. As I understand your concerns, you have questioned the propriety of a requirement that the District's form be completed in order to request records under the Freedom of Information Law. In addition, you asked whether a response indicating that records would be made available to you "in the most timely possible manner" is appropriate.

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, §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)]. In short, 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 processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Second, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen McCarthy, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9599

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July 26, 1996

Mr. Joseph Capaldo
89-C-969
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 information presented in your correspondence.

Dear Mr. Capaldo:

I have received your letter of July 14, as well as the correspondence attached to it.

In brief, you requested records pertaining to yourself from the office of the Monroe County District Attorney. In response, the request was denied and you were advised to seek the records from your trial attorney. You have questioned the propriety of that response.

In this regard, I offer the following comments.

As I understand the matter, the position taken by the Office of the District Attorney is apparently based upon a judicial decision. Specifically, in Moore v. Santucci [151 AD 2d 677 (1989) 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" (id., 678).

Insofar as the records sought were not disclosed to you or your trial attorney or are unavailable presently to you or your attorney, I believe that the records maintained by the District Attorney would fall within the scope of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 supra, 679). 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard F. Mackey
Wendy Evans Lehmann
John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9600

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

July 26, 1996

Mr. Raymond Johnson
95-A-3816
Mohawk Correctional Facility
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 information presented in your correspondence.

Dear Mr. Johnson:

I have received your letter of July 12, as well as the materials attached to it. You described a series of delays in your attempts to obtain records from the New York City Police Department and you have requested an opinion on the matter and assistance in filing a lawsuit.

Before addressing the substance of your concerns, I note that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to compel an agency to comply with law or engage in litigation related activities.

I also note that in your correspondence, you referred consistently to 5 USC §552, which is the federal Freedom of Information Act. That statute pertains to records maintained by federal agencies and is inapplicable with respect to records of the New York City Police Department. That agency, like other entities of state and local government in New York, is subject to the New York Freedom of Information Law.

According to your letter, you sent a request for records to the New York City Police Department on February 14. An acknowledgement of the receipt of that letter was sent to you on February 26, and you were advised that a determination would be made within approximately ninety days. You have written again to the Department, but as of the date of your letter to this office, you had received no further response.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must

respond to requests. Specifically, §89(3) of that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said

> records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 to determine appeals under the Freedom of Information Law is Karen A. Pakstis, Assistant Deputy 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 §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: Detective Carl Parker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9601

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

July 26, 1996

Ms. Sylvia Bleiweiss
[redacted]

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. Bleiweiss:

I have received your letter of July 15, as well as the materials attached to it. You have questioned the propriety of a denial of access to performance evaluations relating to a particular employee of the New York City Transit Authority.

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].

Perhaps of primary significance is §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. 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, the most critical aspect of an evaluation, 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 under §87(2)(g) on the ground that it constitutes an opinion concerning performance, and perhaps as an unwarranted invasion of personal privacy.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence Jenkins
Victoria Clement

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9602

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

July 26, 1996

Mr. Robert Reninger
[redacted]

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

Dear Mr. Reninger:

I have received your request for comments concerning issues arising in the Town of Greenburgh.

The first involves the use of printed request forms supplied by the Town that continue to include the name of the former town clerk as records access officer. Consequently, despite the objections of the current town clerk, you continue to address correspondence with the name of the former clerk. In a memorandum to the supervisor, you indicated that you would use the name of the new clerk if the forms are corrected.

In this regard, if the Town intends to use a form, I believe that it should be accurate and up to date. Concurrently, however, there is no reason in my view to address correspondence with the name of the former clerk; the inaccuracy on the form does not require a perpetuation of that flaw in your requests. I would recommend that the Town amend its form, referring to the records access officer by name and title (town clerk) or perhaps only by title. From my perspective, the name of the records access officer is largely unimportant; what is important is that a records access officer has been designated and is identified in some manner, i.e., by name, by title, or both.

Second, you referred to delays in response 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 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Paul Feiner, Supervisor
Hon. Alfreda A. Williams, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9603

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

July 26, 1996

Mr. Lawrence A. Quinn
[redacted]

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

Dear Mr. Quinn:

I have received your letter of July 15. You referred to a request made under the Freedom of Information Law sent on June 28 to the Rensselaer County Board of Elections and received by that agency on July 1. As of the date of your letter to this office, you had received no response. As such, 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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Rensselaer County Board of Elections

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9604

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

July 26, 1996

Ms. Anita 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 information presented in your correspondence.

Dear Ms. Jones:

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

According to the correspondence, you requested information from the Village of Hempstead Community Development Agency in March. Soon thereafter, you received a letter with a form to be completed for the purpose of seeking records under the Freedom of Information Law. Despite having done so, you have encountered a series of delays, and as of the date of your letter to this office, you had not yet received the documentation that you requested. In addition, you were informed that you would be required to go the Agency's office to obtain it, even though you explained that you could not do so and offered to pay for copies.

In this regard, I offer the following comments.

First, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specifically deals with requests made and responses given by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, the reality that many people work and cannot travel to those locations, and in view of the intent of the Law, I believe that is implicit that agencies must respond to requests by mailing records to applicants. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

I do not believe that the Agency can validly require you to make an appointment to obtain records or travel to its office. Further, assuming that you remit the appropriate fee for copies, plus postage if the Agency chooses to include such charge, the

Agency in my opinion would be required to send the documentation sought to you.

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)]. In short, 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 processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to

requests. Specifically, §89(3) of that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said

> records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 opinion will be forwarded to Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James Garner
Glen L. Spiritis
Alvina Gray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9605

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

July 29, 1996

Mr. Allan E. Alexander
[redacted]

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. Alexander:

I have received your letter of July 15, which reached this office on July 22. You have complained with respect to a failure on the part of Jamestown Community College ("JCC") to provide information sought under the Freedom of Information Law. As I understand the matter, you have requested the grades issued for a particular course in which your son participated, the number of complaints filed against the faculty member who taught the course, the College's policy concerning "complaint processing", and "faculty and course evaluations."

From my perspective, it is likely that some, but perhaps not all of the information sought, must be disclosed. 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."

It is clear in my opinion that the JCC is an "agency" subject to the Freedom of Information Law. According to the Education Law, §6301, community colleges are established and operated by one or more entities of local government, and it was held prior to the enactment of the Freedom of Information Law that records of a

community college were required to be made available pursuant to §51 of the General Municipal Law, which pertains to the duty of municipal governments to disclose records [see Cline v Board of Trustees, 351 NYS 2d 81, affirmed 45 AD 2d 823 (1973)]. More recently, in 1993, the State's highest court, the Court of Appeals, confirmed that a community college is subject to the Freedom of Information Law. In its discussion of the matter, the Court:

> "reject[ed] the position of the intervenor-respondent Nassau Community College Federation of Teachers that the College is not an 'agency' within the scope of FOIL when it engages in its education function. Public Officers Law §86(3) defines an 'agency' as 'any * * * governmental entity performing a governmental or proprietary function'. Intervenor claims that the doctrine of academic abstention' and statutory construction compel the conclusion that the Legislature did not intend to extend FOIL's definition of an agency to a college's faculty committees and academic components when they perform education functions. To the extent that intervenor's argument is an invitation for us to delineate distinctions between the parameters of educational, proprietary and governmental functions, we decline to do so. We do hold that for the purposes of petitioner's FOIL inquiry, this public College constitutes an 'agency'. Nothing in the statute or legislative history requires a contrary holding, and the statutory language should be interpreted consistent with its natural and most obvious meaning" (Russo v. Nassau Community College, 81 NY 2d 690, 698).

Second, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or record, JCC would not be obliged to create a record on your behalf.

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

Relevant with respect to records identifiable to students is §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). In brief, 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. In general, FERPA confers rights of access to "education records" pertaining to a student under the age of eighteen to the parents of the student or to an "eligible student" to mean "a student who has reached 18 years of age or is attending an institution of postsecondary education" (see 34 C.F.R. §99.3), such as JCC. Concurrently, it generally requires that education records be kept confidential, unless the parents or eligible students, as the case may be, waive the right to confidentiality. Therefore, to the extent records maintained by JCC are identifiable to your son, he would have rights of access; conversely, to the extent that records may be identifiable to other students, those portions would in my view be exempt from disclosure.

In the context of your request, grades given in a particular class would be available after personally identifying details concerning students are deleted. I note that in a case dealing with a request for grades of students in a certain teacher's classes, it was contended by a school district that students might be identified even after names were deleted because the grades were recorded alphabetically. Due to that possibility, the court ordered that the records be disclosed after deleting identifying details and "scrambling" the records to ensure that student privacy would be protected [see Kryston v. Board of Education, East Ramapo School District, 77 AD2d 896 (1980)].

With respect to complaints, insofar as complaints have been made by students, again, I believe that any identifying details may be withheld under FERPA. If complaints were made by others, in my opinion, their identities may be withheld under §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." If the complaints were dismissed or unsubstantiated, I believe that disclosure would constitute an unwarranted invasion of the faculty member's privacy as well.

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].

A complaint that has been found to be without merit or which has resulted in no finding of wrongdoing may be withheld based on the direction given by the cases cited above. On the other hand, several of those decisions deal with the discipline of public employees and indicate that a final determination reflective of a finding of misconduct or wrongdoing must be disclosed. In such a case, disclosure would result in a permissible rather than an unwarranted invasion of personal privacy.

With regard to evaluations, an additional ground for denial would be pertinent. Evaluations prepared by officials or staff at JCC would fall within the scope of §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. In my view, an evaluation prepared by staff 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, the most critical aspect of an evaluation, 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 under §87(2)(g) on the ground that it constitutes an opinion concerning performance, and perhaps as an unwarranted invasion of personal privacy.

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.

An agency's policy or procedure, i.e., JCC's policy regarding the processing of complaints, would constitute intra-agency material. However, I believe that it would be available under §87(2)(g)(iii).

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 applicable law, copies of this opinion will be forwarded to JCC officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. Gregory T. DeCinque, President
Je'Anne G. Bargar, Trustee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9606

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 29, 1996

Ms. Sylvia Dimao
[redacted]

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 Ms. Dimao:

I have received your recent letter, which reached this office on July 22. You wrote that you are "in conflict" with your village concerning the application of a particular provision of law, and that the Village Attorney prepared an opinion on the subject. Having requested a copy of that opinion, you were denied access. You have questioned the propriety of the response, for there is no pending litigation on the matter.

From my perspective, the pendency of litigation or the absence thereof would not be determinative. Further, it appears that the Village could have validly withheld the record in question. 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 appears that two of the grounds for denial would serve to enable the Village to deny access to the record.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

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

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

Since the record consists of a legal opinion prepared by the Village Attorney, the other ground for denial of possible relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by statute." One such statute is §4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as a municipal official in this instance, under certain circumstances.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that the record consists of legal advice provided by counsel to the client, the record would be confidential pursuant

to §4503 of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, it appears that the denial of your request was consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Mayor Lavonas
Richard Stagnitti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9607

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 29, 1996

Mr. Charles Akbar Hall
#96-A-0212
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 information presented in your correspondence.

Dear Mr. Hall:

I have received your letter of July 17 and the correspondence attached to it. In brief, you wrote that you have sent three requests to the Albany Police Department for a variety of records. As of the date of your letter to this office, however, you had received no response.

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 for records, and requests should generally be sent to that person. In the context of the facts that you presented, I believe that officials of the Police Department should have responded in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer. Nevertheless, it is suggested that you renew your request and transmit it to the records access officer, Pamela Mineaux, City Clerk, City Hall, Albany, NY 12207.

Second, I note 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Pamela Mineaux, City Clerk
Kevin Tuffey, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9608

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 30, 1996

Ms. Rita Anita Linger
[redacted]

Dr. Judith Long
[redacted]

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 Ms. Linger and Dr. Long:

I have received your letter of July 23 in which you indicated that you and others have initiated a "Court Watch Program" involving Ithaca City Court.

You wrote that one of your goals is to collect "non-identifying statistics that would enable the community to assess how [y]our local courts are addressing domestic violence, and whether the Family Protection and Domestic Violence Intervention Act is being implemented by [y]our police, [y]our courts, [y]our prosecutors." However, after the Common Council endorsed Court Watch, "the City Court judge sealed all City Court files for the last two years." You have sought guidance and assistance in the matter.

In this regard, I offer the following comments.

First, the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

> thereof, except the judiciary or the state legislature."

In turn, §86(1) defines 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 fall beyond the coverage of the Freedom of Information Law. This not to suggest that court records may uniformly be withheld from the public. On the contrary, other statutes may provide significant rights of access to court records (see e.g., Judiciary Law, §255).

Second, it is possible that statistics may be sent to or developed by agencies, such as the Office of Court Administration, the Division of Criminal Justice Services, or your local police or sheriff's departments. It has been determined that the Office of Court Administration is not a court, but rather is an "agency" and, therefore, is subject to the Freedom of Information Law [see Babigian v. Evans, 427 NYS 2d 699, aff'd 97 AD 2d 827 (1984) and Quirk v. Evans, 455 NYS 2d 918, 97 AD 2d 992 (1983)]. As its name suggests, that entity oversees and administers the court system.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Insofar as the kinds of statistics in which you are interested exist, I believe that they would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that inter-agency or intra-agency materials consisting of "statistical or factual tabulations or data" must be disclosed. I note that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law provides in part that an agency is not required to create a record in response to a request. Therefore, to the extent that statistics have not been prepared, an agency would not be required to tabulate or review its records for the purpose of developing new statistics on your behalf.

Lastly, although I am not an expert on the matter, I would question whether the City Court judge has the authority to seal records in the manner that you described. Notwithstanding what may be an intent to protect personal privacy, it is reiterated that court records are frequently available. Further, the only situations of which I am aware pertinent to your inquiry in which records are sealed involve cases in which charges against an accused are dismissed in favor of that person. In that instance, the charges and records related to them are typically sealed pursuant to §160.50 of the Criminal Procedure Law. However,

records of convictions maintained by a court should, in my view, generally be accessible to the public.

It is suggested that you contact the Office of Court Administration for the purposes of learning of the nature of statistics that it may receive or develop and questioning the extent to which a judge has the authority to seal records. Its public information office can be reached at (212) 417-5900. Additionally, it may be worthwhile to contact the Division of Criminal Justice Services' office of public inquiry at (518) 457-6113, as well as local law enforcement agencies.

I hope 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 9609

162 Washington Avenue, Albany, New York 12231
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July 30, 1996

Mr. Peter Barbarisi
J.A.T.C. #441-96-03238
14-14 Hazen Street
E. Elmhurst, NY 11370

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

Dear Mr. Barbarisi:

I have received your recent letter, which reached this office on July 22. Attached is a request for records addressed to the 114th Precinct of the New York City Police Department. You asked whether the request should be sent to a different location and what steps you can take if the request is denied or there is no response.

In this regard, I offer the following comments.

First, pursuant to 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, and requests should ordinarily be sent to that person. While I believe that the officer in receipt of your request should have answered in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it is suggested that you send a request to Sgt. Louis Lombardi, Records Access Officer, Police Department, Legal Bureau, FOIL Unit, Room 110C, One Police Plaza, New York, NY 10038.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny

> such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 Karen A. Pakstis, Assistant Deputy Commissioner, Civil Matters.

Lastly, I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records. It is questionable in my view whether your request to the 114th Precinct would meet that standard.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9610

162 Washington Avenue, Albany, New York 12231
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July 30, 1996

Mr. Juan Reyes
#92-A-9329
Pouch No. 1
Woodbourne, NY 12788

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

Dear Mr. Reyes:

I have received your letter of July 16.

You referred to a request made under the Freedom of Information Law on February 26 for records of the Office of the District Attorney of Westchester County. The request was made by a friend, because you do not speak or write English, and was denied on March 6. The friend was transferred to a different facility in March but was returned to your facility in May, at which time he prepared a letter explaining why the records should be made available. In response, you were informed that the second request would not be considered, because the issues raised in that letter were addressed in the denial of March 6. The friend prepared and sent an appeal on June 27. Upon receipt of the appeal, the Office of the District Attorney referred to the thirty day time period during which a denial may be appealed [see Freedom of Information Law, §89(4)(a)] and indicated that the time for appealing expired thirty days after March 6. You have questioned the propriety of the District Attorney's response.

In this regard, judicial interpretations relevant to the matter appear to reach somewhat contrary conclusions. In one decision, although a petition was dismissed on the ground that it was not timely commenced, it was held that a petitioner was not barred from seeking the records again under appropriate procedures (Matter of Mitchell, Supreme Court, Nassau County, NYLJ, March 9, 1979). In that situation, if the applicant renewed his or her request and appealed a denial of access, that person would have been able to seek judicial review of the denial within four months of the agency's determination. On the other hand, a proceeding was found to have been time barred when a challenge to a second denial of access was made on the same basis as an initial denial, and

there was no change in circumstances [Corbin v. Ward, 160 AD 2d 596 (1990)].

In this instance, I am unaware of any change in circumstances that would alter rights of access. However, for purposes of illustration, such changes may occur in a variety of situations. For instance, if a matter is currently under investigation, disclosure of records might interfere with the investigation and be withheld under §87(2)(e)(i) of the Freedom of Information Law. However, when the investigation has concluded, the records that were properly withheld in the first instance may become accessible, for disclosure would no longer result in any interference.

From my perspective, if an individual is unable or chooses not to appeal a denial within thirty days of agency's denial of access, the failure to do so should not forever preclude that person from seeking the records. There may be changes in circumstances, judicial precedents that could put an issue in a different light, an acquisition of records from other sources that might diminish an agency's capacity to justify a denial, or a change in one's financial ability to initiate a lawsuit. For those reasons, I do not believe that an agency may in every instance deny a second request on the basis of a failure to appeal.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Richard E. Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 961 1

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

July 30, 1996

Mr. John Meyers
#95-A-4531
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 information presented in your correspondence.

Dear Mr. Meyers:

I have received your letter of July 10, which reached this office on July 22. You complained that an appeal made under the Freedom of Information Law for records of the Suffolk County Department of Social Services had not been answered, and you asked whether that agency sent the appropriate documentation to this office. Additionally, you questioned the validity of the denial of your request, which involved a case summary pertaining to your daughter, who is in foster care.

In this regard, I offer the following comments.

First, having reviewed the correspondence attached to your letter, I note that the appeals officer in this instance would not be at the Department of Social Services. In Suffolk County, the person designated to determine appeals for all departments within County government is the County Attorney. While I believe that your appeal should have been forwarded to the County Attorney, it is suggested that you resubmit the appeal to him with an explanation of the delay if necessary.

In a related vein, as you may recall, the denial attached to your letter failed to refer to your right to appeal. Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to

> hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

Second, access to the records in question appears to be governed not by the Freedom of Information Law, but rather by a different statute. With regard to records maintained by a children's or youth facility, whether public or private, I believe 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

Alternatively, you may seek authorization to obtain the records from a court as described in §372.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Enrique Cruz
Derrick Robinson

DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 961la

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

July 30, 1996

Ms. Margaret J. Bourcy
[redacted]

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 Ms. Bourcy:

I have received your letter of July 22 in which you described difficulties in obtaining certain records.

You referred initially to two requests to the Town of Clayton for copies of surveys pertaining to a landfill. While you "have received many excuses", you had not obtained copies of the records as of the date of your letter to this office. Additionally, having written to Jefferson County for a copy of a survey map, you wrote that "this brought a county employee to [your] door, he wanted to know what [you] wanted and why [you] wanted the copy of the survey..."

From my perspective, it is likely that the records in question should be disclosed in great measure, if not in their entirety. In this regard, I offer the following comments.

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

Relevant to an analysis of rights of access is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires that records be disclosed in whole or in part. 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 would conjecture that the surveys consist largely or perhaps entirely of statistical or factual information that must be disclosed under §87(2)(g)(i).

Second, 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, 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)].

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 opinion will be forwarded to Town and County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board, Town of Clayton
Jefferson County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 96/13

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 31, 1996

Ms. Michelle York, Reporter
The Press & Sun-Bulletin
Vestal Parkway East
PO Box 1270
Binghamton, NY 13902

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

Dear Ms. York:

As you are aware, I have received your letter of July 25 and the materials attached to it. You have sought an advisory opinion concerning the propriety of denials of your requests for records by the Town of Owego.

By way of background, on May 22, you requested a record reflective of "disciplinary action regarding Ted Zawerton", a village police officer. A week later, you made an additional request for "previous disciplinary action regarding Ted Zawerton resulting in a 30-day suspension in March and any other records pertaining to completed disciplinary action procedures." The Town denied your request on June 10 based on contentions offered by the attorney for Officer Zawerton, which will be considered in the ensuing analysis.

One of the difficulties, if I understand the facts accurately, is that Officer Zawerton has been involved in at least two incidents and two separate proceedings. While I believe that records of or relating to the proceeding that has not yet been finally determined could justifiably be withheld, records reflective of a final determination indicating findings of wrongdoing or misconduct, as well as charges that were sustained and the penalty imposed, would, in my view, be accessible to the public.

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, several of the grounds for denial are relevant in consideration of 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 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 your requests 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 (see also, Sinicropi, supra). 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, records reflective of findings of misconduct or disciplinary action taken must in my opinion be available under the Freedom of Information Law. However, to the extent that the records sought pertain to charges or proceedings that have not yet been finally determined, I believe that they could properly be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Lynn A. Mieczkowski, Clerk Treasurer
Richard N. Aswad

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 199
FOIL-AO 9613

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

July 31, 1996

Mr. Thomas N. Greene
[redacted]

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, unless otherwise indicated.

Dear Mr. Greene:

I have received your letter of July 17, as well as the materials attached to it. You have sought assistance in obtaining records from the New York State Department of Health under the Freedom of Information Law.

By way of background, you wrote that, in your capacity as an emergency medical technician (EMT), you were "charged, investigated and the investigation was closed and [you] still have no idea of what it concerned..." Requests for records were initiated more than two years ago, when you were informed that the investigation was ongoing and that the records would be withheld. In an effort to learn more of the matter, I contacted John J. Clair, Associate Director of Operations at the Bureau of Emergency Medical Services. He indicated that the Department's New Rochelle office closed the investigation on October 10, 1995 because the allegations could not be substantiated. He also said that he was not aware of any pending request for records.

In this regard, I offer the following comments.

First, pursuant to 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 sent to that person. It is suggested that you renew your request and direct it to the records access officer, Gary A. Lamay, NYS Department of Health, 2230 Corning Tower, Empire State Plaza, Albany, NY 12237.

Second, since you are seeking records pertaining to yourself, I believe that two statutes, the Freedom of Information Law and the Personal Privacy Protection Law, are relevant to an analysis of rights of access. I note that your rights under the two statutes may differ. The former deals with rights of access conferred upon the public generally; the latter deals with rights of conferred upon an individual to records pertaining to him or her. 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.

Section 95(5)(a) authorizes an agency to withhold information compiled for law enforcement purposes when disclosure would:

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

From my perspective, because allegations against you were unsubstantiated, it is doubtful that §95(5)(a) would serve as a valid basis for denial.

Section 95(6)(d) states the Personal Privacy Protection Law does not require an agency to provide to a data subject "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals..." Therefore, if the Department and its attorneys prepared records for use in a quasi-judicial proceeding (i.e., a disciplinary hearing) initiated or to be initiated against you, those records would be outside of rights

conferred by the Personal Privacy Protection Law. I am unaware of whether of any records pertaining to you would fall within this exception.

Section 95(7) states that "[t]his section shall not apply to public safety agency records." Stated differently, rights or access conferred upon a data subject by §95(1) do not apply to public safety agency records. The phrase "public safety agency record" is defined to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Based on the foregoing, if records are maintained by an "agency or component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation," the Personal Privacy Protection Law would not apply as a basis for seeking it.

Where the Personal Privacy Protection Law does not apply, as in cases in which there may be public safety agency records, the Freedom of Information would apply. This not to suggest that all such records would be available, but rather that rights of access to those remaining records would be determined by the Freedom of Information Law.

Again, that statute 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. Three of the grounds for denial may be relevant to the matter.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." Reference was made earlier to the work product of an attorney and material prepared for litigation. Those kinds of records would in my view

be exempted from disclosure by statute [see Civil Practice Law and Rules, §3101(c) and (d)].

Also potentially 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." While you could not invade your own privacy, some records or perhaps portions thereof might include the names or other identifying details concerning persons other than yourself. In those instances, §87(2)(b) might serve as a basis for a denial of access.

The remaining provision of possible significance, §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. I point out, however, that if records are available to you under §95(1) of the Personal Privacy Protection Law, §87(2)(g) of the Freedom of Information Law would not serve as ground for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Gary A. Lamay
John J. Clair

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9614

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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July 31, 1996

Ms. Carol Thompson
The Valley News
PO Box 904
Oswego, NY 13126

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 Ms. Thompson:

I have received your letter of July 26 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law to the Town Oswego.

You wrote that, based on instructions given to her by the Town's zoning attorney, the Town Clerk informed you "that information regarding a zoning issue is available only as an all or nothing package at the fee of 25-cents per page." You added that you are "only looking for 2 pages of copy, and do not wish to purchase the entire packet."

From my perspective, there is nothing in the Freedom of Information Law or any other provision that would require you to obtain a copy of the "entire packet." On the contrary, §87(2) of the Freedom of Information Law states that records accessible under the Law must be made available for inspection and copying. Further, no fee may be charged for the inspection of records. Consequently, any person has the right to view or inspect accessible records at no charge. Following inspection, he or she may request the agency to provide copies of any or all of the records, and the agency would be obliged to do so upon payment of the requisite fee [see Freedom of Information Law, §89(3)].

I note that situations arise frequently in which requested records may be lengthy or voluminous, and the cost of copying the records imposed upon the applicant, as well as the time, effort and labor required of an agency to make copies, may be substantial. In those cases, inspection of the records prior to the production of photocopies may be beneficial to both the applicant and the agency, for the applicant may later select pages of particular interest to be photocopied, and the agency can reduce or even eliminate the

time and effort of making photocopies. For instance, an audit may be hundreds of pages, but it might include few pages of significance to you or your readers. In that instance, as in the situation that you described, there is simply no requirement that you pay for copies of the entire document. Rather, in both, I believe that you may choose the pages of interest and limit your request for photocopies to those pages.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Theresa Cooper, Town Clerk
Joseph Rodak, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9615

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

August 2, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of July 28. You referred to an opinion of July 15 addressed to you in which it was advised that an agency could require payment of fees for copying in advance of its preparation of photocopies. Since you merely want to inspect records, you questioned why you "have to pay for this privilege" and asked that the matter be considered at the next meeting of the Committee on Open Government.

In this regard, based on the correspondence that you forwarded with your letter of July 15, it was assumed that you requested copies of records; nothing in your letter or the correspondence includes a suggestion to the contrary. If indeed you sought to inspect records and not to have copies, and if the records are accessible in their entirety under the Freedom of Information Law, I do not believe that the agency could charge any fee. In short, an agency cannot charge for the inspection of accessible records [see Freedom of Information Law, §87(1)(b)(iii); 21 NYCRR §1401.8(a)(1); Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law by the Mayor of the City of New York, §7.b.]. In the future, if you desire to inspect records, it is suggested that you so specify in a request.

I hope that the foregoing serves to clarify the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Jerry Rosenthal
Gerald S. Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 96/16

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

August 2, 1996

[redacted]
Kirby Building
600 East 125th Street - 2nd Floor
Wards Island, NY 10035

Dear [redacted]:

I have received your recent letter, which reached this office on August 2. As I understand your commentary, you requested information on a variety of topics.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning public rights of access to government records, primarily under the Freedom of Information Law. The Committee does not maintain records generally, and it has no authority to obtain records on behalf of members of the public. Nevertheless, in an effort to assist you, I offer the following remarks.

First, a request for records should be directed to the agency that you believe maintains the records in which you are interested. Further, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and requests should generally be made to that person.

Second, §89(3) of the Freedom of Information Law provides in part that an applicant must "reasonably describe" the records sought. Therefore, when seeking records, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest. In the context of your letter, a request for "information that concerns taxes, employees work force, labor workers under the State of NY, voters information" and the like would not in my opinion meet the standard of reasonably describing the records. I believe that additional detail would be needed.

Enclosed is "Your Right to Know", an explanatory brochure pertaining to the Freedom of Information Law that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9617

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

August 2, 1996

Mr. Anthony Isaacs
#85-A-1147
Shawangunk Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Isaacs:

I have received your recent letter, which reached this office on July 28. You have contended that a variety of records that you requested from the Office of the New York County District Attorney must be disclosed, and you have sought 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 §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 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 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. 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 §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 remaining potentially 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).

Finally, 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)].

I hope 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 9618

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

August 2, 1996

Ms. Kathleen Flamio
[redacted]

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 Ms. Flamio:

I have received your recent letter, which reached this office on July 28. You wrote that your request to look at Glen Cove High School yearbooks was denied by the principal. You have questioned the propriety of his response.

From my perspective, there is no basis for prohibiting you from looking at the yearbooks. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records. A school district clearly is an "agency" [see Freedom of Information Law, §86(3)], 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 on the foregoing, assuming that the District or the High School maintains the yearbooks, I believe that they would constitute "records" that fall within the scope of rights conferred by the Freedom of Information Law.

Second, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except

to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could justifiably be asserted to withhold a yearbook.

While records identifiable to students ordinarily may be withheld pursuant to the federal Family Educational Rights and Privacy Act (20 USC §1232g), in the case of a yearbook, by its nature, those identified have consented to disclosure. Moreover, any purchaser of a yearbook acquires personally identifying details concerning students that appear throughout the yearbook, i.e., through photographs of individuals, classes, teams, clubs, etc. Because those details have been made known to any purchaser of a yearbook and any others with whom the contents of the yearbook may be shared, I do not believe that the District would have any basis for denying access to a yearbook. Moreover, frequently yearbooks are kept and made available to the public at public libraries. If you cannot view the yearbooks at a public library, again, it is my view that the District must make them available for inspection.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Lane Schwartz, Principal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9619

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

August 5, 1996

Mr. Virgilio Martinez
#96-A-2416
Elmira Corr. Recepton Center
PO Box 500
Elmira, NY 14902-0500

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

Dear Mr. Martinez:

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

In brief, you wrote that you have unsuccessfully attempted to obtain records from your parole file and "DOCS records" that were prepared while you were at the Lincoln Correctional Facility. Your requests have gone from one facility to another, and each has indicated that the records are kept elsewhere. Consequently, you have sought assistance in the matter.

In this regard, one of the difficulties may be that the records in question, although they may be physically kept at a correctional facility, may be maintained separately by officials of the Department of Correctional Services and the Division of Parole. While the nature of the records in which you are interested is not entirely clear, it is suggested that separate requests be made.

With respect to records pertaining to parole or parole related functions, I recommend that a request be directed to the Records Access Officer, Division of Parole, 97 Central Avenue, Albany, NY 12206. The records access officer has the duty of coordinating the agency's response to requests. With respect to the other records in which you are interested, it is assumed that they would be maintained by the Department of Correctional Services. Typically, records of that agency pertaining to an inmate are transferred with the inmate when the inmate is transferred to a different facility. Further, the regulations promulgated by the Department indicate that a request for records kept at a facility may be made to the facility superintendent or his designee. As such, it is suggested

that a request for Department records be made at your facility in accordance with the regulations.

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 staff to locate and identify the records of your interest.

I hope 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 9620

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

August 5, 1996

Mr. Edward Szymkowiak
[redacted]

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. Szymkowiak:

I have received your letter of July 26 and the materials attached to it. You have sought an opinion concerning your right to obtain a subject matter list from Delaware County.

In this regard, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to the list that you requested, which must be maintained by an agency. Specifically, §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)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

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 County's records management officer designated pursuant to §57.19 of the Arts and Cultural Affairs Law should be familiar with and have a copy of the schedule applicable to the County and its records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Raymond Christensen, Chairman, Board of Supervisors
R. Spinney, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9621

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

August 5, 1996

Mr. Michael M. Albanese
City Attorney
City of Gloversville
City Hall - 3 Frontage Road
Gloversville, NY 12078-2897

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. Albanese:

I have received your letter of July 30. You have sought an advisory opinion concerning public rights of access to records relating to health insurance benefits of public officers and employees.

In this regard, I offer the following comments.

First, as you are aware, 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 §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, 109 AD 2d 292 (1985) 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].

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. Based on the Wool decision, it might be contended that whether a public employee is covered by a health insurance has no relevance to the performance of that person's official duties, and that, therefore, such information may be withheld.

From my perspective, such a conclusion would be overly restrictive. In Capital Newspapers v. Burns, supra, 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 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

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.

Most appropriate in my opinion would be a disclosure of costs of health care coverage by category in terms of plans that are offered or available to officers or employees. A separate disclosure should identify those officers or employees who receive coverage. However, in conjunction with the preceding commentary, I do not believe that the City would be required to disclose the type of coverage an officer or employee has chosen or which specific dependents are covered under the plan.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Tara Sidor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9622

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

August 6, 1996

Rev. Leonard D. Conforti
a/k/a Martin Cohen
#95-A-2321 B1-125
Shawangunk Corr. 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 information presented in your correspondence.

Dear Rev. Conforti:

I have received your letter of July 23 and the materials attached to it. You described a series of delays in your efforts to gain access to records of the New York City Police Department. In this regard, although their substance has been communicated to you in the past, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would

have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 Karen A. Pakstis, Assistant Deputy Commissioner, Civil Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9623

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

August 6, 1996

Mr. Aramis Fournier Jr.
#96-B-0805
PO Box 1991
Sonyea, NY 14556

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

Dear Mr. Fournier:

I have received your letter of July 28. You have sought "information and procedures on obtaining police service records as well as the address to request such."

In this regard, I offer the following comments.

First, a request should be sent to the agency that maintains the records in which you are interested. Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and a request should be directed to that person. Presumably, the records access officer at the agency that employs a police officer would be the appropriate person and location to request the records in question.

Second, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff 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 §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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 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)].

Aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are pertinent to consideration 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.

In terms of the judicial interpretation of the Freedom of Information Law, as suggested earlier, 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., Prisoners' Legal Services, supra; also 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9624

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

August 6, 1996

Mrs. Linda J. Van Vechten
[redacted]

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, unless otherwise indicated.

Dear Ms. Van Vechten:

I have received your letter of July 29 and the materials attached to it.

According to the correspondence, you have attempted for several months to obtain a "total figure" indicating the maintenance cost, including labor, of a 1984 Mercury used by the Town of Catskill Highway Department. Although the receipt of your requests have been acknowledged, you had received no "formal reply" as of the date of your letter to this office.

In this regard, in an effort to acquire additional information on the matter, I contacted Jean Deyo, the Town Clerk, on your behalf. Based on my discussion with her, there is no record reflective of all maintenance costs incurred, and it would be impossible to prepare such a record.

As you may be 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 a record or records in order to accommodate an applicant. Therefore, if no record exists indicating the total maintenance costs relating to the vehicle in question, the Town would not be required prepare a new record containing the information sought.

I was informed by Ms. Deyo that no particular record containing the information sought is kept with respect to the vehicle in question. She specified that Town employees perform maintenance work on a number of vehicles, and that no record is kept concerning the time spent by an individual employee or a group of employees working on a particular vehicle. That being so, there is no method of ascertaining or computing a "total figure"

reflective of the expense involved in the maintenance of the vehicle that is the subject of your requests.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Jean Deyo, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9625

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 7, 1996

Ms. Estelle Levy
[redacted]

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 Ms. Levy:

I have received your letter of August 2. Your question involves the status of the City Parks Foundation under the Freedom of Information Law.

According to your letter, the Foundation is a not-for-profit corporation which, among other functions, operates tennis concessions at New York City parks. You wrote that "[i]t is housed in the Arsenal where the Commissioner and Parks Counsel have offices...needs Commissioner approval for disbursements, it pays no rent, uses City owned offices equipment and electricity", and that "[a]t the Central Park Tennis Concession, there are New York City Parks Dept paid employees", some of whom "are tenured Parks workers and others provisional/seasonal -- all paid by public funds without whom they could not operate the concession."

From my perspective, assuming the accuracy of your statements, it would appear that the Foundation is subject to the Freedom of Information Law. In this regard, I offer the following comments.

As you may be aware, 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 is generally applicable to entities of state and local government. Nevertheless, there are several judicial decisions in which it has been held that certain not-for-profit corporations are "agencies" due to the nature of their relationship or connection with government.

In a case that involved what may be characterized as an adjunct of a public institution of higher education, it was held that a community college foundation, a not-for-profit corporation, and its records are subject to the Freedom of Information Law. As stated by the court:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Vertified Answer at paragraph 17). These purposes are further amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:
>
> > '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.
>
> Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, 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" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the Foundation in Eisenberg, the Central Park Foundation would apparently not exist but for its relationship with the Department of Parks and Recreation.

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).
>
> 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].

Most recently, the Court of Appeals again determined that a certain not-for-profit corporation constituted an "agency" subject to the Freedom of Information Law. In Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court determined that:

> "The BEDC, a not-for-profit local development corporation, channels public funds into the

> community and enjoys many attributes of public entities. It should therefore be deemed an 'agency' within FOIL's reach in this case" (id., 492).

It was also stated that:

> "The BEDC principally pegs its argument for nondisclosure on the feature that an entity qualifies as an 'agency' only if there is substantial governmental control over its daily operations...The Buffalo News counters by arguing that the City of Buffalo is 'inextricably involved in the core planning and execution of the agency's [BEDC] program'; thus, the BEDC is a 'governmental entity' performing a governmental function for the City of Buffalo, within the statutory definition.
>
> "The BEDC's purpose is undeniably governmental. It was created exclusively by and for the City of Buffalo to attract investment and stimulate growth in Buffalo's downtown and neighborhoods. As a city development agency, it is required to publicly disclose its annual budget. The budget is subject to a public hearing and is submitted with its annual audited financial statements to the City of Buffalo for review. Moreover, the BEDC describes itself in its financial reports and public brochure as an 'agent' of the City of Buffalo. In sum, the constricted construction urged by appellant BEDC would contradict the expansive public policy dictates underpinning FOIL. Thus, we reject appellant's arguments" (id., 492-493).

In the context of the situation that you described, there would also appear to be substantial government control over the Foundation if indeed the Foundation must obtain approval from the Commissioner before making disbursements. Further, in view of the location of the Foundation's offices and the overlap in the performance of its functions with those the Department, the relationship between the Foundation and the Department appears to be similar in many respects to that of the BEDC and the City of Buffalo in Buffalo News.

Even if it is contended that the Foundation is not an agency, its records are maintained in Parks Department premises, and it appears that its records are kept or produced for or on behalf of the Department. Here I point out that §86(4) of the Freedom of Information Law defines the term "record" expansively to mean:

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

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 a case cited earlier concerning 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, supra, 581) 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.).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for there appears to be "considerable crossover" in the activities of the Foundation and the Department.

Most recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, (1995)]. Therefore, if a document is produced for an

agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

Lastly, since you indicated that the Department failed to respond to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that 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)].

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)].

As such, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Deborah Landau
Thomas G. Rozinski
Parke Spencer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2643
FOIL-AO 9626

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

August 7, 1996

Mr. James W. Harris
[redacted]

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. Harris:

As you are aware, I have received your letter of August 2. You indicated that in response to a request for minutes and other records concerning its deliberations, you were informed by the Board of Assessment Review of the Town of Clifton Park that it is not subject to the Freedom of Information Law. You have questioned the validity of that assertion.

From my perspective, a board of assessment review clearly falls within the coverage of the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(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 municipal board that performs a governmental function for a town, I believe that it clearly constitutes an "agency" that falls within the scope of the Freedom of Information Law.

Second, for purposes of the Freedom of Information Law, the term "record" [§86(4)] is defined to include:

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

Based on the foregoing, any materials maintained by the Board would constitute "records" subject to rights of access.

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 most instances, records submitted by a grievant must be disclosed, for none of the grounds for denial would apply. With respect to records prepared by the Board or other Town officials, of possible significance is §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. 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.

Lastly, I believe that a board of assessment review is also a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. 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.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Further, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

> "Each agency shall maintain:
>
> (a) a record of the final vote of each member in every agency proceeding in which the member votes..."

In my opinion, because an assessment board of review is a "public body" and an "agency", it is required to prepare minutes in accordance with §106 of the Open Meetings Law, including a record of votes in conjunction with §87(3)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9627

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

August 7, 1996

Mr. Darrell Little
#91-A-4839
Fishkill Corr. Facility
PO Box 307
Beacon, NY 12508-0307

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. Little:

I have received your letter of July 30 in which you sought guidance in obtaining your "original computation sheet." In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if the "original" record in which you are interested no longer exists, there would be no obligation on an agency to prepare a new record on your behalf.

Second, if the record in question continues to exist, it is assumed that it would be maintained by the Department of Correctional Services. Pursuant to the regulations promulgated by the Department, a request for records kept at a correctional facility may be made to the facility superintendent or his designee; for records kept at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration.

Finally, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, a computation sheet pertaining to you would be accessible to you, for none of the grounds for denial would be applicable.

I hope 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 9628

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 8, 1996

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 information presented in your correspondence.

Dear Mr. Kane:

I have received your letter of August 5 and the materials attached to it. Once again, you have sought my views concerning your requests directed to the Fulton County Industrial Development Agency. Because opinions have been rendered in the past dealing with the substance of the matters that you raised, I do not believe it is necessary to revisit them.

However, you asked that I comment "as to the refusal of the records access officer to certify the response to [your] request." From my perspective, based on the reply by the records access officer, it appears that he intended his statement to be a certification. Specifically, he referred to his "third verification" and wrote as follows: "I hereby state that I have made a diligent search for the referenced record and have found no record or entry of it at the offices of the Fulton County Industrial Development Agency."

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search."

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an

adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Nothing in the Freedom of Information Law specifies the form of a certification. The court in Thomas referred to an affidavit. In this instance, the records access officer provided a "verification." For purposes of the Freedom of Information Law, I do not believe that there would be any substantial distinction between an affidavit and the verification given by the records access officer.

It is noted that the regulations promulgated by the Committee specify that no fee can be charged for a certification requested under the Freedom of Information Law [21 NYCRR §1401.8(a)(3)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: James E. Mraz, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9629

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

August 8, 1996

[redacted]
#90-B-2746
PO Box 2500
Marcy, NY 13403-2500

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

Dear [redacted]:

I have received your letter of July 31 in which you alleged that a nurse at your facility purposely infected you with HIV infected blood. You are interested in obtaining the name of the nurse.

In this regard, while I will not address the substance of your allegation, I offer the following comments.

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

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

Second, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It

is suggested that you refer to §18 of the Public Health Law in any request for medical records.

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

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

Assuming that there is a record pertaining to you reflective of a medical procedure and that the record includes the name of the person who administered that procedure, I believe that it would be available to you. If no such record exists, in my opinion, neither the Freedom of Information Law nor §18 of the Public Health Law would apply.

I hope 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 9630

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

August 8, 1996

Ms. Eileen Murphy
[redacted]

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

Dear Ms. Murphy:

I have received your letter of August 5, as well as the materials attached to it. You have sought assistance in relation to your efforts in gaining access to the so-called "Ryan Report" from the Garden City Public Schools.

According to your letter, a committee headed by a member of the Board of Education, James Ryan, was designated in October of 1995 to "determine preliminarily, without the benefit of any professional advisors, whether it was feasible to redevelop a portion of the former St. Paul's school site as a new high school", and" [i]f such redevelopment was possible, to determine the costs and savings associated with such redevelopment and compare these costs with the cost of repairing and refurbishing the schools as set forth in the Wiedersum Report (a professional consultant's report which identified and priced out necessary school building repairs throughout the district)." Mr. Ryan reported on behalf of the committee in June and offered no recommendation but rather outlined options and costs. When you asked for a copy of the report, he indicated that "he was working from notes", and the Board president said that it is an oral report and that a written report might be prepared at some point in the future.

In July, the Board entered into an agreement with a consulting engineer to study the potential use of the St. Paul's school building at a fee of not more than $10,000. You indicated that "[t]he purpose of this action was to have professional consultants review the Ryan report to see if its findings were accurate." In the contract between the consultant and the District, one element involving the scope of the consultant's work included direction to "review the report prepared by school board members and architectural consultants regarding the adaptive re-use of the St. Paul's school building, and to review the cost estimate of the

adaptive re-use schemes described in the committee report." It is your view that the committee report referenced in the preceding sentence is the Ryan report.

Having requested the report, you were denied access for the following reasons: "intragency material (predecisional) under Public Officers Law Section 87(2)(g) and record does not exist in format requested." You were, however, given "the statistical and factual tabulations that the Ryan Committee had used in composing their report." You appealed, and the denial was sustained "[b]ecause no record exists in the format requested in your application." It is your contention that [w]ithout the specifics of the Ryan report, it is impossible to completely understand what [the engineering firm's] scope of work is."

In this regard, I offer the following comments.

First, as you are likely 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. Nevertheless, it is important to note that the term "record" is defined expansively in §86(4) to include:

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

I have no knowledge of the "format" of any report that might have been prepared by the Ryan committee. If indeed there is no written report, the Freedom of Information Law would not apply. However, there may be a variety of documentation that was used or acquired by the committee in the performance of its duties, all of which would in my opinion constitute records that fall within the coverage of the Freedom of Information Law. It is suggested that you request any records acquired, used or prepared by or on behalf of the Ryan committee in relation to its duties.

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.

If records were acquired from private sources, for example, it is unlikely that any of the grounds for denial would apply. To the extent that records were prepared by the committee, District staff or consultants retained by the District [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)], the provision cited in the denials of

access, §87(2)(g), would be pertinent. 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. 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" (Xerox, supra, 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.

In your correspondence, you recalled a statement that I had made you by phone to the effect that: "Insofar as a recommendation was adopted and became part of the contract, it no longer would have been a recommendation but rather would have represented a determination and should be available to the public." In this regard, the materials that you sent do not include adequate information to conclude that recommendations were adopted and became District determinations. From my perspective, to find that a record or report or portions thereof constitutes a final agency determination, there must be some indication that the advice, opinion or recommendations contained therein were adopted and became a final determination. While that is not clear in this instance, I note that judicial decisions stand for that proposition. In Miller v. Hewlett-Woodmere Union Free School District (Supreme Court, Nassau County, NYLJ, May 16, 1990), the court discussed the matter at length and found that:

"A distinction, then, is consistently made by the Courts between predecisional intra-agency communications that debate a course to be set upon by the agency, and communications that debate a course to be set upon by the agency [sic], and communications linked with the agency's final determination. Assuredly, the statute obliquely refers to 'final agency policy or determinations,' and gives no guidance as to determining at which stage the discussion upon which the determinations is made, becomes, itself, the agency's last or final determination, or the agency's policy. The point is that predecisional records and final agency determinations are differentiated by more than just temporal quantum. Predecisional records imply uncertainty and subjective assessment of a host of options. A final determinations [sic] implies the documents that support a particular decision and goes to the very heart of what FOIL is about. This is because governmental bodies are most often held accountable for what they do, not for what they discuss doing...

"In the matter under review, defendant has failed to meet its burden of establishing that the material sought is exempt from disclosure. Defendant has failed to specify with particularity why the document requested falls specifically within the ambit of non-final intra-agency exemptions...The Superintendent admits to replying directly on the recommendations of the Team in deciding to deny plaintiff's request for a transfer of schools within the school district. The decision was made without any intervening input from third persons. The recommendation was directly responsive to plaintiff's letter and embodies the schools' final determination and policy and was intended to be the basis for the decision...

"On the totality of circumstances surrounding the Superintendent's decision, as present in the record before the Court, the Court finds that petitioner is entitled to disclosure. It is apparent that the Superintendent unreservedly endorsed the recommendation of the Team, adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely

> to agency decision makers' (Matter of Sea Crest Construction Corp. v. Strubing, 82 A.D. 2d 546, 549 [2d Dept. 1981]), but the Court bears an equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived at represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making."

Similarly, in a recent decision that dealt with a claim that a so-called "Master Memorandum" could be withheld, it was stated that:

> "The court's *in camera* reading of the Master Memorandum, together with a reading of the Molinari Memorandum, leads to the conclusion that Borough President Molinari based his actions with respect to Hagemann on the information that he received from the Master Memorandum....
>
> "In view of this adoption and incorporation, the court is not persuaded that the Master Memorandum is exempt from disclosure as a non-final intra-agency document...if, in explaining its decision, the agency 'expressly adopts or incorporates any element of...a staff member's prior oral or written discussion of the matter, those incorporated portions of earlier minutes or documents would no longer qualify as pre-decisional'" [New York I News v. Office of the President of the Borough of Staten Island, 631 NYS2d 479, 483 (1995)].

Again, whether any records or portion thereof were adopted as a final determination is unclear based on the materials that you sent. If the facts are indeed analogous to those in the decisions cited above, it would appear that any such documentation should be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Education
Lee S. Wilson, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9631

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 9, 1996

Mr. Brian J. Skidmore
#90-T-3034
Southport Corr. Facility
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 information presented in your correspondence.

Dear Mr. Skidmore:

I have received your letter of August 5. You wrote that the Clinton County Department of Probation has refused to disclose "all" records pertaining to you in its possession to you. Further, you claimed that the Department has asserted that all such records "are exempt from disclosure under FOIA because their records are 'their property'."

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 may represent the basis upon which the County relied in 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 §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.

As suggested earlier, access to pre-sentence reports is governed by the Criminal Procedure 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 with respect to pre-sentence reports is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to those records.

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 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Commissioner, Clinton County Department of Probation

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9632

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

August 9, 1996

Mr. David Hulse
Fishkill
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 information presented in your correspondence.

Dear Mr. Hulse:

I have received your letter of August 4. You have sought assistance in your efforts in attempting "to find out if there were any police responses" at a particular address in Queens.

From my perspective, the key issue involves the requirement in §89(3) of the Freedom of Information Law that a request 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.

In the context of your inquiry, if the New York City Police Department has the ability to locate records concerning police responses based upon a street address, it is likely that records of your interest could be found and that you could meet the standard of reasonably describing the records. On the other hand, if records of police responses are kept chronologically, for example, there may be no way of retrieving the records that you are seeking.

Assuming that you can reasonably describe the records, a request may be directed to the Department's "records access officer." Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency's designated records access officer has the duty of coordinating an agency's response to requests. It is suggested that your request be sent to Sgt. Louis Lombardi, Records Access Officer, FOIL Unit, Room 110C, One Police Plaza, New York, NY 10038.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, a general incident report or other record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

The kinds of entries that you are seeking have historically been maintained in police blotters. However, 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 and often police departments use different terms for records or reports analogous to police blotters. In 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 or other record is analogous to that described in Sheehan in terms of its contents, I believe that the public would have the right to review it.

If the reports maintained by the Police Department are more expansive than the traditional police blotter described in Sheehan, portions of such reports might be withheld, depending upon their contents and the effects of disclosure. Several grounds for denial may be relevant, and it is emphasized that many of them are based upon potentially harmful effects of disclosure. The following paragraphs will review the grounds for denial that may be significant.

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

Also of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". It might be applicable relative to the deletion of identifying details in a variety of situations, such as domestic disputes, complaints that neighbors' dogs are barking, or where a record identifies a confidential source or a witness, for example.

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

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;

> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my opinion, a record 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 reports, such as investigative reports, would likely fall within the scope of §87(2)(e). Those records would be accessible or deniable, depending upon their contents and the effects of disclosure.

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

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

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

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

Since the records in question are prepared by employees of a police department, I believe that they could be characterized as "intra-agency material". However, insofar as they consist of factual information, §87(2)(g) could not, in my opinion, be asserted as a basis for denial.

Further, 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 statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, some 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9633

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

August 9, 1996

Mr. Rasul Furqan
#93-R-6057
Altona Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Furqan:

I have received your letter of August 1. You complained that your request made under the Freedom of Information Law for records of the Port Authority has not been answered.

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.

I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must

respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Chief Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9634

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

August 9, 1996

Mr. Robert Karlin
[redacted]

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. Karlin:

I have received your letter of July 31, as well as the correspondence attached to it. You have sought my views concerning consistent delays in response to your requests for records of the New York City Department of Environmental Protection.

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 that statute states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would

have failed to comply with §89(3). In an analogous situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 §87(2)(a) through (i) of the Law.

Since many of the records sought appear to involve communications between or among agencies, §87(2)(g) would be particularly relevant. Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Section 87(2)(g) permits an agency to withhold records that:

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Marilyn Gelber, Commissioner
Marie Dooley, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9635

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

August 9, 1996

Mr. Jean Tax
#94-A-7026
Adirondack Corr. Facility
PO 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 information presented in your correspondence.

Dear Mr. Tax:

I have received your letter of July 24, which reached this office on August 8. You referred to delays in response to your requests for records of the New York City Police Department and the Office of the New York County District Attorney.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 to determine appeals at the Police Department is Karen A. Pakstis, Assistant Deputy Commissioner, Civil Matters; the person so designated by the District Attorney is Gary J. Galperin, Assistant District Attorney.

I note that one of the records that you requested is a hospital report pertaining to a complainant. Here I point out the §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes examples of unwarranted invasions of privacy, the first two of which pertain to medical histories and "items involving the medical or personal records of a client or patient in a medical facility."

Another record sought is a probation report. If that is intended to mean a pre-sentence report, a statute other than the Freedom of Information Law would govern access. 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 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen A. Pakstis
Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9636

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

August 13, 1996

Mr. Danny Kennedy
[redacted]

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. Kennedy:

I have received your letter of August 7 in which you sought guidance in your efforts in obtaining medical records pertaining to yourself from Bellevue Hospital.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by Bellevue Hospital, which is part of the New York City Health and Hospitals Corporation. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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

Second, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. As such, that statute may provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in a request for medical records sent to Bellevue Hospital.

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

Access to Patient Information Coordinator
New York State Department of Health
Division of Public Health Protection
Corning Tower Building - Room 2517
Empire State Plaza
Albany, New York 12237

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9637

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

August 14, 1996

Mr. Kalman Finkel
Appeals Officer
New York City Housing Authority
250 Broadway
New York, NY 10007

Dear Mr. Finkel:

I appreciate receipt of your August 5 determination rendered under the Freedom of Information Law in response to an appeal by Mr. Alphe Campbell. In brief, you upheld an initial denial of access to "a document sent by the New York City Housing Authority...to the U.S. Department of Labor" on the ground that it consists of "inter-agency materials which are not final agency policy or determinations."

If that is the only basis for withholding the record in question, I respectfully disagree with your determination.

Although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, depending upon the contents of those materials, it does not appear that §87(2)(g) could be cited to withhold communications between the Authority and a federal agency. Section 86(3) of the Freedom of Information Law defines "agency" to include:

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

The language quoted above indicated that an "agency" is an entity of state or local government in New York. While there is no case law of which I am aware that deals specifically with the status of communications with a federal agency, since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the Authority and a federal governmental

entity, for such an entity would not be an agency for the purpose of the Freedom of Information Law. I note that there is case law involving the assertion of §87(2)(g) in relation to communications between agencies and entities other than New York state or municipal governments. In both instances, it was held that the assertion of §87(2)(g) was erroneous [see Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769; affirmed, 83 AD2d 422; reversed on other grounds, 84 NY2d 148 (1994); also Leeds v. Burns, 613 NYS 2d 46, 205 AD2d 540 (1994)].

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: Alphe Campbell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9638

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

August 14, 1996

Mr. Curtis White
91-A-3833
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

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

Dear Mr. White:

I have received your letter of August 12 in which you raised questions concerning access to records of the Albany Medical Center Hospital, particularly certain of its policies or procedures.

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 includes entities of state and local government within its coverage; it would not include a private hospital, such as the Albany Medical Center Hospital.

Whether you may have the right or the ability to obtain the kinds of records that you described under a different provision of law is beyond the jurisdiction or expertise of this office. It is suggested that you discuss the matter with your attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9639

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

August 14, 1996

Mr. Damion Saulters
96-B-0879
Box 500
Elmira, NY 14902-0500

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

Dear Mr. Saulters:

I have received your letter of August 8 in which you asked where and how you might obtain "P-88" forms pertaining to yourself and your co-defendant.

In this regard, I am unaware of the nature of such a form or the purpose for which it is used or completed. Nevertheless, in an effort to assist you, 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, 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.

Second, insofar as the forms in question are maintained by an agency, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more persons as "records access officer." 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 you believe maintains the forms in which you are interested.

If the forms are maintained by the Department of Correctional Services, I point out that the Department's regulations indicate that a request for records kept at a facility should be made to the facility superintendent; to seek records kept at the Department's Albany offices, a request may be directed to the Deputy Commissioner for Administration.

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 staff to locate and identify the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9640

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

August 14, 1996

Mr. Isaiah Brown
300-96-00595
1606 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Brown:

I have received your letter of August 5 and the correspondence attached to it. One of the items is a request directed to the Office of the New York County District Attorney for all records in the file pertaining your case. You have sought my opinion as to whether your request "should be honored."

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.

Insofar as your request includes 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 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. 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.

I also direct your attention to §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports and memoranda. That provision 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.

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 remaining 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9641

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

August 14, 1996

Mr. Robert J. Ponzini
Village Attorney
Village of Hastings-on-Hudson
Municipal Building at Fulton Park
7 Maple Avenue
Hastings-on-Hudson, NY 10706-1497

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. Ponzini:

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

By way of background, in your capacity as Village Attorney for the Village of Hastings-on-Hudson, you described litigation in which the Village is a third party defendant. In an effort to settle the litigation, you indicated that the parties have been involved in numerous conferences held at the request of the Court during which settlement options have been discussed. Detailed correspondence and proposals have been exchanged at the request of the Court among the parties, and you stressed that during the initial phases of the settlement negotiations, the parties asked that the information be "held in confidence" due to concerns that public disclosure "might impair the viability of negotiations."

Having received a request for "a detailed work plan offered by one of the parties", you wrote that your review of the Freedom of Information Law suggests that none of the exceptions to rights of access could likely be asserted. However, you referred to §87(2)(c), the exception that authorizes an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations." You have contended that your situation is "strikingly similar", for disclosure of the records in question "might, if revealed, impair the ongoing negotiations."

From my perspective, it is unlikely that you could justify a denial of access on the basis of §87(2)(c) or any of the other grounds for denial. In this regard, I offer the following comments.

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

In my view, the proper assertion of §87(2)(c) generally encompasses situations in which an agency or a party to negotiations maintains records that have not been made available to others. For example, if 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)]. Similarly, if an agency is involved in collective bargaining negotiations with a public employee union, and the union requests records reflective of the agency's strategy, the items that it considers to be important or otherwise, its estimates and projections, it is likely that disclosure to the union would place the agency at an unfair disadvantage at the bargaining table and, therefore, that disclosure would "impair" negotiating the process.

I point out in good faith that the Court of Appeals sustained the assertion of §87(2)(c) in a case that did not clearly involve "contract awards" or collective bargaining negotiations. In Murray v. Troy Urban Renewal Agency [56 NY2d 888 (1982)], the issue pertained to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Because premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving optimal prices, the agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In each of the kinds of the situations described above, there is an inequality of knowledge. 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 context of collective bargaining, the union would not have all of the agency's records relevant to the negotiations; 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 records regarding collective bargaining strategy or appraisals would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

In a case involving negotiations between a New York City agency and the Trump organization, the court referred to an opinion that I prepared and adopted the reasoning offered therein, stating that:

> "Section 87(2)(c) relates to withholding records whose release could impair contract awards. However, here this was not relevant because there is no bidding process involved where an edge could be unfairly given to one company. Neither is this a situation where the release of confidential information as to the value or appraisals of property could lead to the City receiving less favorable price.
>
> "In other words, since the Trump organization is the only party involved in these negotiations, there is no inequality of knowledge between other entities doing business with the City" [Community Board 7 v. Schaffer, 570 NYS 2d 769, 771 (1991); Aff'd 83 AD 2d 422; reversed on other grounds 84 NY 2d 148 (1994)].

Based on the foregoing, if the Village and the other parties to the litigation are aware of the content of the records at issue, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably be asserted to withhold the records in question.

I believe that the same conclusion may be reached by considering the matter from a different vantage point more typically associated with litigation. 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." From my perspective, although §3101(c) and (d) of the CPLR authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for litigation, those kinds of records remain confidential in my opinion only so long as they are not disclosed to an adversary or a filed with a court, for example. I do not believe that materials that are served upon or shared with an adversary could be characterized as confidential or exempt from disclosure.

As you are aware, §3101 pertains disclosure in a context related to litigation, and subdivision (a) reflects the general principle that "[t]here shall be full disclosure of all matter

material and necessary in the prosecution or defense of an action..." The Advisory Committee Notes pertaining to §3101 state that the intent is "to facilitate disclosure before trial of the facts bearing on a case while limiting the possibilities of abuse." The prevention of "abuse" is considered in the remaining provisions of §3101, which describe narrow limitations on disclosure. One of those limitations, §3101(c), states that "[t]he work product of an attorney shall not be obtainable", and §3101(d)(2) states in relevant part that:

> "materials otherwise discoverable under subdivision (a) of this section and prepared in anticipation of litigation or for trial by or for another party, or by or for the other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."

Both of those provisions are intended to shield from an adversary records that would result in a strategic advantage or disadvantage, as the case may be. Reliance on both in the context of a request made under the Freedom of Information Law is in my view dependent upon a finding that the records have not been disclosed, particularly to an adversary. In a decision in which it was determined that records could justifiably be withheld as attorney work product, the "disputed documents" were "clearly work product documents which contain the opinions, reflections and thought process of partners and associates" of a law firm "which have not been communicated or shown to individuals outside of that law firm" [Estate of Johnson, 538 NYS 2d 173 (1989)]. In another decision, the relationship between the attorney-privilege and the ability to withhold the work product of an attorney was discussed, and it was found that:

> "The attorney-client privilege requires some showing that the subject information was disclosed in a confidential communication to an attorney for the purpose of obtaining legal advice (*Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 68-69, 431 N.Y.S.2d 511, 409 N.E.2d 983). The work-product privilege requires an attorney affidavit showing that the

> information was generated by an attorney for the purpose of litigation (*see, Warren v. New York City Tr. Auth.*, 34 A.D.2d 749, 310 N.Y.S.2d 277). The burden of satisfying each element of the privilege falls on the party asserting it (*Priest v. Hennessy, supra*, 51 N.Y.2d at 69, 431 N.Y.S. 2d 511, 409 N.E.2d 983), and conclusory assertions will not suffice (*Witt v. Triangle Steel Prods. Corp.*, 103 A.D.2d 742, 477 N.Y.S.2d 210)" [Coastal Oil New York, Inc. v. Peck, [184 AD 2d 241 (1992)].

The thrust of case law concerning material prepared for litigation is consistent with the preceding analysis, in that §3101(d) may properly be asserted as a means of shielding such material from an adversary. In my view, insofar as the records in question have been communicated between the Village and the parties or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Village to its adversary and *vice versa*, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the CPLR or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

It is noted further that an assertion or claim of confidentiality, unless it is based upon a statute, is generally 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, again, 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.

Lastly, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals soon after the enactment of the amended version of the Freedom of Information Law:

> "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)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9643

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

August 14, 1996

Hon. Leo P. Herrling
Supervisor
Town of Throop
RD #5, Robinson Road
Auburn, NY 13021

Dear Supervisor Herrling:

I appreciate receipt of your determination of an appeal made under the Freedom of Information Law by Mr. Emmett M. Kelly. As I understand the matter, Mr. Kelly requested a tape recording of an open meeting of the Town Board, and you upheld an initial denial of access, primarily based on the contention that the Town Clerk uses her own equipment and that, therefore, the tape recording is not subject to the Freedom of Information Law. Moreover, you wrote that the Clerk's tape recordings are erased once written minutes have been prepared.

For the following reasons, I believe that the tape recording falls within the coverage of the Freedom of Information Law and that tape recordings cannot be erased or destroyed except in conjunction with specific requirements imposed by law.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to include:

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

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents

did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In 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).

Further, 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. 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, since the Clerk recorded the meeting in furtherance of the performance of her duties, I believe that the tape recording in question falls within 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 §87(2)(a) through (i) of the Law. In my view, a tape recording of an open meeting is accessible, for you were present, and 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]. Moreover, since any person present at an open meeting of a public body 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)], I do not believe that there would be a valid basis for withholding any aspect of a recording of an open meeting.

Lastly, 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 preparation and/or approval of minutes.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and its judicial interpretation and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Emmett M. Kelly
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9642a

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

August 14, 1996

Mr. Philip Nelson
96-B-0493
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

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

Dear Mr. Nelson:

I have received your letter of August 7 in which you sought guidance concerning your efforts in obtaining certain records.

By way of background, you wrote that you were required to pay a "mandatory surcharge" to be collected by the Department of Correctional Services in conjunction with your plea of guilty. The Department deducted monies from your institutional pay, and you indicated that the surcharge was paid in full prior to your release in 1995. Nevertheless, you wrote that both the inmate records coordinator at the facility and the court claim that they never received payment. You are interested in obtaining monthly statements from the Department.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be made to the facility superintendent or his designee; to seek records kept at the Department's Albany offices, a request may be directed to the Deputy Commissioner for Administration. It is possible that records pertaining to the matter might have been transferred after your release to the Department's central offices.

Second, I note that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Consequently, in the unlikely event that the records in question do not or no longer exist, the Freedom of Information Law would not apply.

Third, §89(3) also states that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, assuming that the records of your interest continue to exist and can be found, they must be disclosed to you, for none of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9643

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

August 15, 1996

Mr. Wayne Jackson
c/o Saugerties Legal Services
15 Barclay St., Suite 10
Saugerties, NY 12447

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. Jackson:

I have received your letter of August 14 in which you sought my views concerning "any infractions" of the Freedom of Information Law that might have occurred in conjunction with the commentary that you offered.

According to your letter, you submitted a request on June 17 to an unnamed state agency to inspect records that in your words were "adequately described." Having received no response to the request, you appealed on June 27. Nevertheless, on July 2, you received a letter dated June 27 indicating that your request would involve several hundred dollars in copying fees, and you were asked to provide "a good faith deposit of $100." Soon thereafter, you wrote to the agency, stating that you sought to inspect records and that its request for a deposit represented an "illegal demand." In a letter of July 16, you were informed that your requests for "all material submitted" to the unnamed state agency would be denied on the ground that it was "unreasonably broad", and you were informed of the right to appeal. On July 23, you asked the agency to investigate whether "possible wrongdoing" had occurred when a deposit of $100 was requested. You appealed on August 6 and received a letter the next day dealing with the issue of the deposit and stating that "even where the request is only for the inspection of records, copying may be necessary if portions of the records need to be deleted for privacy concerns or other reasons." As such, it was advised that there was no evidence of wrongdoing.

In this regard, your letter neither identifies the agency to which the matter pertains, nor does it describe the nature or volume of the records sought. That being so, I cannot suggest that an agency engaged in "infractions"; rather, under the circumstances, I can only offer the following general remarks.

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

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing 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. On the other hand, if particular records cannot be located except by means of a review of what may be hundreds or thousands of records individually, the request in my opinion would not reasonably describe the records. In that event, the records access officer could explain that the records are not kept in a manner that would permit their retrieval in conjunction with the terms of the request and indicate how the records are kept.

Second, with respect to what may be an unduly broad or voluminous request, I doubt that there is any way of determining exactly when those characterizations would be apt. 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 have requested. However, if the number of records is voluminous, the holding in Fisher & Fisher might be pertinent.

Third, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. In short, when accessible and deniable information appear on the same page, the practice of preparing a redacted copy and charging the established fee, in my opinion, is fully justifiable.

I note, too, that it has been held that an agency may require advance payment of a fee for copying records, particularly when a request is voluminous (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9644

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

August 15, 1996

Mr. Charles G. Jackson
#90-A-7266
Bare Hill Corr. Facility
Caller Box 20 - Cady Road
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 information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of August 11. As I understand your inquiry, you are interested in obtaining mental health records indicating medications prescribed or ordered for you during a certain period of your incarceration.

In this regard, although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. It is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF: pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9645

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

August 15, 1996

Mr. Alan Newton
#85-A-3855
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 information presented in your correspondence.

Dear Mr. Newton:

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

According to the materials, your request for records of the New York City Police Department was denied because they "relate to a sex offense and are confidential under Section 50(b) of the Civil Rights Law." You have contended that the denial was improper, for §50-b(2)(a) provides that the confidentiality restrictions imposed by subdivision (1) of §50-b do not apply to "[a]ny person charged with the commission of a sex offense...against the same victim." You have asked whether there is a means by which you "may compel the Police Department to follow the law and grant [your] freedom of information request."

From my perspective, the Freedom of Information Law does not apply, and §50-b of the Civil Rights Law would not confer rights of access to the records sought, even though you may be the person charged. As I understand §50-b, although the Police Department may not be prohibited from disclosing records falling within the coverage of that statute to you, it is not obliged to do so, for that statute does not confer a right of access.

Subdivision (1) of §50-b states that:

> "The identity of any victim of a sex offense, as defined in article one hundred thirty or §255.25 of the penal law, shall be confidential. No report, paper, picture, photograph, court file or other documents, in the custody or possession of any public officer or employee, which identifies such

> victim shall be made available for public inspection. No such public officer or employee shall disclose any portion of any police report, court file, or other document, which tends to identify such a victim except as provided in subdivision two of this section."

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." Section 50-b of the Civil Rights Law exempts records identifiable to a victim of a sex offense from disclosure. Consequently, the Freedom of Information Law in my view provides no rights of access to those records. Any authority to disclose or obtain the records in question would be based on the direction provided by the ensuing provisions of §50-b.

In this regard, the introductory language of subdivision (2) provides that "[t]he provisions of subdivision one of this section shall not be construed to prohibit disclosure of information to: a. Any person charged with the commission of a sex offense..." While the Department is not forbidden from disclosing records subject to §50-b to a person charged, I do not believe that §50-b creates a right of access on behalf of such person. Further, subdivision (3) states in relevant part that "The court having jurisdiction over the alleged sex offense may order any restrictions upon disclosure authorized in subdivision two of this section..."

In sum, it is my view that issues involving the disclosure of the records in question would be governed by §50-b of the Civil Rights Law, rather than the Freedom of Information Law. That being so, it is suggested that you discuss the matter with your attorney.

As you requested, I am returning the original response to your appeal by the New York City Police Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9646

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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August 16, 1996

Ms. Frances 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 information presented in your correspondence, unless otherwise indicated.

Dear Ms. Thompson:

I have received your letter of August 11 in which you asked that I contact the records access officer at the New York City Office of Payroll Administration "so that [you] can inspect and/or xerox the proposed contract." You were informed that the contract would be available to you when it is "registered."

In this regard, I note that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; it is not empowered to compel an agency to grant or deny access to records or otherwise enforce the law.

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.

From my perspective, the only ground for denial of potential relevance under the circumstances would be §87(2)(c), which permits an agency to withhold records insofar as disclosure would "impair present or imminent contract awards or collective bargaining negotiations." Having contacted the Office of Payroll Administration on your behalf, I was informed that representatives of the City Comptroller have indicated that contracts into which City agencies enter are not final until they are "registered", i.e., approved by the Comptroller. Prior to final approval, it is possible that a contract award may be nullified or suspended. In that event, it has been contended that disclosure could "impair" the City's ability to engage in an optimal agreement. On the other hand, if disclosure would not impair the award, I believe that the contract should be made available.

I was also told that it is likely that the contract will be registered and approved within approximately two weeks, at which time it will available from the Office of the Comptroller or the Office of Payroll Administration.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Nan P. Davis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-300
FOIL-AO-9647

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

August 20, 1996

Paul L. Dashefsky, 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 information presented in your correspondence.

Dear Mr. Dashefsky:

I have received your letter of August 12. You indicated that you represent a former employee of the Department of Public Safety at the State University at Stony Brook, which has denied his request for certain records pertaining to him.

According to your letter, the University maintains two file categories of records concerning its present and former employees. One consists of a "personal history file", which has been made available to him. The other, the "administrative file", contains other employment related records that have been withheld, such as "union and job related complaints", a memorandum concerning your client prepared by his supervisor relating to a particular incident, another memorandum "concerning alleged misperceptions made by" your client, and correspondence between the University and an "outside Employee Assistance Program" to which the University referred the client.

You have sought an opinion concerning your client's rights of access to the administrative file and the kinds of documents that you described. From my perspective, while some elements of the documentation in question might justifiably be withheld, it is likely that significant portions must be disclosed to him. In this regard, I offer the following comments.

I believe that two statutes, the Freedom of Information Law and the Personal Privacy Protection Law, are pertinent to an analysis of rights of access. Both relate to records maintained by state agencies, and for purposes of the former, §86(4) of the Public Officers 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."

For purposes of the latter, §92(9) of the Public Officers Law defines "record" 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 irrespective of the physical form or technology used to maintain such personal information."

Based on the foregoing, the entirety of the administrative file would consist of records subject to rights conferred by the Freedom of Information Law. It is likely that most if not all documents within the file constitute records under the Personal Privacy Protection Law as well.

The Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, two of the grounds for denial may be pertinent.

Section 87(2)(g) authorizes an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials

may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 potentially 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." While your client could not invade his own privacy, the cited provision might be asserted to withhold records or portions thereof identifying others. For example, in the context of a complaints, it has generally been advised that an agency may withhold records insofar as disclosure would identify a complainant.

The Personal Privacy Protection Law pertains to a class of records, those that include personal information that can be retrieved by means of an individual's name or other personal identifier. In brief, that statute generally requires that state agencies disclose records about data subjects to those persons. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §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)].

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. Consequently, the Personal Privacy Protection Law may provide the subject of records with rights of access that exceed rights conferred by the Freedom of Information Law. Notwithstanding the foregoing, I believe that an agency may withhold those aspects of records which if disclosed would result in an unwarranted invasion of privacy with respect to persons other than your client.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9648

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

August 21, 1996

Mr. Norman McCorkle
95-A-4616
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. McCorkle:

I have received your letter of August 4, which reached this office on August 16. You have sought guidance with respect to two issues.

The first involves an Article 78 proceeding commenced under the Freedom of Information Law in which you prevailed. You wrote, however, that the agency has not yet complied with the court's decision and order by disclosing the records to you. In this regard, the Committee on Open Government, as a matter of policy, does not offer advice or assistance after litigation has been commenced. It is suggested that you confer with your attorney or contact the court.

The other pertains to your desire to know where to request records concerning police misconduct and whether such records are accessible. In short, requests should be made to the "records access officers" at the agencies that you believe maintain the records of your interest. An agency's designated records access officer has the duty of coordinating an agency's response to requests. To seek records from the New York City Police Department, a request may be directed to Sgt. Louis Lombardi, Records Access Officer, Room 110C, One Police Plaza, New York, NY 10038. While I am unaware of the name of its records access officer, the address of the New York City Transit Police Department is 370 Jay Street, Brooklyn, NY 11201.

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.

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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 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)].

Aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are pertinent to consideration 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.

In terms of the judicial interpretation of the Freedom of Information Law, as suggested earlier, 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., Prisoners' Legal Services, supra; also 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9649

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

August 21, 1996

Ms. Ellen Nimmons Fitzgerald
[redacted]

Dear Ms. Fitzgerald:

As you are aware, a copy of a letter dated August 8 addressed to the Superintendent of the Pelham School District and sent to Attorney General Vacco has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the State's Freedom of Information Law.

In your letter to the Superintendent, you indicated that prior to the vote on the budget, you "requested an accounting of the number of teachers, teacher aides and students for each section, in each class, in all four of Pelham's elementary schools." At the time, you were informed that the District did not yet have the figures that you requested, and you asked that they be sent to you when they become available. As of the date of the letter, you had not yet received the information sought.

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 provides in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought had not been developed or compiled in the form of a record or records, the District would not have been obliged to prepare new records containing the information sought on your behalf.

Second, when records do exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, to the extent that District records include the kinds of information to which you referred, they must be disclosed. I note that §87(2)(g)(i) of the statute specifies that those portions of internal documents, or "intra-agency materials", consisting of "statistical or factual tabulations or data" must be disclosed.

Enclosed for your consideration is "Your Right to Know", an explanatory brochure concerning the Freedom of Information and Open Meetings Laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Charles Wilson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9630

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

August 21, 1996

Mr. Thomas E. Walsh, II
Assistant County Attorney
County of Rockland Department of Law
Allison-Parris County Office Building
New City, NY 10956

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

Dear Mr. Walsh:

I have received your letter of August 13. You have asked whether in my view "the Rockland County Commissioner of Finance, when acting as a public administrator, is required to comply with the FOIL Law." If that statute applies, you asked further whether information pertaining to a distributee, devisee or legatee, or information gathered in attempts to locate those persons, may "be deleted as an unwarranted invasion of personal privacy."

From my perspective, records maintained by the Commissioner acting in his capacity as public administrator would fall within the coverage of the Freedom of Information Law. In this regard, I offer the following comments.

First, as you are aware, 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."

Based on the foregoing, the courts are not subject to the Freedom of Information Law. However, it is my understanding that an office of public administrator is not a court. 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, a public administrator, as the title suggests, performs administrative functions relative to surrogates' courts. Particularly in a situation in which the public administrator is a non-judicial municipal employee, as in this case, it would appear that any documents that he maintains would constitute agency records within the coverage of the Freedom of Information Law.

Second, viewing the matter from a different vantage point, the term "record" is defined broadly in §86(4) of the Freedom of Information Law to include:

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

In the context of your inquiry, any documentation "kept" or "held" by the Commissioner, an employee of the executive branch of county government, would in my opinion constitute an agency record subject to rights conferred by the Freedom of Information Law.

Lastly, assuming that preceding analysis is accurate, I note 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.

As you suggested, the only apparent potential ground for denying access to records or perhaps portions of records maintained by a public administrator would be §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy."

While I am unfamiliar with the specific records that may be kept by a public administrator, I believe that insofar as those records include information reflective of or equivalent to records available from a surrogate's court, the public administrator would be required to disclose. Section 2502 of the Surrogate's Court Procedure Act states that:

"The clerk shall keep and maintain:

1. A record book properly indexed in which shall be entered a description of every proceeding with proper entries under each denoting the papers filed, orders and decrees made and the steps taken therein, with the dates of filing and recording the several papers in the proceeding.

2. Such other record books, properly indexed, as may be necessary or convenient to record at length any documents required by law to be recorded.

3. A court and trust fund register in which shall be entered a reference to any proceeding in which a decree or order directs a deposit of money, the date thereof, the amount thereof, the amount so deposited, any receipt therefor and the name of the person to and for whom the deposit is made.

4. A record book, properly indexed, with proper entries denoting the name and file number of the estate and the date of filing any informal account or any release pursuant to 2202.

5. Such other books as the chief administrator of the courts in each department or the court in each county may direct to be kept."

Additionally, subdivision (8) of §2501 provides that "All books and records other than those sealed are open to inspection of any person at reasonable times."

During our discussion of the matter, you expressed concern with respect to the disclosure of records developed or gathered in the process of attempting to locate distributees, legatees or devisees. In my view, it is likely that disclosure of names of or other identifying details pertaining to persons ancillary to the distribution of the assets of an estate, such as the heirs of those persons, other family members, or neighbors, friends, or acquaintances could justifiably be withheld as an unwarranted invasion of privacy. Again, however, information maintained by the public administrator that is also maintained and made available by the court clerk would in my opinion be accessible under the Freedom of Information Law from the public administrator.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: George W. Renc, Commissioner of Finance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9651

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

August 23, 1996

Mr. Willie Wade
[redacted]

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

Dear Mr. Wade:

I have received your letter of August 9, as well as the materials attached to it.

You have complained with respect to requests for records directed to the Department of Health relating to incidents that occurred at the Arden Hill Hospital. It appears that the incidents had been investigated by both that agency and the State Office of Mental Health. Some records have been disclosed, but the contents of many were substantially deleted.

While I am unfamiliar with the specific records at issue or the nature of the incidents in question, 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, under the circumstances, it would appear that at least two of the grounds for denial would be significant to an analysis of rights of access.

Section 87(2)(a), the initial ground for denial, pertains to records that "are specifically exempted from disclosure by state or federal statute." In the context of your inquiry, several statutes might prohibit disclosure. For instance, §2805-l of the Public Health Law entitled "Incident reporting" relates to various kinds of events occurring at hospitals. In relation to those reports, §2805-m requires that such reports be kept confidential and specifies that they are not subject to disclosure "under article

six of the public officers law", which is the Freedom of Information Law. Similarly, §6527(3) of the Education Law pertains to records regarding investigations of patient mental health care and incidents at mental health facilities and states in part that:

> "Neither the proceedings nor the records relating to performance of a medical or a quality assurance review function or participation in a medical and dental malpractice prevention program nor any report required by the department of health pursuant to section twenty-eight hundred five-1 of the public health described herein, including the investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law."

Also potentially relevant is §87(2)(b) of the Freedom of Information Law, which states that an agency may 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 "disclosure of items of involving the medical or personal records of clients or patients in a medical facility." Therefore, even when the statutes conferring exemptions regarding incident reports and similar records do not apply, insofar as records would identify clients or patients, I believe that an agency would have the ability to deny access to protect personal privacy.

Lastly, you enclosed a news article which indicated that the State Health Department and Office of Mental Health would be conducting investigations. In my view, it does not follow that reporting of certain matters by the news media would necessarily require that the records sought must be disclosed. For reasons described above, records prepared in conjunction with investigations may justifiably be withheld in whole or in part.

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
cc: Hon. William J. Larkin, Jr.
Gary A. Lamay
Susan F. Berry

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9652

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

August 26, 1996

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 information presented in your correspondence.

Dear Mr. Kless:

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

According to the correspondence, in response to a recent request for copies of records of the City of Buffalo, you were informed that a money order would serve as the only acceptable method of payment. If compelled to use a money order, you complained that your cost of obtaining photocopies would exceed twenty-five cents per photocopy.

In this regard, there is nothing in the Freedom of Information Law that pertains specifically to the means by which fees for copies should be paid. In the only decision of which I am aware, which, I note, was rendered in Erie County, it was found that the County Board of Elections "failed to provide a reasonable and rationale basis to justify their policy of requiring payment of fees for copying of records in the form of only bank checks or money orders", and it was ordered that the agency be required to accept payment in United States currency as well [Reese v. Mahoney, Supreme Court, Erie County, June 28, 1984]. Based on the decision reached in Reese, I believe that the City of Buffalo is required to accept United States currency as legal tender for payment for photocopies prepared in response to a request under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Kathleen E. O'Hara, Corporation Counsel
Lt. Mark Makowski, F.O.I.L. Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9653

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

August 26, 1996

Mr. Jerry Brixner
[redacted]

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

Dear Mr. Brixner:

I have received your letter of August 14, as well as the materials attached to it. You have questioned the propriety of a denial by the Town of Chili of your request for a list of the names and addresses of those who applied for membership on the Town's Ethics Committee.

From my perspective, the denial of your request was likely consistent with law. 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.

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 there is no provision in the Freedom of Information Law that specifically pertains to the matter, it has consistently been advised that the names of those who seek government positions, other than elective office, would, if disclosed, constitute an unwarranted invasion of personal privacy.

In addition, §89(7) provides in relevant part that nothing in the Freedom of Information Law "shall require the disclosure of the name or home address...of an applicant for appointment to public employment..." Although the language quoted in the preceding sentence relates to names and addresses of those seeking public employment, in view of the thrust of that provision, I believe that

the names and home addresses of those who unsuccessfully applied to serve on an appointed body may also be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9654

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 26, 1996

Mr. Donald Morritt
#84-C-0902
Woodbourne Corr. Facility
Pouch #1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Morritt:

I have received your letter of August 16 in which you sought assistance in obtaining your "mental health file" from the Onondaga County Department of Mental Health. You indicated that a request for the file was made under the Freedom of Information Law but that the request was not answered.

In this regard, while the Freedom of Information Law includes all records of a county, for example, within its scope, that statute would not govern rights of access in this instance.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which prohibits mental health facilities from disclosing clinical records pertaining to a patient or client Consequently, the Freedom of Information Law would not confer rights of access to the records in question.

A different statute, however, deals directly with rights of access to mental health records to the subject of those records. Specifically, §33.16 of the Mental Hygiene Law provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

Section 33.16(b) states in relevant part that a facility must respond to a request within ten days, and subdivision (d) of §33.13 pertains to the right to appeal a denial of access and states that:

> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

If you do not receive a satisfactory response to your request, it is suggested you request the rules and regulations from the appropriate commissioner in order to ensure that you are following the correct procedure and that you can properly assert your rights.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: David Brownell, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9655

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 26, 1996

Mr. Frank J. Duci
[redacted]

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. Duci:

I have received your recent letter, which reached this office on August 21.

You referred to a series of questions that you raised at a meeting of the Schenectady City Council concerning the construction of new sidewalks as part of a street resurfacing program. Although you were given a copy of a contract for resurfacing the streets, no information was provided concerning where sidewalks were constructed, their cost or the reason for so doing. You have asked whether you are entitled "to get the answers" to your questions under the Freedom of Information Law.

In this regard, 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 or a city council 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, there is no documentation indicating the amount spent through the resurfacing contract to construct new sidewalks on private property, I do not believe that the City would be required by the Freedom of Information Law to prepare new records on your behalf.

In the future, rather than attempting to elicit information by raising questions, it is suggested that you request existing records that might contain the information of your interest. 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 §87(2)(a) through (i) of the Law. Further, records reflective of expenditures of public monies are generally available, for none of the grounds for denial would be applicable.

Further, "Because extracting money from the 1995-96 resurfacing street contract/bid for paving concrete sidewalks on private property was never discussed in public, and because a public hearing on the subject of extracting dollars from the low bid contract was never held", you asked which state agency you might contact "to initiate a peoples ethics charge and/or a legal action against those involved in Schenectady's City Government." To my knowledge, there is no state agency that has the authority to deal with municipal ethics related issues or that can take action against a city. However, there may be a City ethics board or commission that investigates such matters. In addition, as you are aware, the Office of the State Comptroller is authorized to review the financial activities of local governments and to conduct audits.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: City Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9656

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 26, 1996

Mr. Willie Anthony
#94-R-0933
Oneida Corr. Facility
PO Box 4580
Rome, NY 13442-4580

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. Anthony:

I have received your letter of August 17 in which you sought assistance in your efforts "to get the 8 months and 3 days credited" to your jail time.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning public access to government records, primarily under the Freedom of Information Law. The Committee has no function directly pertaining to computing or gaining credit for jail time. That being so, I offer the following comments.

First, 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.

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. From my perspective, a record indicating jail time accumulated or credited would be accessible, for none of the grounds for denial would be applicable.

Third, requests for records should be directed to the "records access officer" at the agency that maintains the records of your interest. In this instance, it appears that the records in question are maintained by the New York City Department of Correction. One of those identified in your letter, Mr. Thomas

Antenen, is the records access officer for that agency. If you have not yet requested records from him under the Freedom of Information Law, it may be worthwhile to do so.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated to determine appeals at the Department of Correction is its General Counsel, Ernesto Marrero.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Thomas Antenen, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9657

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 27, 1996

Mr. Robert T. Brooks
95-A-3175 H-1-106
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brooks:

I have received your letter of August 20. You have sought guidance concerning the ability to obtain the "rap sheets" of witnesses who testified against you 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 pertaining to others 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-9658

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 27, 1996

Ms. Stephannie A. Andrews
Amityville Civic Association
156 Cedar Street
Amityville, NY 11701

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 Ms. Andrews:

I have received your letter of August 17, which reached this office on August 26. You have questioned the propriety of various aspects of rules and regulations recently adopted by the Village of Amityville to implement the Freedom of Information Law.

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 implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

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..."

Additionally, §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 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)].

With specific respect to the Village's rules, section 3 requires that requests be made "on forms supplied by the Village." 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), 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

> records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Relevant to the foregoing is a decision rendered by the Appellate Division, Second Department, which includes Amityville within its jurisdiction. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Other aspects of the Village's rules, with the possible exception of section 12, are, in my view, reasonable. Section 12 gives the records access officer the authority in "special circumstances" to "vary these rules to meet the exigencies of the situation." In my opinion, the validity of the rule would be dependent on the manner in which it is carried out. I believe that all laws, including the Freedom of Information Law and the regulations promulgated by the Committee, must be implemented in a manner that is reasonable and that gives effect to their intent. The records access officer could not in my opinion act in a manner inconsistent with 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 Board of Trustees. In addition, copies of the Committee's regulations and model regulations designed to facilitate agencies' ability to adopt appropriate rules and regulations will be sent to you and the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9659

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 27, 1996

Ms. Beverly L. Ouderkirk
Superintendent of Schools
Valley Central School District
944 State Route 17K
Montgomery, NY 12549-2240

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 Ms. Ouderkirk:

I have received your letter of August 21. You have asked that I confirm an opinion rendered during a telephone conversation with your staff. In brief, it was advised that when an agency produces copies of records in response to a request but the applicant for the records has not paid the requisite fee, the agency can refuse to honor further requests until the fee is paid.

There is no judicial decision of which I am aware that is pertinent to the matter. However, from my perspective, when a request for copies of records is served upon an agency, both the agency and the applicant bear a responsibility. The agency is responsible for compliance with the Freedom of Information Law by retrieving the records sought and disclosing them to the extent required by law. The agency is also required to produce copies of records "[u]pon payment of, or offer to pay, the fee prescribed therefor" [see Freedom of Information Law, §89(3)]. Concurrently, if the applicant requests copies, I believe that he or she bears the responsibility of paying the appropriate fee.

If an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9660

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 28, 1996

Ms. R. Penelope 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 information presented in your correspondence.

Dear Ms. Phillips:

I have received your letter of August 22 in which you indicated that you have attempted without success to obtain a copy of a registration statement pertaining to a mobile home park in which you reside.

In an effort to assist you, I contacted Patrice Huss in an attempt to ascertain the status of your request. She informed me that the record is maintained at the Division's Albany offices and that it has been or soon will be sent to you.

For future reference, I note 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrice Huss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3652
FOIL-AO-9661

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 28, 1996

Mr. David Paige
[redacted]

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. Paige:

I have received your letter of August 21 in which you complained with respect to a variety of activities in local governments in your vicinity in which public rights of access to government appear to be diminishing. You wrote that you "do not understand why the responsibility of gaining access to records or meetings via Supreme Court Action should be the financial burden of citizens whose Constitutional Rights have been denied." Specific reference was made to a resolution recently adopted by the Woodridge Village Board of Trustees which enables the Board to prohibit a member of the public from recording a meeting unless written notification is given at least twenty-four hours prior to the meeting.

In this regard, I offer the following comments.

First, the right to attend meetings and to obtain records from government agencies is not constitutional in nature; rather it is statutory. Unless a statute confers rights of access to government records, there is no such right. Several judicial decisions, none in this jurisdiction, indicate that there is no constitutional right to government records. Similarly, prior to the enactment of the Open Meetings Law, the public had no right to attend meetings of public bodies.

I note that the Open Meetings Law provides the public with the right to attend, observe and listen to the proceedings of public bodies. Nevertheless, the Law is silent with respect to public participation. Consequently, a public body may choose to prohibit the public from speaking at meetings. On the other hand, public bodies may choose to authorize public participation, and many do. In those instances, it has been suggested that a public body permit

the public to participate by means of reasonable rules that treat members of the public equally.

With respect to the requirement imposed by the Board of Trustees relative to notice of an intent to record prior to a meeting, I believe that the requirement would be found to be invalid. As you may be aware, several judicial decisions indicate that a member of the public may record, either by means of audio or video recorders, open meetings of public bodies, unless the use of the recording devices would be disruptive or obtrusive. Perhaps a leading decision on the matter, a unanimous decision rendered by the Appellate Division, Second Department, is Mitchell v. Board of Education of the Garden City Union Free School District [113 AD 2d 924 (1985)], in which it was held that a Board of Education's rule prohibiting the use of tape recorders at meetings was unreasonable and therefore invalid. I note that the Court referred to "the unsupervised recording of public comment", and found that such recording "will not distract from the true deliberative process of the body" (id., 925). In my view, the use of the term "unsupervised" is intended to mean that no formal prior notification or permission should be needed for a member of the public to use recording equipment, so long as the equipment is used in a manner that is neither obtrusive nor disruptive.

Lastly, it is true that the Committee on Open Government has no authority to enforce either the Freedom of Information Law or the Open Meetings Law. It is my hope, however, that the opinions rendered by this office are educational and persuasive and that they enhance compliance with law. While the opinions are not binding, as you may be aware, they have been cited frequently by the courts and the courts have agreed with them in the great majority of those cases. It is also true that the only means of compelling compliance with the two statutes involves the initiation of a judicial proceeding. In both statutes, the courts have discretionary authority to award attorney's fees to the successful party.

Under the Freedom of Information Law, §89(4)(c) provides 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."

Under the Open Meetings Law, §107 authorizes a court to award attorney's fees to the successful party. I note, too, that in a recent decision rendered by the Court of Appeals, the State's highest court, it was held that when a court determines that a flagrant violation of the Open Meetings Law occurred and when a request is made for an award of attorney's fees, it would be an abuse of discretion not to award such fees [see Gordon v. Village of Monticello, 87 NY 2d 124 (1995)].

In addition to judicial mechanisms for guaranteeing compliance, I believe that demonstrations of interest by the public have a positive effect upon compliance with open government laws. When individuals and groups seek to assert their rights, governmental entities often give greater attention to the spirit of those laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2653
FOIL-AO-9662

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 28, 1996

Mr. Joseph R. Lipczynski
[redacted]

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. Lipczynski:

I have received your letter of August 19 in which you complained that the Leisurewood Recreational Campgrounds is operated like "a dictatorship." You referred to your inability to obtain its records and participate at meetings and questioned how this can be so "in a free country."

In short, Leisurewood appears to be a private entity; it is not government. The laws that guarantee citizens' rights in a free country pertain to their relationships with their government, not with private organizations.

As indicated in previous correspondence, the statutes within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information and Open Meetings Laws, require that government agencies disclose records and that government bodies conduct meetings in public. Those laws, however, do not apply to private organizations, such as Leisurewood.

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."

Based on the foregoing, the Freedom of Information Law includes entities of state and local government within its coverage; it does not cover entities that are not governmental.

Similarly, the Open Meetings Law applies to public bodies, and §102(2) of that law defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

As such, public bodies include such governmental entities as city councils, town boards, village boards of trustees, boards of education, the State Senate and Assembly and similar governmental bodies; it does not include the governing body of a private organization.

Under the circumstances, I do not believe that I can offer assistance, for the matter is beyond the jurisdiction of this office. If you object to the manner in which Leisurewood is run, there is no requirement that you continue to live there. I hope, however, that the preceding commentary enhances your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9663

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 28, 1996

Mr. Michael Ocasio
94-A-3130
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ocasio:

I have received your letter of August 9 which, for reasons unknown, did not reach this office until August 26. You have sought guidance concerning your attempts to gain access to records of the Second Department Grievance Committee pursuant to the Freedom of Information Law.

In this regard, I offer the following comments.

First, it is emphasized that the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law, which pertains to agency records. Section 86(3) of the Freedom of Information Law defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

As such, the Freedom of Information Law excludes the courts and court records from its coverage.

Second, with respect to the discipline of attorneys, §90(10) of the Judiciary Law states that:

> "Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney or counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records."

Based on 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, and that the Freedom of Information Law would be inapplicable. If indeed your request involves records available under §90(10) of the Judiciary Law, it is suggested that you renew the request, citing and highlighting appropriate aspects of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert Strauss, Chief Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9664

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 29, 1996

Mr. Timothy Sheridan
Orangetown Police Benevolent Association
Dutch Hill Road
Orangeburg, 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 information presented in your correspondence.

Dear Mr. Sheridan:

I have received your letter of August 27 in which you sought assistance concerning a request for records directed to the Town of Orangetown.

As I understand the matter, you requested time sheets concerning employees of the Orangetown Police Department for a particular time period and you received no response. A second request was made and you were advised that it had been approved. Nevertheless, as of the date of your letter to this office, you had not yet received the records, and you asked how you may appeal or how the law can be enforced by this office.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or otherwise compel an agency to grant or deny access to records. Nevertheless, it is my hope that opinions rendered by this office are educational, persuasive and that they serve to enhance compliance with the Law. With that goal, 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 agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

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, the governing body, has the responsibility to ensure compliance with the Freedom of Information Law.

Additionally, §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."

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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 two of the grounds for denial relate to attendance records or time sheets, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

Of significance is §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 issue of leave time or absences, the times that employees arrive at or leave work would constitute "statistical or factual" information accessible under §87(2)(g)(i).

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)].

With specific respect to time sheets or attendance records, in a decision pertaining to a particular police officer and records indicating the day and dates he claimed as sick leave, which was affirmed by the State's highest court, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use

> sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In sum, time sheets, attendance and similar records pertaining to public employees, including police officers, must be disclosed, subject to the qualifications described above.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9665

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1996

Mr. Tom Morrison
Friends of Wickers Creek Archaeological Site
Box 178
Dobbs Ferry, NY 10522

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Morrison:

I have received your letter of August 28, as well as the materials related to it. You have sought my views concerning your right to gain access to a document prepared by the Dobbs Ferry Village Attorney apparently addressed to the Board of Trustees pertaining to alleged conflicts of interest. In addition, you asked that I comment with respect to the possibility that there may be a conflict of interest.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning rights of access to government records. The Committee has neither the jurisdiction nor the expertise to offer guidance or commentary relative to conflicts of interest or ethics issues. Consequently, the following remarks will be limited to the issue of rights of access to the record prepared by the Village Attorney.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 record in question, both of the grounds for denial cited by the Village Attorney are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than 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 (1889); 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 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, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

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 or opinion 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.

The other ground 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 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 would appear that the record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

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:pb

cc: Board of Trustees
Kevin J. Plunkett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9666

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1996

Mr. Patrick Milwood
#80-A-2131
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Milwood:

I have received your letter of August 26 in which you requested various materials from this office. The records sought pertain to communications involving the office of a district attorney and a pre-sentence report.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records. The Committee does not have possession of records generally and does not maintain any of the records in which you are interested. Nevertheless, I offer the following comments.

First, a request should be directed to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating the agency's response to requests.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. However, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to a pre-sentence report, it is my view that that record 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".

Here I direct your attention to §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive

procedure concerning access to pre-sentence reports and memoranda. That provision states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. 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.

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;

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9667

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1996

Mr. Peter A. Reese
[redacted]

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, unless otherwise indicated.

Dear Mr. Reese:

As you are aware, I have received your letter of July 25. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning the Roswell Park Alliance Foundation ("the Foundation") and whether it is subject to the requirements of the Freedom of Information Law. Alternatively, you asked whether records of the Foundation must be made available indirectly through the Roswell Park Cancer Institute ("the Institute").

By way of background, the Institute is clearly required to comply with the Freedom of Information Law. As you pointed out, various provisions of the Public Health Law, particularly §2420, specify that the Institute is "under the management and control of the Department." The Foundation is a not-for-profit corporation and, therefore, the initial question is whether it is an "agency" as defined by the Freedom of Information Law. 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, in general, the Freedom of Information Law includes entities of state and local government within its

coverage; only in rare instances would not-for-profit corporations be subject to the Freedom of Information Law.

Those rare instances involve situations in which certain not-for-profit entities perform what traditionally have been viewed as governmental functions and have statutory relationships with government agencies [i.e., see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980)] or where there is a significant nexus between a government agency and a not-for-profit entity and in which the government agency maintains a significant degree of control over the not-for-profit entity [i.e., see Buffalo News, Inc. v. Buffalo Enterprise Development Corporation, 84 NY 2d 488 (1994)].

Having acquired information pertinent to the matter from both the Foundation and the State Department of Health, it does not appear that the elements needed to conclude that the Foundation, is an agency are present.

It is my understanding that the Attorney General has determined that the Foundation is a private entity; its employees are paid by the Foundation not by the Institute or the Department of Health; it employs its own attorneys and, like all not-for-profit corporations in New York, the Foundation is subject to oversight and filing requirements imposed by the Office of the Attorney General, not the Department of Health. I am mindful of the decision rendered by the Court of Appeals in Buffalo News. Nevertheless, in that case a not-for-profit corporation, the Buffalo Enterprise Development Corporation ("the Corporation"), was created by the City of Buffalo. Further, several City employees serve as members of the Corporation's Board of Directors. In addition, the Corporation's budget is subject to a public hearing. In short, the Corporation is and was found to be essentially an extension of the government of the City of Buffalo.

In the case of the Foundation, it is true that the President of the Institute serves on the Foundation's Board of Directors. However, other than that person, the Foundation's Board includes no state employees. Further, in terms of its creation, I have received a copy of a portion of a publication prepared by the co-chairs of the Foundation in which they described an incident in their lives in 1989 involving a family member was treated at the Institute. They wrote that:

> "The Roswell Park Alliance was born of our belief that Roswell Park is an irreplaceable asset to our community - indeed to the world - and that community support is essential if the Institute is to provide the best in cancer care, research and education.
>
> "On February 20, 1990, the first meeting of the Roswell Park Alliance convened. Fifty-five men and women were invited to serve as

> founding members and 50 said 'yes.' Little did we know that morning that the collective accomplishments of these dynamic, committed, caring and resourceful individuals would exceed even our lofty expectations...
>
> "Alliance members come from all walks of life, hold different world views, march to the beat of different drummers. But together we have made - and continue to make - today and tomorrow more promising for cancer patients. The common thread - to make a difference - that unites the Alliance membership is reinforced every day a cancer patient is admitted to Roswell Park."

In short, the Foundation is the creation of private citizens who collectively sought to support the Institute. Again, clearly distinguishable is the Corporation, which was created by government, not by private citizens.

In a related vein, you suggested that the Foundation "was formed to avoid restrictions on solicitation of funds by state agencies." While some kinds of solicitations, notably those of a political nature, are prohibited in state facilities, I believe that there is no restriction with respect to solicitation of charitable contributions. Consequently, your contention regarding the reason for creating the Foundation appears to be erroneous.

I am also aware that the Foundation maintains its offices within the physical confines of the Institute. However, I have been informed that it pays for space and ancillary overhead costs, such as lighting and the use of office equipment.

The alternative question, whether records of the Foundation must be made available indirectly through the Institute, involves similar kinds of considerations. The issue in the context of that question is whether the records of the Foundation are Institute records. In this regard, §86(4) of the Freedom of Information Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In a recent decision rendered by the Court of Appeals, it was found that even though certain records were not in the physical custody of an agency, they fell nonetheless within the coverage of the

Freedom of Information Law [Encore College Bookstore, Inc. v. Auxiliary Services Corporation of State University of New York at Farmingdale, 87 NY 2d 410 (1995)]. In that case, a branch of the State University of New York (SUNY) contracted with the Auxiliary Services Corporation, which supplied "essential services" to SUNY. Because the Auxiliary Services Corporation was found to be carrying out functions that would otherwise necessarily be performed by SUNY, it was determined that it maintained records on behalf of SUNY through a delegation of responsibility and that, therefore, the materials sought were SUNY records. The situation involving the Freedom of Information Law and the Institute appears to be quite different. While it is clear that the Foundation was created to support the Institute, there is nothing in the materials that you provided or that has been acquired from other sources that would suggest that the Foundation performs essential services for the Institute by contractual or other means. If that is so, I do not believe that records maintained by the Foundation could be characterized as "agency records" or that they would fall within the coverage of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Thomas B. Tomasi, President and Chief Executive Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9668

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
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September 5, 1996

Ms. Maria Justice
[redacted]

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 Ms. Justice:

I have received your correspondence of August 27 in which you asked that I comment with respect to certain practices of Community School Board #17 relating to its implementation of the Freedom of Information Law.

According to your letter to the President of the Board, some Board members "would advocate charging exorbitant copying fees for public documents..." You wrote further that, by means of policy, members of the public cannot pass the security desk or therefore request or review records "without first having an appointment." In addition, you indicated that you were informed that "only after a written request was made to the office and a written acknowledgment sent to the requestor, 10 days later, would the requestor receive -- 5 days after that the requested material."

In this regard, I offer the following comments.

First, while you did not describe the fees sought to be charged, in my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for searching for records or to charge more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted

in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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.

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)].

Second, I do not believe that an appointment can be required in order to request records. Section 1401.4 of the Committee's regulations, entitled "Hours for public inspection", states in relevant part that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Potentially relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division, Second Department, which includes Brooklyn. Among the issues was the validity of a similar limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Lastly, although an agency must accept requests during regular business hours, it is not required to respond instantly. 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board #17

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9669

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 5, 1996

Mr. Grant P. Morrison
[redacted]

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. Morrison:

I have received your letter of August 22 and the correspondence attached to it.

Having sought records pertaining to you, apparently in the nature of complaints, from the East Greenbush Central School District, you contend that they must be disclosed following the deletion of names. The District has contended, however, that those that are handwritten may be withheld in their entirety because the handwriting might serve to enable you to identify the writers, even after the deletion of names. In addition, the District indicated that records may be withheld in their entirety when deletion of identifying details alone would not serve to protect the identities of students.

From my perspective, the issue involves the reasonableness of the District's position. There appears to be no disagreement that disclosure of identifying details pertaining complainants may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. If names and addresses, as well as any other personally identifying details are deleted, the kinds of record in question typically would be available. In the context of your inquiry, if indeed persons who wrote handwritten letters represent few among potentially hundreds of writers, it seems unlikely that the disclosure of their handwriting following the deletion of identifying details would enable a recipient of the letters to identify them. If that is so, I would disagree with the District's position with respect to that issue.

Perhaps more significant is the District's other basis for denial, that even after names are deleted, students' identities might be established by a reader of the records. In this regard,

as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students other than your child, I believe that they must be withheld. A 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.

Depending on the content of the records, in some instances it is possible that students' identities may be "easily traceable" even if names or other personal details are deleted. In those cases, it is likely that records could be withheld in their

entirety. On the other hand, if students could not be identified following the deletion of names or other details, I believe that the records should be disclosed after the deletions are made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrance L. Brewer, Superintendent
Donn F. Dykstra, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9670

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 6, 1996

Mr. David Rivera
95-R-1602
PO Box 8
Otisville, NY 10963

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. Rivera:

I have received your Letter of August 22, which reached this office on August 30.

You have sought assistance in obtaining your "triple III out of State Rap Sheet." You wrote that the record in question is in your correctional folder, but that your counselor denied your request and failed to inform you of the reason or the name and address of the person to whom an appeal may be directed.

In this regard, I offer the following comments.

First, I am unaware of the nature of a "triple III out of state rap sheet." If it is the same as or part of the criminal history record prepared by the Division of Criminal Justice Services (DCJS), §5.22 of the regulations promulgated by the Department of Correctional Services specifies that it must be disclosed to you.

If the record in question is separate from the DCJS report, it is likely that the Freedom of Information Law would govern rights of access. In brief, that statute is upon a presumption of access. Stated differently, all records 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 record contains a factual account of your out of state convictions and/or arrests, I do not believe that there would be any basis for withholding the record from you.

Second, with respect 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 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)].

For your information, the person designated by the Department of Correctional Services to determine appeals under the Freedom of Information Law is Counsel to the Department, Anthony J. Annucci.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Roger Allen, Corrections Counselor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9671

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of August 28 in which you referred to an opinion addressed to you on August 16. Attached to your letter is an excerpt from a recent calendar of public hearings on contract awards. One of the hearings pertains to the ability of the public to review a draft copy of a proposed contract. It is your view that the notice indicating the public's ability to review the proposed contract conflicts with the thrust of the advisory opinion of August 16 and you asked that the opinion be rescinded. You referred to a portion of the opinion in which it was written that:

> "Prior to final approval, it is possible that a contract award may be nullified or suspended. In that event, it has been contended that disclosure could 'impair' the City's ability to engage in an optimal agreement. On the other hand, if disclosure would not impair the award, I believe that the contract should be made available."

You contended that "if one were to agree with [my] line of thinking, the contract should not have been made available to public review at all."

I believe that you have misconstrued my remarks. In short, whether disclosure would "impair present or imminent contract awards" [see Freedom of Information Law, §87(2)(c)] may be dependent upon attendant facts and circumstances. I was not suggesting that contracts, prior to their final approval, should always be made available or withheld, but rather that the issue of impairment my involve different responses in conjunction with

different facts and procedures. As such, I see no need to "rescind" the earlier opinion.

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

FOIL-AO-9672

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1996

Mr. Julio Cesar Borrell
441-94-09167
275 Atlantic Avenue
Brooklyn, NY 11201

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Borrell:

I have received your letter of August 30 and the materials attached to it.

In brief, you have sought assistance in obtaining "a document or some form of record that shows the date and hour that the grand jury gave its voted decision" to indict you. Although you were informed by the Office of the Queens County District Attorney that it does not possess any such record, you wrote that you "feel sure that there must be something written down somewhere to that effect."

In this regard, I offer the following comments.

First, as indicated by Assistant District Attorney Horwitz, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no record containing the information sought is maintained by the Office of the District Attorney, that agency would not be required by the Freedom of Information Law to prepare a record containing the information of your interest.

Second, even if that agency had possession of such record, I believe that it would be beyond the scope of rights conferred by the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 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. As such, records of any "matter attending a grand jury proceeding" 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.

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

cc: William R. Horwitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-301
FOIL-AO-9673

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1996

Mr. Willard F. Miller
Attorney At Law
4 Beech Street
Garden City, NY 11530

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miller:

I have received your letter of August 26 in which you requested an advisory opinion concerning the Freedom of Information Law. Specifically, you asked whether that statute confers rights of access to "[a]ll tapes of interviews, transcripts, notes, correspondence, logs and any and all information found and produced during an investigation by the Office of the Inspector General." You wrote that the investigation to which the records relate "has been closed and resulted in no action."

You did not indicate whether a request for the records in question might be made, for example, by a member of the public or news media, a complainant, or the subject of an investigation. While rights of access would likely differ to some extent with respect to those three categories of applicants, any such rights would in my view be narrow.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, §89(2)(b) provides a series of examples of unwarranted invasions 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 they are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, in general, 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].

Several of the decisions cited above, 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 or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In addition, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

In view of the duties of the Inspector General, also potentially relevant is §87(2)(e), which states in part 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...
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation..."

In Hawkins v. Kurlander [98 AD 2d 14 (1938)], while the facts were different from the situation you presented, the Appellate Division referred to and "adopted" the view of federal courts under

the federal Freedom of Information Act. The Court cited Pape v. United States (599 F.2d 1383, 1387), which held that a major purpose of the "law enforcement" exception "is to encourage private citizens to furnish controversial information to government agencies by assuring confidentiality under certain circumstances" (Hawkins, supra, at 16). Similarly, the Appellate Division in Gannett v. James cited §87(2)(e)(i) and (iii) in upholding a denial of complaints made to law enforcement agencies, stating that:

> "the confidentiality afforded to those wishing it in reporting abuses is an important element in encouraging reports of possible misconduct which might not otherwise be made. Thus, these complaints are exempt from disclosure which might interfere with law enforcement investigations and identify a confidential source or disclose confidential information" [86 AD 2d 744, 745 (1982)].

Further, it has generally been advised that those portions of a complaint which identify complainants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. As indicated earlier, §89(2)(b) contains 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 withheld.

The remaining ground for denial of apparent relevance would be §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.

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, recommendations concerning the course of an investigation or opinions offered by employees interviewed would fall within the scope of the exception.

I note that the Personal Privacy Protection Law (Public Officers Law, Article 6-A) generally applies to records maintained by state agencies that contain personal information. Although §95(1) of that statute generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access conferred by that statute "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred

> thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, rights of access granted by the Personal Privacy Protection Law do not extend to records of agencies or units within agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities. In my opinion, the kinds of records at issue would constitute public safety agency records and, therefore, the Personal Privacy Protection Law would not grant rights of access to a data subject in the circumstance that you described.

Notwithstanding the foregoing, an individual who provided a statement or whose testimony was transcribed would have rights of access to those records. However, again, I do not believe that the subject of the investigation would have rights of access to portions of records identifiable to a complainant or witness, for example, even though they may relate to the subject.

I hope that I have been of assistance. Should any questions arise concerning the foregoing, 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-9674

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1996

Mr. Frank J. Duci
[redacted]

Dear Mr. Duci:

I have received your recent letter in which you requested a variety of information concerning a former employee of the City of Schenectady who is now employed by a different agency.

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning public access to government records and meetings. The Committee does not have possession or control of records, nor does it have the authority to compel an agency to grant or deny access to records. In short, I cannot make the information that you requested available because this office does not have it.

Requests for records should be directed to the "records access officer" at the agency that you believe maintains the records in which you are interested. The records access officer has the duty of coordinating the agency's response to requests.

In addition, since you sought information from me by raising questions, as indicated in my previous letter to you, the Freedom of Information Law does not require that agencies provide information by answering questions; rather, it requires agencies to respond to requests for and to disclose existing records to the extent required by law. Therefore, it is suggested that you request records instead of attempting to obtain information by raising questions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-282
FOIL-AO-9675

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 12, 1996

Ms. Patty Villanova
[redacted]

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 Ms. Villanova:

I have received your letter of September 4. You have questioned the propriety of the practice of collecting records about members of the public by the Chief of Police in the Town of Putnam Valley.

In this regard, there is no provision of law of which I am aware that would specifically prohibit the Chief of Police or a police department from collecting information about the public. I note, however, that similar practices of other law enforcement agencies have either ended or been prohibited by the courts. For instance, the FBI, the New York State Police, the New York City Police Department and other law enforcement agencies collected what were often characterized as non-criminal intelligence files, primarily in 1950's and '60's, about members of the public. When the existence of those files became known, due to public outcry and pressure, those agencies were essentially required to end their practice of collecting that kind of information. Further, I know of one instance in which a federal court in New York prohibited an agency from continuing its practice of collecting and maintaining non-criminal intelligence files about the public.

I note, too, that although the state's Personal Privacy Protection Law does not apply to records maintained by local governments, it prohibits state agencies from collecting personal information unless the information is clearly necessary for the performance of their legal duties. Since that statute does not pertain to local governments, it could not be cited to preclude the Chief of Police from collecting personal information unnecessarily. Nevertheless, I believe that the thrust of that law, as well as the actions taken to end similar practices of other law enforcement agencies, is clear: that government agencies should not be

collecting and maintaining information about innocent people unless there is a clear legal basis for doing so.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
William Carlos, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9676

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 13, 1996

Mr. Walter Greening
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Greening:

I have received your letter of September 6 in which you wrote that "[u]nder [my] direction", the Superintendent "has declared 'Greening-related' records, off limits to all citizens of the State of New York."

If that is your belief, it is my view that you have misconstrued the advice offered to the Superintendent and other District officials. I have not suggested that "Greening-related materials" are off limits. In fact, it is clear that any of those records that are accessible under the Freedom of Information Law must be made available for inspection, and for copying if the appropriate fee is tendered. The difficulty involves the District's belief that some requests might have been made on behalf of you or your wife in order to circumvent the requirement that the fees referenced in previous correspondence to your wife be paid. All that I have suggested was that it would seem reasonable under the circumstances to enable the District to receive some assurance that requests by persons other than yourselves are not made on your behalf if indeed the District is continuing to refuse to honor your requests based upon the alleged failure to pay fees owed the District.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Beverly L. Ouderkirk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9677

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 13, 1996

Mr. Paul J. Schafer
[redacted]

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. Schafer:

I have received your letter of September 3 and the correspondence attached to it. You have complained with respect to the treatment of your requests for records by John H. Grant, the District Superintendent of the Cattaraugus-Allegany-Erie-Wyoming BOCES.

Having reviewed the materials, particularly Mr. Grant's response to you of July 2, it appears that he has acted in a manner consistent with law. In an effort to provide clarification, I offer the following comments.

First, the Freedom of Information Law enables an agency to require that a request for records be made in writing. When a proper request is made, 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)].

Second, since you alluded to the subject, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge a fee of up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., those that cannot be photocopied).

Lastly, the Freedom of Information Law pertains to existing records, and there is no provision in that statute concerning prospective applications for records, i.e., requests for records that may be prepared in the future, but which do not exist at the time a request is made. While an agency my choose to supply records on an ongoing basis as they are prepared, I do not believe that the Law requires that an agency agree to supply records that do not yet exist.

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:jm

cc: John H. Grant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9678

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 13, 1996

Mr. Michael Hajovsky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hajovsky:

I have received your letter of September 1 and the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of your request for records by the New York City Department of Parks.

As I understand the matter, the Department solicited proposals ("RFP's") to construct a newsstand at Grand Army Plaza in Brooklyn. Following the deadline for their submission, you requested the proposals submitted by persons or firms other than yourself. Your request was denied and you were advised that all proposals had "been rejected and the bid has been reissued." You were also informed that the Department "may not release information regarding the proposals...as doing so would place those bidders at a disadvantage for the next upcoming bid." You also pointed out that the RFP indicates that those submitting proposals were authorized to seek an exception from disclosure under the Freedom of Information Law based on §87(2)(d) of that statute, and that "to [your] knowledge", you were the only submitter who sought such an exception from disclosure.

In this regard, I offer the following comments.

First, from my perspective, 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)]. Similarly, in a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their "preference" concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported 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'."

In short, I do not believe that an agency may, by means of a request, a contract or a promise, agree to keep records confidential. Insofar as an agreement requiring or promise of confidentiality diminishes rights of access conferred by the Freedom of Information Law or other applicable law, I believe that it is void and unenforceable.

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.

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 under that provision 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, when an agency solicits 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 a 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 and receives a number of bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, 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, generally 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. When that is so, I do not believe that §87(2)(c) would serve as a basis for withholding.

In the context of the situation that you described, because all proposals have been rejected, the process applicable to that initial solicitation has ended. That being so, it is difficult to envision how §87(2)(c) could properly be asserted. If and when new proposals are sought, individuals and firms will be starting from the same place, and I do not see how disclosure would "impair" as that term is used in §87(2)(c).

However, 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 §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of firms responding to RFP's. If, for example, the records could be used to ascertain a unique business process or include significant and detailed financial information, it might be contended that certain aspects of the records might, if disclosed, cause substantial injury to its competitive position.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.).

I believe that 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.

In my view, the Department has the ability to withhold records to the extent that disclosure would cause substantial injury to the competitive position of a commercial enterprise, even if no request for an exception from disclosure is made. Moreover, it appears that some aspects of the proposals could properly be withheld under §87(2)(d) for the very reason that you offer in your letter to the

Department on August 6. In that correspondence, you asked for an exception from disclosure because, in your opinion, "it would be unfair if anyone else used the plans for the construction, or to submit in next bidding [your] architect's drawing with their bid and thus unfairly compete against [you]."

In short, while it is questionable whether §87(2)(c) would serve as a valid basis for a denial of access, it appears that §87(2)(d) would serve as an appropriate basis for withholding some the records in question in whole or in part.

I note that the response by the Department denying your request failed to refer to your right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. Here I point out that §89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial.

Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Denise N. Holt, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9679

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 13, 1996

Ms. Pamela S. Greening
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Greening:

I have received your letter of September 2 and the materials attached to it.

The correspondence pertains to the ongoing disputes between you and others and the Valley Central School District concerning requests made under the Freedom of Information Law. In brief, the issue involves whether you requested to "review" records, i.e., to inspect them, or to have copies. As you are aware, when records are available under the Freedom of Information Law, an agency cannot charge for inspection. However, when copies are requested, an agency may charge up to twenty-five cents per photocopy, or the actual cost of reproducing other records.

You have contended that your request merely involves an attempt to "review" records; the District contends that you have sought copies. Although you forwarded a variety of correspondence on the matter, I have no knowledge of the existence of other correspondence that may exist or the possibility that oral communications pertinent to the matter might have occurred between you or others and officials of the District. In any event, I cannot attempt to resolve the matter because of the inconsistencies in the correspondence. On the one hand, it is true that you referred to a request to "review" (see e.g., your request of June 24). On the other hand, in a letter of July 13, you wrote that you "specifically requested copies of check numbers...and the bills sent to Valley Central..." Due to the apparent conflict, or perhaps requests to review and requests for copies, I cannot offer specific guidance.

Nevertheless, I reiterate the substance of advice rendered at the request of the Superintendent on August 27. That is, if an applicant has requested copies of records and has failed to pay the appropriate fee, I do not believe that the agency would be required to honor ensuing requests until the fee is paid.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Beverly L. Ouderkirk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9680

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 16, 1996

Mr. Jonathan Bryant
#77-A-2816
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 information presented in your correspondence.

Dear Mr. Bryant:

I have received your letter of September 3 in which you sought assistance in obtaining records under the Freedom of Information Law from the Chief Court Clerk in Washington County.

In this regard, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information

Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit a request citing an applicable provision of law. If your efforts continue to fail, you might contact the Office of Court Administration, the agency that oversees the court system.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Kathleen LaBelle, Chief Court Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9681

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 16, 1996

Mr. Leo C. Halpern
Civil Rights Law Advocate
Para - Legal Assistant
100-10M Casale 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 information presented in your correspondence.

Dear Mr. Halpern:

I have received your letter of September 3. As you requested, enclosed are four copies of the Personal Privacy Protection Law. In addition, you asked whether the State Senate and Assembly "have an exemption" from the Freedom of Information Law.

In this regard, while the State Legislature is not exempt from the Freedom of Information Law, it is treated differently under that statute from agencies generally.

Section 88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. The structure of that provision differs from that of §87 of the Freedom of Information Law, which pertains to agencies of state and local government generally. 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 §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.

I hope 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

FPPL-AO 203
FOIL-AO 9682

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 16, 1996

Mr. Dennis DeLucia
#29431-053
FCI Schuylkill
PO Box 759
Minersville, PA 17954

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. DeLucia:

I have received your recent letter in which you asked how you can request records about yourself from various locations in New York State.

In this regard, first, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, in general, entities of state and local government, except the courts and the State Legislature, are subject to the Freedom of Information Law.

Second, a request should be directed to the "records access officer" at the agency or agencies that you believe would maintain records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. From my perspective, if an applicant merely requests records about himself

or herself, without additional description, it is unlikely that the request would meet the standard of reasonably describing the records. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records that you are seeking.

Since some records about yourself could likely be withheld from others 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)(b)], it is suggested that any request for records pertaining to yourself include reasonable proof of identity.

Also of potential significance is the Personal Privacy Protection Law, which generally applies records maintained by state agencies that contain personal information. I note that it does not apply to records of local governments or the courts. Further, although §95(1) of that statute generally grants rights of access to records to a person to whom the records pertain, §95(7) provides that rights of access conferred by that statute "shall not apply to public safety agency records". The phrase "public safety agency record" is defined by §92(8) to mean:

> "a record of the commission of corrections, the temporary state commission of investigation, the department of correctional services, the division for youth, the division of probation or the division of state police or of any agency of component thereof whose primary function is the enforcement of civil or criminal statutes if such record pertains to investigation, law enforcement, confinement of persons in correctional facilities or supervision of persons pursuant to criminal conviction or court order, and any records maintained by the division of criminal justice services pursuant to sections eight hundred thirty-seven, eight hundred thirty seven-a, eight hundred thirty-seven-c, eight hundred thirty-eight, eight hundred thirty-nine, eight hundred forty-five, and eight hundred forty-five-a of the executive law."

Therefore, rights of access granted by the Personal Privacy Protection Law do not extend to records of state agencies or units within those agencies whose primary functions involve investigation, law enforcement or the confinement or persons in correctional facilities.

Enclosed for your review are two brochures, one dealing with the Freedom of Information Law and the other with the Personal Privacy Protection Law. In addition, as you requested, enclosed is the Committee's latest index to advisory opinions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9683

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1996

Mr. Albert May
92-A-0003
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 information presented in your correspondence.

Dear Mr. May:

I have received your letter of September 3 in which you raised the following questions:

> "1) Would copies of fingerprints lifted off any alleged murder weapon, and all relevant reports thereto, be subject to FOIL if a trial witness stated at trial that the analysis of such were inconclusive.
>
> 2) Would a criminal defendant be entitled to a list of witnesses presented to a Grand Jury and a list of real, demonstrative or documentive presented to a Grand Jury under F.O.I.L.
>
> 3) Does the fact that materials requested under F.O.I.L. were not offered at a criminal trial as evidence have any bearing on F.O.I.L. disclosure. Also, does the "Rosario Rule" have an effect on F.O.I.L. 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 §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 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 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. 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 §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. From my perspective, fingerprints of a person other than yourself may properly be withheld.

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.

I note that 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, while I am unaware of judicial decisions that have specifically considered the relationship between the Freedom of Information Law and disclosure devices applicable 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].

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9684

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1996

Mr. Barshai Allah
77-A-3772
Arthur Kill Correctional Facility
2911 Arthur Kill Road
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 information presented in your correspondence.

Dear Mr. Allah:

I have received your letter of September 3 in which you asked that this office conduct an investigation with respect to the implementation of the Freedom of Information Law by the Arthur Kill Correctional Facility and others.

It is noted initially that the Committee on Open Government is authorized to provide advice concerning access to records. The Committee is not empowered to conduct an investigation or compel an agency to grant or deny access to records. Nevertheless, having reviewed your correspondence, I offer the following comments.

First, you referred to requests made on the basis of 5 U.S.C. §§552 and 552a. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies; they have no application to records maintained by agencies of state or local government in New York. The statute that generally pertains to rights of access to government records in New York is the Freedom of Information Law (Public Officers Law, §§84-90).

Second, according to regulations promulgated by the Department of Correctional Services, a request for records maintained at a correctional facility may be directed to the facility superintendent or his designee. With respect to records maintained at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for 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)].

Finally, the Freedom of Information Law pertains to records, and an agency is not required to create or prepare a record in response to a request [see §89(3)]. In several instances, you requested records and in addition, asked that witnesses be presented at a hearing. In my view, a request to have witnesses present at a hearing is unrelated to the Freedom of Information Law or the duties imposed by that statute.

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-9685

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1996

Mr. Raymond Johnson
Mohawk Correctional Facility
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 information presented in your correspondence.

Dear Mr. Johnson:

I have received your letter of August 30 and the materials attached to it.

As I understand the matter, in a letter addressed to you dated July 23, you were informed by the appeals officer for the New York City Police Department that the records access officer's constructive denial of your request had been "overturned" and that she directed that a response be forwarded to you as soon as possible. Nevertheless, as of the date of your letter, you had received no further response. Consequently, you asked what steps might be taken in this kind of situation.

In this regard, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of a request for 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."

As I understand the language quoted above, when an agency receives an appeal it has ten business days to take one of two actions: either the agency must disclose the records or fully explain in

writing the reasons for further denial. Under the circumstances, although the appeals officer overturned the constructive denial, the records were not made available. Since the letter of July 23 constitutes a determination of an appeal, from my perspective, because the records have not been made available, you have the ability to initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9486

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1996

Ms. Dorothea L. Burt
[redacted]

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 Ms. Burt:

I have received your letter of August 29, which reached this office on September 6. You have sought an advisory opinion concerning a partial denial of access to records by the Niagara County Department of Human Resources. You were given information indicating that sick leave was granted to a number of employees, including the dates of the leaves, but the County withheld the names of the persons to whom sick leave was granted. You added that you "did not request any personal type of information regarding the individuals' illness, since [you] felt that was confidential."

From my perspective, based on judicial decisions, the names of persons who used or were granted sick leave must be disclosed. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to attendance records involving the use of leave time, I believe that such records are generally accessible under the 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.

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).

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert L. Schuman, Manager of Labor Relations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9687

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 20, 1996

Mr. Tim Sheridan
Orangetown Benevolent Association
99 Yale Terrace
Blauvelt, NY 10913

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. Sheridan:

I have received your letter of September 9 in which you raised questions concerning a request made under the Freedom of Information Law for records of the Town of Orangetown.

As I understand the matter, you requested certain time sheets on August 9. In an undated acknowledgement of the receipt of the request, you were informed that the records would be available on October 4 at a cost of twenty-five cents per photocopy. You have asked why it should take so long to produce the records. In addition, you questioned the "automatic" fee of twenty-five cents per photocopy when the actual cost of reproduction is lower than that amount.

In this regard, 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an

acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. I note that it has been held that time sheets pertaining to a public employee have been found by the State's highest court to be available and that the case involved a police officer [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

Second, in my view, a fee of twenty-five cents per photocopy is appropriate and consistent with law. Section 87(1)(b)(iii) of the Freedom of Information Law states that an agency's rules and regulations must include reference to:

> "the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine inches by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

Based upon the foregoing, unless a different statute authorizes other fees, the first clause of the provision quoted above provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. The next clause, which deals with the "actual cost of reproduction", pertains to "other" records, i.e., those records that cannot be duplicated by means of photocopying, such as tape recordings or computer tapes.

Your inference that an agency is permitted to recover only its costs when preparing photocopies is, in my view, inaccurate. Whether the actual cost of photocopying is more or less than twenty-five cents, an agency is clearly authorized to establish a

fee of up to twenty-five cents per photocopy. Again, the "actual cost" standard pertains to the reproduction of records that cannot be photocopied. I point out, too, that no fee may be charged for the inspection of records accessible under the Law.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Homer Wanamaker, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9688

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 20, 1996

Mr. John McLean
94-A-2331
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. McLean:

I have received your letter of September 16 in which you appealed a denial of access to records by a court clerk.

In this regard, I note that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has no power to determine appeals or compel an agency to grant or deny access to records.

Further, the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the

procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you resubmit a request citing an applicable provision of law. If your efforts continue to fail, you might contact the Office of Court Administration, the agency that oversees the court system.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9689

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1996

Ms. Margaret J. Bourcy
[redacted]

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, unless otherwise indicated.

Dear Ms. Bourcy:

I have received your letter of September 9, as well as other related correspondence.

As in the case of previous correspondence, you expressed interest in acquiring various records pertaining to real property located in the Town of Clayton in Jefferson County. Based upon your comments, and those of a member of the Town Board, Dr. Douglas Rogers, it is emphasized that the Freedom of Information Law pertains to existing records maintained by or for an agency. Therefore, if the records sought are not maintained by or for the Town or the County, for example, the Freedom of Information Law would not apply. Similarly, an agency is not required to create a record in response to a request or acquire records in order to accommodate an applicant. To be sure, insofar as records are maintained by or for an agency, they must be disclosed, unless an exception to rights of access may be properly asserted [see Freedom of Information Law, §87(2)]. In the context of the situation that you described, the kinds of records in which you are interested, if they exist and can be located, would in my view be public, for none of the grounds for denial would apply.

Lastly, you asked whether the State might maintain the kinds of records that you are seeking. To the best of my knowledge, it does not. Nevertheless, it might be worthwhile to contact the agency that has oversight with respect to real property assessment, the Office of Real Property Services. That agency is located at 16 Sheridan Avenue, Albany, NY 12210-2714.

I hope that the foregoing serves to clarify your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Douglas Rogers
Bonnie Rose
Scott Schrader

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9690

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1996

Mr. Maurice Rosa
[redacted]

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. Rosa:

I have received your correspondence of September 9. As I understand the matter, you are seeking assistance with respect to your efforts in obtaining information concerning a former public official from the Town of Thompson.

In this regard, on the basis of the materials that you forwarded, the nature of the information sought is not entirely clear. Nevertheless, I offer the following general comments.

First, I point out that the Freedom of Information Law pertains to existing records. Further, §89(3) of the Law provides in part that an agency is not required to create or prepare a record in response to a request. Similarly, the Freedom of Information Law does not require agencies to prepare answers to questions. In the future, rather than raising questions as a means of attempting to elicit information, it is suggested that you request records.

Second, in a related vein, one of the difficulties might involve the possibility that certain records have been destroyed. Here I point out that agencies may destroy or dispose of records in accordance with retention schedules developed pursuant to §57.25 of the Arts and Cultural Affairs Law by the State Education Department and its State Archives and Records Administration. Agencies cannot destroy records until the minimum retention period has been reached, and the nature of the record determines how long it must be kept. For instance, minutes of meetings must be permanently retained, while a tape recording of a meeting must be retained for a minimum of four months. I am unaware of the particular retention periods that might be applicable in the context of your requests. However, you could ask to review the retention schedule maintained

by the Town Clerk, who serves as the Town's Records Management Officer.

Lastly, since one of the issues appears to involve a public employee's paycheck, I note that there is case law indicating that the front of a paycheck, if it continues to exist, must be disclosed, but the back of the check, which might indicate endorsements or the manner in which an individual spends his or her money may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b); also Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald S. Price, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO- 9691

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1996

Mr. Michael Brown
95-B-1037
Auburn Correctional Facility
135 State Street
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 information presented in your correspondence.

Dear Mr. Brown:

I have received your letter of September 15, as well as the materials attached to it. Having reviewed the correspondence, although you referred to opinions rendered by this office, is it unclear whether you understand that the Freedom of Information Law does not apply to the courts or court records.

As you may be aware, the Freedom of Information Law pertains to records of an "agency." That term is defined in §86(3) of the Freedom of Information Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 include:

> "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. In your request for court records, you referred to provisions of the Freedom of Information Law, particularly those involving the time for responding to

requests and the right to appeal. However, those provisions do not apply in cases in which requests are made for court records. Again, the courts are excluded from the coverage of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9692

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1996

Ms. Joan Tuohy
[redacted]

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 Ms. Tuohy:

I have received your letter of September 9 in which you sought information concerning records relating to deceased relations.

The first pertains to your father who attended school in Manhattan from 1918 to 1925. As you may be aware, the New York City school system is now organized by means of community school districts. I do not believe that was so when your father might have attended school. It is suggested, however, that you contact the New York City Board of Education, which is located at 110 Livingston Street, Brooklyn, NY 11201 and direct your request to its "records access officer." That person has the duty of coordinating an agency's response to requests for records.

I note that a federal statute, the Family Educational Rights and Privacy Act, prohibits a school district from disclosing records identifiable to students, unless a parent of a student under the age of eighteen or a student who as reached the age of majority consents to disclosure. However, the prohibition against disclosure does not apply if the person to whom the records pertain is deceased. Therefore, in any request, it is suggested that you indicate your relationship and provide some proof that your father is deceased.

You also referred to a relative who is known to have died on Rikers Island some time after 1920. However, you are unaware of whether he was an inmate or an employee at the facility.

In this regard, it is suggested that you write to the records access officer at the New York City Department of Correction, Mr. Thomas Antenen, 60 Hudson Street, 6th Floor, New York, NY 10013.

I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records requested. Therefore, a request should include sufficient detail to enable an agency to locate and identify the records.

Lastly, various provisions of law deal with the retention and disposal of records. Under those provisions, records must be retained for particular periods of time depending upon, for example, their historical, legal or fiscal value. As such, it is possible that records in which you are interested in some instances might have been destroyed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9693

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1996

Ms. Marcie Haskell
[redacted]

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 Ms. Haskell:

I have received your letter of September 6 and the correspondence attached to it. You have questioned the propriety of a denial of your request for telephone records that "detail all local phone calls made from all extensions in the office of Assemblywoman Barbara Clark..."

In this regard, §88 of the Freedom of Information Law deals with rights of access to records of the State Legislature. It is noted that the structure of that provision differs from that of §87 of the Freedom of Information Law, which pertains to agencies of state and local government generally. 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 §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.

From my perspective, it is unlikely that the kinds of records that you requested would fall within the categories of records that must be disclosed by the State Legislature.

Enclosed is a copy of the Freedom of Information Law for your review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Sharon Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9694

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1996

Mr. Henry Franklin
95-B-2081
Auburn Correctional Facility
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 information presented in your correspondence.

Dear Mr. Franklin:

I have received your undated letter, as well as the materials attached to it. Having reviewed the correspondence, although you referred to opinions rendered by this office, is it unclear whether you understand that the Freedom of Information Law does not apply to the courts or court records.

As you may be aware, the Freedom of Information Law pertains to records of an "agency." That term is defined in §86(3) of the Freedom of Information Law to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 include:

> "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. In your request for court records, you referred to provisions of the Freedom of Information Law, particularly those involving the time for responding to requests and the right to appeal. However, those provisions do not

apply in cases in which requests are made for court records. Again, the courts are excluded from the coverage of the Freedom of Information Law.

As you requested, the materials attached to your letter are being returned to you.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9495

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1996

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 information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of September 9 and the correspondence attached to it. You have questioned the propriety of a denial of your request for the "Corplex Report" by the New York City Board of Education.

According to your letter, the former Secretary to the Board contracted with Corplex, Inc. to investigate the backgrounds of the finalists under consideration for the position of Chancellor. Prior to any disclosure made in response to a request under the Freedom of Information Law, the Report or information derived from it was leaked to the news media and was used in an article. Further, in conjunction with an investigation of the leak by the Special Commissioner of Investigation, the former Secretary was subpoenaed, and you wrote that "[o]ne of the exhibits attached to [his] litigation papers was the Corplex Report, or portions thereof." Based on the foregoing, it is your view that the denial of your request was inappropriate.

In this regard, absent additional detail, I do not believe that you have provided sufficient information to enable me to offer specific guidance. As such, I offer the following general remarks.

First, §89(7) of the Freedom of Information Law provides in part that nothing in the remaining provisions of that statute "shall require the disclosure of...the name or home address of...an applicant for appointment to public employment..." Therefore, the names of candidates being considered for the position of Chancellor would not have been available as of right to the public. That being so, insofar as names of the candidates appeared in the Corplex Report, I do not believe that there would ordinarily be a requirement that they be disclosed on request. Further, it follows that a disclosure of the names coupled with the information gained

through the investigation would constitute an unwarranted invasion of personal privacy pursuant to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law.

Second, insofar as the content of the Corplex Report has been published by the news media, I do not believe that the Board could justify a denial of access to the published material. In short, the information would be in the public domain. However, publication of some of the contents of the Report would not in my view necessitate disclosure of the Report in its entirety. I note, too, that it has been held that an inadvertent or erroneous disclosure of records that could properly be withheld does not create a right of access [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)]. Similarly, in my opinion, the leak of a record would not create a public right of access to the entire record.

Lastly, if a record that could otherwise be withheld has been disclosed or introduced into evidence in a public proceeding, the record would thereafter be available to the public [see Moore v. Santucci, 151 AD2d 677 (1989)]. I am unaware of whether the matter to which you referred involving the former Secretary was a public proceeding during which the Report or portions thereof were publicly disclosed. If there was no public disclosure, the principle enunciated in Moore would be inapplicable.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Jonides Deedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9696

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 26, 1996

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 information presented in your correspondence.

Dear Mr. Kless:

I have received your letter of September 2, which reached this office on September 13. You questioned whether the record of a call made to an E-911 system is available to the caller, or whether the record of an E-911 call "becomes" a 911 "if the ID information can be deleted."

In this regard, I can only reiterate commentary offered in the opinion addressed to you on July 23, that "E-911" refers to an "enhanced" system that enables a law enforcement agency to ascertain the location from which the call was made, and that §308(5) of the County Law prohibits disclosure of the records of any such calls. Again, that provision states that:

> "Records, in whatever form they may be kept, of calls made to a municipality's E911 system shall not be made available to or obtained by any entity or person, other than that municipality's public safety agency, another government agency or body, or a private entity or a person providing medical, ambulance or other emergency services, and shall not be utilized for any commercial purpose other than the provision of emergency services."

As I understand the language quoted above, an agency cannot disclose the record of an E-911 call to a member of the public, even if that person is the caller. I am not suggesting that §308(5) represents optimal public policy or well-conceived legislation, but rather that it is the law.

You also asked what penalties may be imposed against a records access officer who "knowingly does not follow the rules relating to

disclosure." If that person fails to respond to a request or inappropriately denies access to records, the applicant for records has the right to appeal under §89(4)(a) of the Freedom of Information Law. If the appeal is denied, the applicant may seek judicial review under Article 78 of the Civil Practice Law and Rules. In such a proceeding, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Lastly, §89(8) of the Freedom of Information Law provides that:

> "Any person who, with intent to prevent public inspection of a record pursuant to this article, willfully conceals or destroys any such record shall be guilty of a violation."

I note that §240.65 of the Penal Law is the companion provision relating to §89(8).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen E. O'Hara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9697

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 27, 1996

Mr. John Lanorith
94-R-1080
Lyon Mountain Correctional Facility
P.O. Box 276
Lyon Mountain, NY 12952

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lanorith:

I have received your undated letter, which reached this office on September 16.

You have claimed that your constitutional rights were violated by the Department of Correctional Services by virtue of its failure to comply with urinalysis test procedures and you have sought assistance in "rectifying this matter."

In this regard, having read your commentary, I note that the function of the Committee on Open Government involves providing advice concerning rights of access to government records. The only aspect of your remarks that relates to access to records pertains to a denial of your request for a "urinalysis test log book" indicating the time or times that you were tested. In my view, insofar as a log book entry pertains to you, it likely should be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Intra-agency materials consisting of statistical or factual information must be disclosed [see §87(2)(g)(i)]. If the log book entry pertaining to you consists of factual information, I believe that it would be available to you. Portions of the log book pertaining to persons other than yourself could in my opinion be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

I point out that the regulations promulgated by the Department of Correctional Services indicate that requests for records maintained at a facility may be directed to the facility superintendent or his designee. If you have not done so, it is suggested that you submit a request under the Freedom of Information Law to the appropriate person. In addition, if a request is denied, the Department's regulations state that a denial may be appealed to Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9698

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 27, 1996

Ms. Bette Smith Lathan
[redacted]

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 Ms. Lathan:

Your letter addressed to Governor Pataki and later transmitted to the State Education Department has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

You have complained that the Town of Vienna has been uncooperative with respect to requests for old vital records and that the fees sought to be assessed by the Town are excessive.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal clerks. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

I hope that the foregoing serves to clarify the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9699

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 27, 1996

Mr. Willie Wade
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Wade:

I have received your letter of September 11. You referred to an advisory opinion rendered at your request on August 23 and indicated that you "neither understand nor agree with the opinion." You stressed that patient confidentiality should not be an issue and questioned why the Arden Hill Hospital should be treated differently from others.

In this regard, having reviewed the opinion in question, reference was made to §§2805-l and 2805-m of the Public Health Law. The former pertains to incident reporting by hospitals, and the latter to the confidentiality of information relating to incidents reported to the Department of Health. Perhaps you do not understand my response due to a lack of recognition of the nature and scope of incidents required to be reported. Those incidents include not only those that might involve a particular patient; they also relate to fires, equipment malfunctions, strikes, emergency situations, problems with telephone, electricity, fuel, water, pest control and other matters. As such, a variety of incident reports and related records might be confidential, even though they do not name or otherwise identify patients.

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 FOIL-AO-9700

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1996

Mr. Robert B. Liddell
[redacted]

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. Liddell:

I have received your letter of September 17, as well as the materials related to it. You requested records from the Auburn Enlarged City School District concerning a teacher who resigned in 1980. The records sought pertain to the teacher's termination, discipline and "incidence of sexual abuse." Although he disclosed the minutes of the meeting during which the Board of Education accepted the teacher's resignation, the Superintendent of Schools denied access to the other records sought and wrote that "items contained in the district's personnel files are not accessible...as they are not public records.

You have sought assistance in obtaining the records. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Therefore, insofar as the information sought does not exist in the form of a record or records, or if records have legally been destroyed because of their age, the Freedom of Information Law would not apply.

Second, to the extent that records continue to 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.

It is emphasized 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.

In the context of your inquiry, perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". In addition, as you are aware, §89(2)(b) provides a series of examples of unwarranted invasions 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. 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].

The other 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 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].

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".

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case,

> i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], even though the sanction was far short of a removal from employment, the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated under §3020-a of the Education Law, but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of

> Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

Notwithstanding the foregoing, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Lastly, of potential relevance 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. §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. In short, absent consent to disclose by a parent of a student under the age of eighteen or a student who has reached that age, the District could not in my opinion disclose records or portions thereof that would identify a particular student or students.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carl P. Mangee, Ph.D., Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9701

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1996

Mr. E. Higgins
92-A-7904
Midstate Correctional Facility
P.O. Box 216
Marcy, NY 13403-0216

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Higgins:

I have received your letter of September 13. You have sought assistance in gaining access to the Suffolk County Jail's "procedure on strip search/strip frisk directive."

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, section 89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with section 89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under section 89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the County Attorney has been designated to determine appeals of denials of access by Suffolk County Departments.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the records in which you are interested. However, from my perspective, three of the grounds for denial may be relevant to your inquiry.

Specifically, section 87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of

inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records in question consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that rules and regulations would be available, unless a different basis for denial could be asserted.

A second provision of potential significance is section 87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations of judicial proceedings...
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be

> disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into

> the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and apparently would not if disclosed preclude police officers from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is section 87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of law enforcement officers or others, it appears that section 87(2)(f) would be applicable.

In sum, while some aspects of the records might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9702

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1996

Mr. Hugh 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 information presented in your correspondence.

Dear Mr. McNamara:

I have received your letter of September 13, as well as the correspondence attached to it. You have sought assistance in obtaining "the names of the EMTs and fire department personnel who were in [y]our home" in your absence on the morning of April 25.

In this regard, having reviewed the correspondence, I offer the following comments.

First, it is emphasized 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 a record in response to a request. Therefore, if there is no record identifying the firefighters who entered your home, the Department would not be obliged to prepare a new record containing that information.

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 §87(2)(a) through (i) of the Law. From my perspective, if there is a record indicating which firefighters were in your home on the morning of April 25, their names should be disclosed. In short, I do not believe that any of the grounds for denial would apply. Further, the information in question would be factual in nature and available under §87(2)(g)(i) and relevant to the performance of the firefighters' duties.

Lastly, there are suggestions in the correspondence that the Department may have a rule or policy that would prohibit the disclosure of the names. In my view, any such rule or policy would be invalid insofar as it conflicts with law. I note that 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. On the contrary, the contents of the records in question serve as the factors relevant to an analysis of the extent to which they may be withheld or must be disclosed. In this instance, again, if records exist containing the information sought exist, I believe that those portions identifying the firefighters would be accessible under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chief Rowland McClave
Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9703

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1996

Ms. Betty Robnette
[redacted]

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 Ms. Robnette:

I have received your recent, undated letter, which reached this office on September 16. You have sought assistance in obtaining your birth records as well as those involving a court case litigated near the time of your birth.

In this regard, the primary function of this office involves providing advice concerning the Freedom of Information Law. Although that statute does not govern rights of access to records in the circumstance that you described, I offer the following comments and suggestions.

First, you did not indicate whether you might have been adopted. If you were adopted, records of birth, including those pertaining to the adoption, would be confidential. It is noted that the first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which generally requires that adoption records be sealed and confidential. As such, the Freedom of Information Law would not be applicable to those records. Section 114 states in part that:

> "No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection

> shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct."

Based on the foregoing, only a court by means of an order could unseal records relating to an adoption.

Second, assuming that there was no adoption, access to certain records would be governed by §4173 of the Public Health Law. As a person over the age eighteen, you would have a right of access to birth records from either the local registrar of vital records or the Bureau of Vital Records at the State Department of Health. I note that under §4173 either a registrar or the Department of Health may charge fees for search and duplication of birth records.

Lastly, although the Freedom of Information Law does not include the courts or court records within its coverage, many court records are available under other provisions of law (see e.g., Judiciary Law, §255). If you are aware of the court in which the proceeding occurred, it is suggested that you request the records of the proceeding from the clerk of the court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2665
FOIL-AO- 9704

162 Washington Avenue, Albany, New York 12231
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October 1, 1996

Hon. Susan Briggs
Town Clerk
Town of Russell
Box 628
Russell, NY 13684

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 Ms. Briggs:

I have received your letter of September 20. In brief, you referred to a series of events focusing on the new Russell Town Supervisor and his actions, and you asked for guidance in an effort to enable you and other town officials to carry out your duties effectively and in a manner consistent with law.

In this regard, as you may be aware, the Committee on Open Government is authorized to provide advice concerning agency records and meetings of public bodies. Consequently, my comments will generally relate to issues pertaining to those subjects.

It is emphasized at the outset that the Supervisor is but one among five members of the Town Board. Although as Supervisor, he may have several specific duties or areas of authority (see e.g., Town Law, §29), he has one vote at Board meetings, and §63 of the Town Law states in part that "Every act, notion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board", and that "The board may determine the rules of its procedure." In short, the Board is the governing body of the Town.

Second, the Open Meetings Law provides direction concerning the contents of minutes and when they must be disclosed. 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 addition and perhaps most importantly, §30(1) of the Town Law states in part that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting." Based upon the foregoing, the clerk, not the town supervisor, has the statutory responsibility to prepare minutes and ensure their accuracy. Further, the supervisor in my view, has no right, acting unilaterally, to change or correct minutes.

I point out that in an opinion issued by the State Comptroller, it was advised that when a member of a board requests that his or her statement be entered into the minutes, the board must determine, under its rules of procedure, whether the clerk should record the statement in writing, which would then be entered as part of the minutes (1980 Op.St.Comp. File #82-181).

Moreover, although as a matter of practice, policy or tradition, many public bodies approve minutes of their meetings, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Additionally, in another opinion of the State Comptroller, it was found that there is no statutory requirement that a town board approve minutes of a meeting, but that it was "advisable" that a motion to approve minutes be made after the members have had an opportunity to review the minutes (1954 Ops.St.Compt. File #6609).

In short, it is my view that you, in your position as clerk, have the responsibility and the authority to prepare minutes and to insure their accuracy. While the Supervisor may have other areas of authority, I do not believe that the alteration of minutes is among them.

With respect to records, §30 of the Town Law states that the town clerk: "Shall have the custody of all the records, books and papers of the town." Therefore, even though a person other than

yourself may have physical possession of the records in question, as Town Clerk, I believe that you have legal custody of the records.

In a related vein, it is noted that §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the 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, §14012(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If you have been designated records access officer, I believe that you have the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law.

Lastly, and in a related area, the "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the management, custody, retention and disposal of records by local governments.

With respect to the retention of records, §5725 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."

While a person other than you may have physical possession of records, I do not believe that that person has legal custody of them. As indicated earlier, §30 of the Town Law specifies that the town clerk is the custodian of town records. Consistent with that provision is §5719 of the Arts and Cultural Affairs Law, which states in part that a town clerk is the "records management officer" for a town.

A failure to share records or to inform the clerk of their existence may effectively preclude the clerk from carrying out her duties as records management officer, or as records access officer for purposes of responding to requests under the Freedom of Information Law. In short, if the records access officer does not know of the existence or location of Town records, that person may not have the ability to grant or deny access to records in a manner consistent with the requirements of the Freedom of Information Law or comply with other provisions of law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2047
FOIL-AO-9705

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 1, 1996

Mr. Leonard Rosen
[redacted]

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. Rosen:

I have received your letter of September 16 in which you raised questions concerning your right to obtain a copy of a performance evaluation prepared by your former employer, the Y.M.H.A.

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the provisions of the State's Freedom of Information and Personal Privacy Protection Laws. Neither of those statutes would apply to a private organization, such as the Y.M.H.A.

The Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law, in general, includes entities of state and local government within its coverage.

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 a city. Further, the Personal Privacy Protection Law would not be applicable or serve as a barrier to disclosure of records maintained by a private entity.

Because the statutes referenced above do not apply to the Y.M.H.A., I do not believe that it would be obliged to disclose records to you or be prohibited from disclosing its records to a government agency.

I note that the governmental entity that you mentioned, the New York City Human Rights Commission, is an "agency" required to comply with the Freedom of Information Law. Therefore, records in its possession pertaining to you 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 §87(2)(a) through (i) of the Law.

One of the grounds for denial of access, §87(2)(b), states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While you could not invade your own privacy, it is possible that records about you might identify persons other than yourself. In that instance, insofar as disclosure would result in an unwarranted invasion of others' privacy, the Commission could in my view withhold records in response to a request made under the Freedom of Information Law.

Lastly, pursuant to 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 made under the Freedom of Information Law may be directed to that person.

I hope that the foregoing serves to clarify 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-9706

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 1, 1996

Mr. Michael 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 information presented in your correspondence.

Dear Mr. Kless:

I have received your letter of September 15 in which you complained with respect to delays in response to requests for records and asked what penalties may be imposed for failure to comply with the Freedom of Information Law.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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)].

Your question concerning penalties that may be imposed was answered in an opinion addressed to you on September 26.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kathleen E. O'Hara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9707

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 1, 1996

Mr. Rafael Robles
88-AA-8275 E-5-7
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 information presented in your correspondence.

Dear Mr. Robles:

I have received your letter of September 16 in which you raised questions concerning access to records.

Your first area of inquiry pertains to a police officer who established a security and investigation firm after his retirement, and you asked whether you can obtain a list of detectives he hired under the Freedom of Information Law.

In my view, there would be no obligation to disclose the information in question. 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, an "agency" is an entity of state or local government; a private firm would not be an agency and, therefore, would not be subject to the Freedom of Information Law.

The second question involves your right to obtain records concerning injuries sustained by police officers in the line of duty. In this regard, §87(2)(b) of the Freedom of Information Law provides that an agency may withhold records to the extent that disclosure would result in "an unwarranted invasion of personal

privacy." Further, §89(2)(b) lists examples of unwarranted invasions of personal privacy, the first two of which pertain to medical information. Consequently, I believe that an agency may withhold information that indicates a medical condition or injuries. It is also noted that §50-a of the Civil Rights Law states that police officers' personnel records that are used to evaluate performance toward continued employment or promotion are confidential.

Lastly, you asked whether documents concerning social security disability would be public. Here I point out that records relating to social security would be maintained by a federal agency, the Social Security Administration, which is subject to the federal Freedom of Information and Privacy Acts. Since those statutes are beyond the jurisdiction of this office, I cannot offer specific guidance. However, I note that the federal Freedom of Information Act, like the New York Freedom of Information Law, includes provisions authorizing agencies to withhold records based on considerations of personal privacy.

I hope that the foregoing serves to enhance your understanding of the issues 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

One Commerce Plaza
99 Washington Ave.
Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
http://www.dos.ny.gov/coog

October 2, 1996

FOIL AO 9708

[redacted]

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 Ms. Pellegrino:

I have received your undated letter, which reached this office on September 25. You have raised a series of issues relating to the implementation of the Open Meetings Law by the Board of Education of the Mount Pleasant Central School District.

Based on a review of your correspondence, I offer the following comments.

First, in my view, there is no legal distinction between a "work session" and a "meeting." By way of background, it is noted that the definition of "meeting" has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the

Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

> "We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one's official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute" (60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as "informal," stating that:

> "The word 'formal' is defined merely as 'following or according with established form, custom, or rule' (Webster's Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body" (id.).

Based upon the direction given by the courts, if a majority of a public body gathers to discuss public business, any such gathering, in my opinion, would ordinarily constitute a "meeting" subject to the Open Meetings Law that must be preceded by notice.

Second, §104 of the Open Meetings Law pertains to notice and provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Third, the phrase "executive session" is defined in §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 from a meeting; rather, it is part of a meeting. Further, an executive session may be held only after an open meeting has been convened. As you may be aware, 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. Motions to enter into executive sessions that merely describe the subjects to be considered as "personnel issues", "negotiations" or "litigation" would, according to judicial interpretations, be inadequate to comply with law.

It is emphasized that the term "personnel" appears nowhere in the Open Meetings Law. Some personnel related issues may clearly be considered in an executive session; others just as clearly cannot. The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question 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 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 at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" 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.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the

> Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, 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 Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, 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.

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

"The purpose of paragraph d is "to enable 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.

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].

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the School District."

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].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the teachers union."

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this opinion will be forwarded to the Board of Education.

I hope that I have been of 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-9709

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Barry Finnerty
c/o Orange County Jail
40 Erie Street
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 information presented in your correspondence.

Dear Mr. Finnerty:

I have received your letter of September 22, as well as the correspondence attached to it. You have asked that I forward information "on how to force a county, city or any municipality to adhere" to the Freedom of Information Law.

In this regard, enclosed are copies of the Freedom of Information Law and an explanatory brochure that might be useful to you. However, having reviewed your correspondence, I offer the following comments.

In one of your requests, you asked for a citation relating to a particular case in which an assistant district attorney was involved. I agree with the Assistant County Attorney that a request of that nature is not the kind envisioned by the Freedom of Information Law. The Freedom of Information Law pertains to requests for records; it is not a vehicle that requires an agency to conduct research in order to provide responses to requests for information.

You also referred to a request in which you sought "the names and address of the corporations that service Orange County Jail", and you indicated that the request was never answered.

Although you did not include a copy of the request, 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 requested records. It is unknown to me whether the Orange County Jail is "serviced" by few or many corporations, and it is unclear from my perspective what the focus of your request might be. It is suggested that you provide additional

detail to enable County officials to locate the records in which you are interested.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Laurie T. McDermott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9710

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Gilbert Williams
94-A-4915
Box 3600
Marcy, NY 13403

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Williams:

I have received your letter of September 21 and the materials attached to it. Although the correspondence is not completely clear, it appears that you have unsuccessfully attempted to obtain records relating to certain incidents leading to arrests and to your allegations concerning the conduct of police officers. As such, you have requested assistance in obtaining the records.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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." 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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 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)].

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 v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Doland C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty. March 25, 1981; Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988) and Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)]. 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., Prisoners' Legal Services, supra; also 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.

With respect to other records in which you are interested, 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, a witness, or persons other than yourself.

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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9711

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Kenneth G. Pavel
90-C-1235
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-2500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Pavel:

I have received your letter of September 21 and the materials attached to it. You have complained with respect to delays in response to requests for records and appeals that you have made to the Department of Correctional Services.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9712

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Alvaro A. Sanchez
87-A-7358
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. Sanchez:

I have received your letter of September 17. Your problem, in short, "is that the Queens District Attorney and all related parties have lost [your] entire court files." You have requested the "intervention" of this office in the matter.

In this regard, 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 "intervene" in the legal sense on behalf of an applicant for records. It is also noted that although the office of a district attorney is an "agency" required to comply with the Freedom of Information Law [see definition of "agency", Public Officers Law, §86(3)], the courts and court records are outside the coverage of that statute [see definition of "judiciary", §86(1)].

As a general matter, the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provide in part that an agency need not create a record in response to a request. If indeed the Office of the District Attorney does not maintain the records sought, the Freedom of Information Law would not apply. However, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

It is suggested that you discuss the matter with a representative of Prisoners' Legal Services. I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9713

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Henry J. Bartosik
[redacted]

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. Bartosik:

I have received your letter of September 19 and the correspondence attached to it.

As I understand the matter, you obtained records from the Ellenville Central School District that included individuals' initials, rather than signatures or typewritten names. You have asked whether there is an obligation on the part of the District to provide "either a reasonable response as to the identity of the school employee or the establishment of a policy or procedure to have a printed or typed name to identify the handwriting."

In this regard, as you may be aware, the advisory jurisdiction of the Committee on Open Government pertains to the requirements of the Freedom of Information Law. As such, I do not believe that I can appropriately comment on the District's record-keeping procedures. Further, while a signature, stamp replicating a signature, or a typewritten name of an employee on the kind of record that you described would in my view clearly be accessible to the public, I note 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, while the record including the initials would be accessible, I know of no legal requirement that the District prepare a new record for the purpose of identifying those whose initials appear. Similarly, while a District official could inform you orally or by means of a written communication of the identities of those employees, in a technical legal sense, I do not believe that there is any obligation to do so. In short, the District in my view is not required by the Freedom of Information Law to explain the content of a record that has been disclosed.

It is suggested that you offer a recommendation to the Board of Education or appropriate District official that a policy or procedure be adopted to guarantee the ability to identify employees in the circumstances that you described.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Ferrara, Superintendent
Judy Taft, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9714

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Temer J. Leary
Warren County Jail
Municipal Center
Lake George, NY 12845

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. Leary:

I have received your letter of September 23. You have sought assistance in obtaining your records from a psychiatric center. According to your letter, although a request was made for the records, the facility did not respond.

In this regard, while the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains generally to government records in New York, a different provision of law, §33.16 of the Mental Hygiene Law, deals specifically with the records in question.

As I understand §33.16 of the Mental Hygiene Law, it provides rights of access to clinical mental health records, with certain exceptions, to "qualified persons," and paragraph 7 of subdivision (a) of that section defines that phrase to include "any properly identified patient or client." It appears that you are a "qualified person" and that you may assert rights of access under that statute.

Section 33.16(b) states in relevant part that a facility must respond to a request within ten days, and subdivision (d) of §33.13 pertains to the right to appeal a denial of access and states that:

> "(d) Clinical records access review committees. The commissioner of mental health the commissioner of mental retardation and developmental disabilities and the commissioner of alcoholism and substance abuse services shall appoint clinical record access review committees to hear appeals of the

> denial of access to patient or client records as provided in paragraph four of subdivision (c) of this section. Members of such committee shall be appointed by the respective commissioners. Such clinical record access review committees shall consist of no less than three nor more than five persons. The commissioners shall promulgate rules and regulations necessary to effectuate the provisions of this subdivision."

If you do not receive a satisfactory response to your request, it is suggested you request the rules and regulations from the appropriate commissioner in order to ensure that you are following the correct procedure and that you can properly assert your rights.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jesse Nixon, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9715

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 2, 1996

Mr. Carlos Samper
93-A-2614
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 information presented in your correspondence.

Dear Mr. Samper:

I have received your letter of September 19. You have asked whether you can assert the Freedom of Information Law to request "the records and files of the District Attorney's Office" that pertain to you.

From my perspective, the office of a district attorney is clearly required to disclose records pursuant to 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(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."

Since an office of a district attorney is a governmental entity that performs a governmental function, it constitutes an "agency" subject to the requirements of the Freedom of Information Law.

Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and a request may be directed to that person.

I point out that §89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9716

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 3, 1996

Mr. Gary L. Rhodes
[redacted]

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. Rhodes:

I have received your letter of September 21 and the materials attached to it. You asked whether a request for a preliminary application for a grant submitted by the Town of Henderson to the United States Rural Utilities Service was appropriately denied by that agency and whether you might be able to obtain it from the Town.

In this regard, as you are aware, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law, which pertains to records maintained by entities of state and local government. The Rural Utilities Service, which is part of the United States Department of Agriculture, is a federal agency that is not subject to the State's Freedom of Information Law, but rather the federal Freedom of Information Act (5 U.S.C. §552). Consequently, I cannot comment with respect to the propriety of its denial of your request.

However, I believe that the Town of Henderson would be required to disclose its copy of the document in question.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although §87(2)(g) of the Freedom of Information Law permits the withholding of inter-agency or intra-agency materials, depending upon the contents of those materials, it does not appear that §87(2)(g) could be cited to withhold communications between a local government agency, such as a town, and a federal agency.

Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The language quoted above indicates that an "agency" is an entity of state or local government in New York. Since the definition of "agency" does not include a federal agency, I do not believe that §87(2)(g) could be cited by the Town as a means of withholding records communicated between the Town and a federal governmental entity, for such an entity would not be an "agency" for the purpose of the state's Freedom of Information Law.

In short, as I understand its nature, none of the grounds for denial could properly be asserted by the Town to withhold the record in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Henderson
Joel M. Weirick, Freedom of Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9717

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 3, 1996

Mr. Peter Barbarisi
441-96-03238
14-14 Hazen Street
East Elmhurst, NY 11370

<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 information presented in your correspondence.</u>

Dear Mr. Barbarisi:

I have received your letter of September 27 and the correspondence attached to it. You have sought guidance concerning your unsuccessful efforts to obtain court records under the "'Freedom of Information Act' 5 U.S.C.A. 552."

In this regard, the statute that you cited is the federal Freedom of Information Act, which applies only to federal agencies. The statute that generally pertains to government records in New York is the New York State Freedom of Information Law. I point out, however, that the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is

not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you submit a new request to the clerk of the court that maintains the records in which you are interested and that you cite an applicable provision of law as the basis for your request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Clerk, Supreme Court, Queens County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9718

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 3, 1996

Mr. Jamal Key
93-A-7632
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 information presented in your correspondence.

Dear Mr. Key:

I have received your letter of September 21. You have sought information concerning "the rules governing disclosure" by the Westchester County Supreme Court, the Office of the District Attorney and the City of Yonkers Police Department.

In this regard, I offer the following general comments.

First, some of the items sought are court records. In this vein, 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) 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 or records used in evidence during a public judicial proceeding, for reasons to be discussed later, 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.

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.

Since you referred to 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 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. 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 §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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Clerk, Westchester County Supreme Court
Records Access Officer, Office of the District Attorney
Records Access Officer, City of Yonkers

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2668
FOIL-AO-9719

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of September 17 in which you raised a variety of issues concerning a meeting of the Investment Committee of the New York City Teachers' Retirement System Board of Trustees. In conjunction with your commentary, I offer the following remarks.

First, when a committee consists solely of members of a public body, such as the Board of Trustees of the Teachers' Retirement System, I believe that the Open Meetings Law is clearly applicable.

By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. Among the changes was a redefinition of the term "public body". "Public body" is now defined in §102(2) to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for 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."

Although the original definition made reference to entities that "transact" public business, the current definition makes reference to entities that "conduct" public business. Moreover, the definition makes specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the amendments to the definition of "public body", I believe that any entity consisting of two or more members of a public body, such as a committee or subcommittee consisting of members of the Board of Trustees, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of Trustees consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

Second, every meeting of a public body must be convened as an open meeting, and §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.

While I am unaware of the specific nature of the subject matter considered during the executive session to which you referred, I believe that two grounds for entry into executive session would likely be pertinent. Specifically, §105(1)(f) permits a public body to discuss, among other matters, the financial history of a particular corporation. In addition, §105(1)(h) permits a public body to conduct 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."

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 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, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. If a motion is made to enter into executive session, I believe that minutes must refer to the motion.

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. 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)].

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. Ordinarily, a record of votes of the members appear in minutes required to be prepared pursuant to §106 of the Open Meetings Law.

Lastly, it is noted that there is nothing in the Open Meetings Law or any other provision of law of which I am aware that deals with agendas or requires that they be prepared. However, if an agenda is prepared and includes a general description of the topics to be discussed, it would likely be available under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9720

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1996

Mr. Kevin Monroe
93-A-9440
Otisville Correctional Facility
P.O. Box 8
Otisville, NY 10963

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. Monroe:

I have received your letter of September 30, which reached this office on October 4. You have requested a copy of your probation report from this office. It is assumed that you are referring to your pre-sentence report.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to records. The Committee does not maintain records generally. In short, I cannot provide access to the report in question, because this agency does not maintain it. Nevertheless, 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 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. It is suggested that you review that statute.

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-9721

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1996

Mr. Wayne Tanner
President
Central Dover Development Corp.
177 Dover Furnace Road
Dover Plains, NY 12522

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. Tanner:

I have received your letter of October 1 in which you requested "a hearing" in order that you may appeal "the apparent refusal" of the Town of Dover to provide you with records reflective of expenses relating to certain litigation in which the Town is involved. Following your request, which was apparently made in March, the Town Clerk acknowledged its receipt on March 25 and indicated that the attorney in possession of the records sought had been contacted and you would be notified "at the earliest possible time to provide you with the information as requested."

In this regard, I offer the following comments.

First, there is no provision in the Freedom of Information Law that envisions a "hearing" relating to a request for or denial of access to records. Rather the right to appeal is described in the Freedom of Information Law. As indicated above, however, the Committee on Open Government and its staff have the authority to render advisory opinions. Although the remarks offered in the following paragraphs are advisory, it is our hope that opinions issued by this office are educational and persuasive.

By way of background, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 payments to a law firm, relevant is a recent decision involving a request for "the amount of money paid in 1994" to a particular law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" [Orange County Publications v. County of Orange, 637 NYS 2d 596 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the descriptive material) 'including descriptions of issues researched, meetings and conversations between attorney and client'" (id., 599). The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "...respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431 N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (*Ibid.*). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather '[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged' *Matter of Priest v. Hennessy*, *supra*, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (*Licensing Corporation of America v. National Hockey League Players Association*, 153 Misc.2d 126, 127-128 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; *see*, *De La Roche v. De La Roche*, 209 A.D.2d 157, 158-159, 617 N.Y.S.2d 767 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by

statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is *uniquely the product of the professional skills* of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (*Brandman v. Cross & Brown Co.*, 125 Misc.2d 185, 188, 479 N.Y.S.2d 435 [Sup. Ct. Kings Co. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (*See, id.*).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or as material prepared for litigation, or both" (id., 604-605; emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §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.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "Applying these guidelines to the facts at bar, the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law § 87(2)(g). *See, Matter of Dunlea v. Goldmark, supra*, 54 A.D.2d 449, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy, will not be barred from disclosure under this exemption. *See, Ingram v. Axelrod, supra*" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were

found to be accessible. In my view, the direction provided in Orange County Publications would be applicable to the situation to which you referred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Caroline Reichenberg, Town Clerk
Thomas Whalen, Special Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9722

162 Washington Avenue, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 9, 1996

Mr. Jeff Rockefeller
[redacted]

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. Rockefeller:

As you are aware, I have received copies of your appeals addressed to the Rensselaer County Sheriff's Department. Upon delivery of those documents, you requested an advisory opinion.

One of the issues involves the apparent failure of the Department to respond to your requests or appeals. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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)].

In short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

The first appeal pertains to your request for records identifying the inmates who were transported to court with you on a particular date. Here I point out that the Freedom of Information Law applies to existing records, and that an agency is not required to create a record in response to a request [see §89(3)]. Therefore, if there is no record containing the information sought, the Department would not be required to prepare a new record on your behalf. However, if such a record exists, I believe that it would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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, none of the grounds for denial could be justifiably asserted to withhold the information in question. I note that in a somewhat similar situation, it was held that records identifying inmates housed in a segregated housing unit at a state correctional facility with the inmate requesting the records had to be disclosed [Bensing v. LeFevre, 506 NYS2d 822 (1986)]. Also of possible relevance to the matter is §500-f of the Correction Law, which pertains to county jails and states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether so employed when arrested, number of previous convictions. The daily record shall be a public record and shall be kept permanently in the office of the keeper."

The other appeal involves a request for records indicating "any history of misconduct" on the part of two employees of the Sheriff's Department. 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 §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. 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" [Capital Newspapers v. Burns, 67 NYS 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)].

Also relevant is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The third ground for denial of significance, §87(2)(g) states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. The records sought in my opinion consist of intra-agency materials. However, insofar as your request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra]. Three of those decisions, Powhida, Scaccia and Farrell, involved findings of misconduct concerning police officers. Further, Scaccia dealt specifically with a determination by the Division of State Police to discipline a state police investigator. In that case, the Court rejected contentions that the record could be withheld as an unwarranted invasion of personal privacy or on the basis of §50-a of the Civil Rights Law.

It is also noted, however, that in Scaccia, it was found that although a final determination reflective of a finding of misconduct is public, the records leading to the determination could be withheld. Further, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff, Rensselaer County
Ingrid Gundrum

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9723

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. Paul Lucas
94-A-5108
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lucas:

I have received your letter of September 24, which reached this office on October 3. You have sought advice concerning rights of access to records which you requested from the Office of the Westchester 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 §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.

Also of potential 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.

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, it is assumed that your reference to a probation report involves a pre-sentence report. If that is so, I note that 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 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. It is suggested that you review that statute.

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-9724

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. Edward Laraby
94-B-1648
135 State Street
Auburn, NY 13021-0618

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. Laraby:

I have received your letter of September 27. You have complained with respect to the treatment of your requests by the Monroe County Records Access Officer and the Office of the Monroe County District Attorney. You indicated that you have been denied access to records relating to your recent conviction and to previous convictions.

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.

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).

Second, 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)].

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (section 1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Monroe County
Records Access Officer, Office of the Monroe County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9725

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. Eric Tolliver
94-B-1563
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tolliver:

I have received your letter of September 26. You have requested an opinion concerning the concerning your right to obtain records under the Freedom of Information Law from an attorney designated to represent you pursuant to Article 18-B of the County Law.

In this regard, first, it is noted at the outset that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally applies to records maintained by state and local government.

Second, Article 18-B encompasses §§772 to 722-f of the County Law. Under §722, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9726

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. James B. Calfa
[redacted]

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. Calfa:

I have received your letter of September 26 and the correspondence attached to it. You have complained that your requests for records sent to the Town of Brookhaven Traffic Safety Division have not been answered.

Based on a review of your correspondence, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and requests should generally be made to that person. While I believe that the recipient of your requests at the Traffic Safety Division should have responded in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to the Town's records access officer. To the best of my knowledge, the Town Clerk is so designated.

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, you requested records relating to accidents occurring at a particular intersection, as well as a traffic volume study, a traffic study and a "warranted for placement decision."

With respect to the first component of your request involving accidents occurring at a certain intersection, I point out that §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, if the Town maintains records pertaining to accidents by location, it is likely that records concerning a particular intersection could be readily located, and that the request would meet the standard of reasonably describing the records. On the other hand, if records of accidents are kept chronologically, and every such record had to be reviewed to ascertain the location of an accident, that standard likely would not be met.

Lastly, 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.

It would appear that the studies that you requested would fall within §87(2)(g). While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian Carrick
Stanley Allan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9927

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. Aramis Montalvo
86-A-2453
Pouch No. 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Montalvo:

I have received your letter of September 25 and the correspondence attached to it.

You sought guidance concerning your rights of access to records relating to your conviction maintained by the New York City Police Department. Having reviewed your request, I offer the following comments.

First, you referred to both the New York Freedom of Information Law and the federal Freedom of Information and Privacy Acts in your requests. The federal acts apply only to federal agencies; the Freedom of Information Law generally governs rights of access to government records maintained by entities of state and local government in New York.

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 §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, 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 arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of 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 9728

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 11, 1996

Mr. Robert Gunning
[redacted]

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. Gunning:

I have received your letter of September 20, as well as the materials attached to it. The correspondence pertains to your efforts in gaining access to certain applications submitted to the Department of Conservation and Waterways of the Town of Hempstead. The Deputy Town Attorney denied the request, citing §87(2)(g)(iii) of the Freedom of Information Law and stating that "this information is exempted from disclosure until such time as there is a final determination on the application." In addition, you complained that you have encountered delays in response to requests.

From my perspective, the applications in questions must be disclosed, even though no determination has been made. In this regard, I offer the following comments.

First, I note at the outset that the Freedom of Information Law pertains to all 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."

Based on the foregoing, when documentation is or comes into the possession of the Town, even if it is preliminary, draft or under review, it would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial could justifiably be asserted to withhold the applications in question.

The provision cited in the denial of your request, §87(2)(g), relates to "inter-agency or intra-agency materials." Inter-agency materials involve records transmitted between or among agencies; inter-agency materials involve records transmitted within an agency. The term "agency" is defined in §86(3) to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The language quoted above indicates that an "agency", in general, is an entity of state or local government; it is not a private entity. Therefore, an application submitted to the Town by a private entity, i.e., Crows Nest Marine, would constitute neither inter-agency nor intra-agency material, because that private entity is not an agency. That being so, I believe that any such application must be disclosed.

If Town officials in considering such applications have prepared letters or memoranda in which they have expressed their opinions concerning the adequacy or propriety of an application, I would agree that those kinds of documents would consist of intra-agency materials that could be withheld. However, a record submitted to the Town by a private entity or person would fall outside the scope of §87(2)(g), and that provision would not serve as a basis for a denial of access.

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 opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ronald Levinson
Susan Jacobs
Arnold Palleschi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9729

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1996

Mr. Joseph Plater
95-B-2336
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 information presented in your correspondence.

Dear Mr. Plater:

I have received your letter of September 29. You have sought guidance concerning how you can obtain information "from a non-federal agency", particularly information concerning when two individuals were admitted to and discharged from a hospital.

In this regard, I offer the following comments.

First, it is unclear what you intend to mean by a "non-federal agency." To put the matter in perspective, the federal Freedom of Information Act pertains to records maintained by federal government agencies. In addition, each state has enacted a statute dealing with public access to government records. In this state, the New York Freedom of Information Law applies to records of state and local government agencies. I know of no statute that provides the public with rights of access to records of private businesses or organizations.

More 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."

Second, neither the Freedom of Information Law nor any other law of which I am aware would provide the general public with the right to obtain hospital records indicating the time of a patient's admittance or discharge. Even if a hospital is a governmental entity subject to the Freedom of Information Law, I note that it authorizes an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)]. Further, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to medical or hospital information.

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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9730

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1996

Mr. David A. Usher
95-B-0224
Mt. McGregor Corr. Facility
PO Box 2071
Wilton, NY 12831

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. Usher:

I have received your letter of October 2. You referred to a request for records sent to the Department of Correctional Services on September 23 that had not been answered, and you sought assistance in the matter.

In this regard, I offer the following comments.

First, since your request involved records pertaining to you, I point out that the regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a correctional facility should be made to the facility superintendent or his designee. I would conjecture that most, if not all of the records requested would be maintained at your facility. As such, it is suggested that you submit a request to your facility in accordance with the Department's regulations.

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 by the Department to determine appeals is Counsel to the Department, Anthony J. Annucci.

I hope 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-9731

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 17, 1996

Mr. John Martire
90-T-1156
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 information presented in your correspondence.

Dear Mr. Martire:

I have received your letter of October 1, which reached this office on October 7. You indicated that you are interested in obtaining all records pertaining to you from the Division of Parole covering the period of December 29, 1995 to the following May 10.

It is unclear whether you are seeking the records from this office or whether you are asking for assistance in obtaining them. In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning access to records under the Freedom of Information Law. The Committee does not have possession of records generally, and it has no authority to acquire records on behalf of an applicant.

As a general matter, a request for records should be directed to the "records access officer" at the agency that maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. It is suggested that you request the records in question by writing to the records access officer at the Division of Parole, 97 Central Avenue, Albany, NY 12206.

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.

From my perspective, there would be no basis for withholding records that you prepared or that had been made available for your inspection in the past. However, insofar as the request involves

records that you did not prepare or have not seen, it is possible that one or more of the grounds for denial would be pertinent.

Section 87(2)(b) permits an agency to withhold record to the extent that disclosure would result in "an unwarranted invasion of personal privacy." That provision might apply to portions of records that identify persons other than yourself.

Also potentially 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 determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Records Access Officer, Division of Parole

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9732

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 17, 1996

Mr. Ian Dawes
88-B-0326
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dawes:

I have received your letter of September 7. Please accept my apologies for the delay in response.

According to your letter, you submitted a request at your facility to "review and inspect" records prepared in connection with two disciplinary hearings. However, you were informed that the facility would charge four dollars prior to any inspection of the documents, and you have sought assistance in the matter.

In this regard, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there may often be situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to officials of the Department of Correctional Services.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci
Robert Butera

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9733

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 17, 1996

James B. Bacon, Esq.
Bacon & Bernz
100 Little Britain Road
Newburgh, NY 12550

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bacon:

I have received your letter of October 4 in which you requested an advisory opinion concerning access to certain records.

You wrote that "[a] teacher is requesting that the school district release the content of certain letters that were sent by parents to the school district allegedly complaining about the teacher's conduct." You have asked "whether or not the teacher would be entitled to said letters if deletions were made to protect the children's identity as well as the parent's identity."

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.

Relevant under the circumstances is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students, I believe that they must be withheld. A 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.

Depending on the content of the records, in some instances it is possible that students' or parents' identities may be "easily traceable" even if names or other personal details are deleted. In those cases, it is likely that records could be withheld in their entirety. On the other hand, if students could not be identified following the deletion of names or other details, I believe that the records should be disclosed after the appropriate deletions are made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9734

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 21, 1996

Mr. Barry Finnerty
[redacted]

Dear Mr. Finnerty:

I have received your letter of October 1, which is addressed to the Committee on Open Government in care of Laurie T. McDermott.

Please be advised that Ms. McDermott is an assistant county attorney employed by the Office of the Orange County District Attorney. The Committee on Open Government is a unit of the Department of State that is authorized to provide advice concerning the Freedom of Information Law. While I am unfamiliar with your request, based on the content of your letter, I offer the following comments.

First, since you indicated that you are indigent and have no "financial means to acquire copies", I point out that the Freedom of Information Law contains no provision dealing with the waiver of fees due to indigency. In Whitehead v. Morgenthau [552 NYS 2d 518 (1990)], it was held that the office of a district attorney could charge fees based upon its established policy, even though the applicant was an indigent inmate.

Second, since there appears to be an issue regarding the timeliness of a response to a request, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Laurie T. McDermott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9735

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 21, 1996

Mr. Jimmy Williams
91-A-8494
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 information presented in your correspondence.

Dear Mr. Williams:

I have received your letter of October 2. You have sought assistance in relation to a request for records of the Department of Correctional Services in which you sought the records "which the NYS Dept. of Correctional Services, Division of Parole will be reviewing at [your] parole hearing." The request was denied because there was "no exact specification" of the records. It is your understanding that a response of that nature was "struck down by the courts."

In this regard, I offer the following comments.

First, I note that the Department of Correctional Services and the Division of Parole are separate agencies. Although employees of the Division may be assigned to or carry out their duties at a correctional facility, they do not have custody or control of records maintained by the Department of Correctional Services, and Department staff may have no knowledge of which records might be reviewed at a parole hearing. It is suggested that you contact the senior parole officer at your facility to ascertain the identity of the Division of Parole employee at the facility who could appropriately respond to your request.

Second, as a general matter, the Freedom of Information Law does not require that an applicant provide an "exact specification" of the records sought. When that statute was initially enacted in 1974, it required that an applicant request "identifiable" records. Therefore, if an applicant could not name the record sought or "identify" it with particularity, that person could not meet the standard of requesting identifiable records. In an effort to enhance its purposes, when the Freedom of Information Law was revised, the standard for requesting records was altered. Since

1978, §89(3) has stated that an applicant must merely "reasonably describe" the records sought. As you may be aware, it has been held by the Court of Appeals 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)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and 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 this instance, I am unaware of the means by which the Department currently maintains pertaining to inmates. Further, it is reiterated that Department staff may have no knowledge regarding the records that a different agency, the Division of Parole, intends to use or review relative to a hearing.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9736

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 22, 1996

Ms. Joyce M. Nunge
Business Education Teacher
Potsdam High School
29 Leroy Street
Potsdam, NY 13676

<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 information presented in your correspondence, unless otherwise indicated.</u>

Dear Ms. Nunge:

As you are aware, I have received your letter of October 7 in which you raised questions concerning the Freedom of Information Law.

By way of background, last month, you asked the Superintendent of the Potsdam School District for "a printout of the names of all teachers and their current salaries including salary step and approved graduate hours." You indicated by phone that the District has the ability to produce a printout containing the information sought. In response to the request, the Superintendent gave you a printout containing teachers' names and salaries, but "refused [your] request for the salary steps and graduate hours." You have asked whether the Superintendent "can, under the law", give you a printout containing the items in question, and if the answer is affirmative, whether you can distribute photocopies to others.

Based on the judicial interpretation of the Freedom of Information Law, the Superintendent must provide access to the information sought, and you may reproduce it as you see fit. 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 emphasized 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 of most significance concerning the kinds of items at issue 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 those persons, 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 the context of your inquiry, I note that in a decision cited earlier, Steinmetz, the records sought consisted of information similar to the items that you have requested. Specifically, the request in that case as described by the court involved the following items pertaining to teachers:

> "1. Step hired on.
> 2. Year hired
> 3. present step & column as of 9/79
> 4. All written approvals for courses including name of course and number of credits if available
> 5....or if written approval is missing...all names of courses and number of credits (for each course)

6. Verification of satisfactory completion of each course or how this is done."

In short, the court determined that the information described above must be disclosed, with the exception of a transcript or similar document that would indicate individuals' grades. Additionally, in a recent decision rendered by the Appellate Division, Third Department, it was held that disclosure of "an individual's educational background" would not result in an unwarranted invasion of personal privacy [Ruberti & Ferlazzo v. Division of State Police, 641 A.D.2d 411, 415 (1996)].

Lastly, in general, 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)].

In my view, since the record in which you are interested must be disclosed under the Freedom of Information Law, once it is disclosed to you, you may do with it as you see fit.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Superintendent and the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary P. Snell, Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9737

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 22, 1996

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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Kane:

I have received your letters of October 7 and October 15, as well as a copy of a response sent to you on October 9 by Alfred E. Stahl of the Fulton County Industrial Development Agency. You have sought an advisory opinion concerning a denial by the Agency of your request for a certain construction agreement involving Crossroads Incubator Corporation.

Based upon my understanding of the matter, the documentation in which you are interested is not kept, held, filed, produced or reproduced by, with or for the Fulton County Industrial Development agency or any other entity subject to the Freedom of Information Law. If that is so, the record that you are seeking would be beyond the scope of rights of access conferred by that statute.

I hope that the foregoing serves to enhance your understanding of the scope of the law.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfred E. Stahl

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9738

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 22, 1996

Mr. Alberto Paez
95-A-1820
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Paez:

I have received your letter dated September 31, which reached this office on October 8. You complained that several agencies have failed to respond to your requests for records in a timely manner.

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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, and requests should generally be made to that person. While I believe that the recipients of your requests should have responded in a manner consistent with the Freedom of Information Law, if you have not already done so, it is suggested that you resubmit your request to the agencies' records access officer.

I note that the Lincoln Hospital Center and the Emergency Medical Service are part of the New York City Health and Hospitals Corporation, whose central offices are located at 125 Worth Street, New York, NY 10013. Further, if you are seeking medical records pertaining to yourself, the statute that deals directly with patients' rights of access is §18 of the Public Health Law. In brief, that statute generally requires that a physician or hospital disclose medical records pertaining to a patient to that patient.

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 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-9739

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 23, 1996

Mr. William J. Risalek
88-A-1001
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 information presented in your correspondence.

Dear Mr. Risalek:

I have received your letter of October 7 in which you raised questions in relation to a request made under the Freedom of Information Law sent recently to the Division of Parole. Having reviewed the correspondence, 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 provides in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no documentation that specifies the criteria used to determine what constitutes an approved residence, the Division of Parole would not be obliged to prepare a record containing the information sought on your behalf. Similarly, if there is no list of offices in which a "special caseload" has been assigned, the Division would not be required to develop a list in an effort to respond to your request.

Second, insofar as the Division maintains records falling within the scope of your request, I note 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 not familiar with the records that might fall within of your request, several of the grounds for denial appear to be pertinent to the matter.

Of likely relevance is §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 basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the substance of many of the records sought would consist of factual information, instructions to staff that affect the public, or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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).

Again, I am unfamiliar with the records in question. However, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection or impair effective law enforcement 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.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." In the context of your request, it is possible that some aspects of the records in question would fall within the scope of §87(2)(f).

Lastly, in the event of an agency's failure to respond to a request, you asked what the Committee would "consider to be an appropriate length of time to wait before initiating an Article 78 proceeding to compel compliance." 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 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-9740

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 24, 1996

Mr. Robby Ellnor
96-B-1567
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442-4580

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. Ellnor:

I have received your recent letter. You have sought guidance concerning the use of the state and federal Freedom of Information Laws to gain access to court records.

In this regard, the federal Freedom of Information Act pertains to records maintained by federal agencies; it does not apply to courts. The statute that generally pertains to government records in New York is the New York State Freedom of Information Law. I point out, however, 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 the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is

not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

It is suggested that you submit a request to the clerk of the court that maintains the records in which you are interested and that you cite an applicable provision of law as the basis for your request.

I hope that the foregoing serves to clarify 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- 9741

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 24, 1996

Mr. Marvin K. Pefferman
[redacted]

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. Pefferman:

I have received your letter of October 9. You have complained with respect to a series of delays that you have encountered in your efforts to obtain records from the Division of Housing and Community Renewal.

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 that statute states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In a situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 note 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. While I am not familiar with the specific contents of the records in which you are interested, based on your description of them, it does not appear that the grounds for denial would be applicable.

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Division's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrice Huss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9742

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 24, 1996

Mr. Mark 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 information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 6, as well as a variety of related materials. You have sought an advisory opinion concerning the propriety of certain denials of access to records by the City of Long Beach.

By way of background, one of the attachments to your letter is an article that appeared in *Newsday* in which it was reported that:

> "The state comptroller's office has charged the city of Long Beach with illegally giving away tens of thousands of dollars to many of its departing employees and allowing current workers to exceed the time allotted for sick leave and vacations.
>
> "In a report issued earlier this year...the city was charged with improper termination payments and improper payment for unused leave time."

Following that disclosure, you requested from the City records concerning "all retired pensioned employees, including exempt employees, receiving bona fide legal pensions plus compensatory dollars from December 1990 to July 1996." The request was denied by the City's Corporation Counsel on the ground that disclosure would result in "an unwarranted invasion of personal privacy." He added that he was guided by the decision rendered in Bahlman v. Brier [462 NYS2d 381 (1983)]. You also referred to another request for "time and accrual records" relating to a particular retired employee that was denied.

From my perspective, with certain minor exceptions, the records containing the information sought must be disclosed. In general, records reflective of payments made to present or former public employees are, in my view, clearly available. Similarly, time and attendance records are accessible. 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. While two of the grounds for denial are relevant to an analysis of rights of access, neither in my opinion could validly be asserted to withhold the information in which you are interested.

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.

The records in question would constitute "intra-agency materials." However, they would appear to consist solely of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

Although somewhat tangential to the matter, 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 wages, including compensation for unused sick, vacation or personal leave, must be disclosed.

As suggested by Corporation Counsel, of primary 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 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.

Based upon the direction provided by the Freedom of Information Law and the courts, I believe that other records reflective of payments made to public employees are available. For instance, insofar as W-2 forms of public employees indicate gross wages, they must be disclosed. 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. That conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office in so holding (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

The records sought include information apparently derived from attendance records. While I am mindful of the decision rendered in Bahlman v. Brier, supra, it is emphasized that the decision was effectively reversed by the State's highest court. In a case dealing with attendance records indicating the dates and dates of sick leave claimed by a particular employee that was affirmed by the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need,

> good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

Although the records at issue are not attendance records, figures indicating payments based on or derived from attendance records coupled with salary records, would, for reasons described in the preceding commentary, be public.

Employees' social security numbers, home addresses, member and retirement numbers are unique identifiers and could in my view be withheld based on considerations of privacy. In my opinion, those items may be deleted prior to the disclosure of the remainder of the records.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the City of Long Beach officials identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward Eaton, City Manager
Joel Asarch, Corporation Counsel
Michael Barlotta, Jr., City Comptroller
Michael Zapson, President, City Council
Pearl Weill, Vice-President, City Council
Thomas Kelly, Councilman
Joel Crystal, Councilman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9743

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 25, 1996

Mr. Michael Purcell
76-A-2063 (HU 109)
P.O. Box 8
Otisville, NY 10963

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. Purcell:

I have received your letter of October 7. You have asked whether you have the right to review both your "parole and prison case files."

In response to a request to review your "institutional history records", you were told that you were not allowed to examine the records on your own to determine which might be useful to you. Further, you were asked to indicate "exactly which records you would want to see." You also wrote that you were interested in reviewing the "case files" pertaining to you and relating to your parole.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require that you identify the records in which you are interested or that you indicate "exactly" the record that you seek to review. Section 89(3) of the Freedom of Information Law states that an applicant must "reasonably describe" the records sought. Therefore, an applicant must provide sufficient detail to enable an agency to locate the records.

Second, I an unaware of whether the term "institutional history records" has a precise meaning. I note that §5.21 of the regulations promulgated by the Department of Correctional Services states that "personal history data" is available to an inmate. That phrase is defined to mean:

> "records consisting of inmate name, age, birthdate, birthplace, city or previous residence, physical description, occupation,

> correctional facilities in which the inmate has been incarcerated, commitment information and departmental actions regarding confinement and release."

There may be other records in an "institutional file" some of which may be available under the Freedom of Information Law, others of which may not. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 extent to which records would be available or deniable would be dependent upon their specific contents and the effects of disclosure in conjunction with the direction provided in §87(2). The same analysis would be applicable with respect to records pertaining to parole.

Third, if a record is accessible in its entirety, an applicant would have the right to review or inspect it at no charge. Thereafter, if copies are requested, the applicant could be required to pay the requisite fee for photocopying.

Lastly, if a request is denied in whole or in part, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roger Allen, Senior Counselor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9744

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. Temer J. Leary
Warren County Jail
Municipal Center
Lake George, NY 12845

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. Leary:

I have received your letter of October 10. You indicated that you requested records and "did all the proper steps", but that you were denied and are unaware of what "your next step should be."

In this regard, when a request is denied by an agency, the applicant has the right to 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, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that 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 (CPLR) [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)].

A proceeding initiated under Article 78 of the CPLR generally may be brought in the Supreme Court in the county in which the denial of access occurred. It is also noted that this office, as in this instance, renders advisory opinions concerning the Freedom of Information Law. If you believe that an advisory opinion would be useful to you, you may write again to this office. Advisory opinions are not prepared following the initiation of litigation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9745

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. David Rylance
Chair
Ulster County Community College
Board of Trustees
Stone Ridge, NY 12484

Dear Mr. Rylance:

I appreciate having received a copy of your determination of an appeal rendered under the Freedom of Information Law on October 10. In brief, you upheld a denial of a request for an "incident report on unlawful entry" into a building located at Ulster County Community College. You wrote that the record in question is protected under the provisions of the Family Educational Rights and Privacy Act (FERPA), and that disclosure would constitute an unwarranted invasion of personal privacy.

In this regard, I point out that the FERPA and the regulations promulgated by the United States Department of Education were amended recently. As you may be aware, FERPA pertains to education records identifiable to students. The phrase "education record" is defined in federal regulations to mean records relating to a student that are maintained by an educational agency or institution (34 CFR §99.3). However, the definition specifically excludes:

> "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..."

In addition, a recent amendment, §99.8(b)(1) states that:

"Records of a law enforcement unit means those records, files, documents, and other materials that are -

(i) Created by a law enforcement unit;

(ii) Created for a law enforcement purpose; and

(iii) Maintained by the law enforcement unit."

Based on the foregoing, if the report in question could be characterized as a record of a law enforcement unit, the FERPA likely would not serve as a basis for withholding the records. In that case, the record would be subject to whatever rights exist 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.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." If indeed disclosure of a student's identity would result in such an invasion, names or other identifying details may be deleted. However, if, following the deletions, a student's privacy would adequately be protected, I believe that the remainder of the record would be available.

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
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9746

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. Thomas B. Fish
95-A-7132
P.O. Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fish:

I have received your letter of October 10. You have asked whether it is possible under the Freedom of Information Law to obtain another person's school report cards, behavioral reports and school counselor reports.

From my perspective, those kinds of records would not be available without the consent of the person to whom the records pertain. 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.

Relevant under the circumstances is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this instance, of primary significance is the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232g.

In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student

eighteen years or over similarly waives his or her right to confidentiality.

In short, the kinds of records that you described would be exempt from disclosure, unless the person to whom the records pertain consents to disclosure.

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- 9747

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. Paul J. Nassetta
[redacted]

Hon. Carole A. Clearwater
Town Clerk
Town of Hyde Park
P.O. Box 311
Hyde Park, NY 12538

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Nassetta and Ms. Clearwater:

I have received correspondence from both of you concerning the same matter, specifically, requests directed to the Town of Hyde Park by Mr. Nassetta. Having reviewed the correspondence, I offer the following comments.

First, although the issue will be considered in greater detail later in this response, I note that the Freedom of Information Law contains two standards regarding the fees to be charged for copies of records. Section 87(1)(b)(iii) permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches. The other standard pertains to records that cannot be photocopied (i.e., computer tapes and discs, tape recordings, etc.). With respect to those records, the Law permits an agency to charge a fee based upon the actual cost of reproduction.

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. It is also important to note, however, that §86(4) of the Law defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda,

> opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if information is maintained in some physical form, it would 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 in the early days of the Freedom of Information Law 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, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, an agency is not 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 the context of certain of your requests, the question in my view involves whether or the extent to which the Town has the ability to generate the data in the format and with the combination of items that you requested. If the Town has the ability to generate the combination of data requested in the format in which you are interested, I believe that it would be required to do so. However, as indicated above, if the Town cannot extract or generate the combination of data or produce it in the format of your choice, I do not believe that it would be obliged to create a new program in order to accommodate you.

Third, one of the issues involves the requirement in the Freedom of Information Law that an applicant "reasonably describe" the records sought [see Freedom of Information Law, §89(3)]. 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. If, for example, the only method of locating references to lawsuits or settlements involves reviewing minutes of meetings, I would agree with Ms. Clearwater that neither she nor other Town officials would be obliged to review all of the minutes covering a period of years in an effort to locate those that might be pertinent. In that kind of situation, I do not believe that the request would meet the standard of reasonably describing the records. However, as the clerk suggested, you could review the minutes in an attempt to locate the information sought.

Next, in an effort to provide additional information regarding fees, I note that 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 electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape) to which data is transferred.

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 be considered to have been constructively denied. In such a circumstance, 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 [Flood v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that the foregoing will serve to enhance understanding of the Freedom of Information Law and resolve the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9748

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. Jody Allen
86-B-2551
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 information presented in your correspondence.

Dear Mr. Allen:

I have received your letter of October 8. You have asked that this office "protect [your] constitutional rights" in relation to alleged failures to respond appropriately to an "omnibus motion for discovery" and a request made under the Freedom of Information Law to the office of a district attorney.

In this regard, I offer the following comments.

First, the primary function of the Committee on Open Government involves providing advice concerning public rights of access conferred by the state's Freedom of Information Law. It is generally not involved in protecting constitutional rights.

Second, 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.

Stated differently, the records that you might have the right to obtain as a member of the public under the Freedom of Information Law may differ from those that you might obtain under a discovery motion.

Second, since you complained with respect to a delay in response, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-205
FOIL-AO-9749

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1996

Mr. Alfredo Rivera
91-B-0987
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 information presented in your correspondence.

Dear Mr. Rivera:

I have received your letter of October 4. You described a situation in which you believe that you were a victim of discrimination in the workplace. The matter involved a private employer, the City of Rochester Police Department and the Division of Parole. You have sought assistance in the matter, as well as information about the Freedom of Information Law and the "Privacy Information Law."

In this regard, I offer the following comments.

First, the functions of this office do not pertain to matters relating to claims of discrimination. Therefore, it is suggested that you contact the regional office of the State Division of Human Rights, which is located at 65 Court Street, Buffalo, NY 14202.

Second, the Freedom of Information Law applies 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 on the foregoing, the Freedom of Information Law clearly applies to records maintained by a city police department or the

Division of Parole. However, it would not apply to a private company, such as your former employer.

To seek records under the Freedom of Information Law, a request should be directed to an agency's designated "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records. Further, §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 of your interest.

Lastly, I note that the state's Personal Privacy Protection Law would not apply to the agencies to which you might request records. That statute pertains to state agencies only; it does not apply to units of local government, such as a city or its police department. While the Division of Parole is a state agency, rights of access by the subjects of records do not extend to "public safety agency records", such as those maintained by the Division of Parole pertaining to parolees.

Enclosed for your review is an explanatory brochure concerning the Freedom of Information Law that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9750

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 29, 1996

Mr. Jose Rivera
94-A-1656
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051-0999

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. Rivera:

I have received your letter of October 9 which you wrote for "the purpose of clearing up some confusions" concerning the Freedom of Information Law. Specifically, you asked whether it is "illegal" for your grandfather to withhold information about your mother, such as the location of her burial or her death certificate. You also asked whether there is a way to determine whether your father is alive or dead.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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 on the foregoing, in general, the Freedom of Information Law applies to records maintained by entities of state and local government in New York. Private persons are not required to comply with that statute, and I know of no provision of law that would require your grandfather to provide information to you.

If you are aware of where your mother died, i.e., which city or town, as her son, you would have the right under §4174 of the

Public Health Law to obtain a death certificate and related records from the registrar of vital records.

With respect to your father, the same would be so. Further, if he is or was an inmate in a state correctional facility, you can acquire various information about him from the Department of Correctional Services. I note that §5.21(b) of the Department's regulations states that:

> "The immediate family of an inmate shall be entitled to the following information without authorization from the inmate: correctional facility in which confined, general state of health, nature of injury or illness, date of death, cause of death, and departmental actions regarding release and confinement. Other information shall be released in the discretion of the custodian or his designee, unless otherwise provided for herein."

The regulations also indicate that a request for records kept at a correctional facility should be made to the facility superintendent; to seek records from the Department's central offices in Albany, a request may be directed to the Deputy Commissioner for Administration.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9751

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 29, 1996

Mr. Michael Caputo
Democrat and Chronicle
55 Exchange Boulevard
Rochester, NY 14614-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Caputo:

I have received your letter of October 15 in which you requested an advisory opinion concerning the propriety of a denial of access to records by Monroe County.

According to your letter, following a decision to privatize the operation of three County golf courses, the County issued a request for proposals ("RFP") for contractors to manage the golf courses. Six proposals were submitted by the deadline set by the County, and a committee established by the County selected Jack Tindale, Inc. ("Tindale"). The contract with that firm is currently under negotiation and is subject to approval by the County Legislature. You added that the County is not negotiating with any other submitter of an RFP. After the announcement to the selection of Tindale, you requested release of all six proposals. The County denied both your initial request and your appeal, citing §87(2)(c) of the Freedom of Information Law and contending that disclosure "could impair present or imminent contract awards and could impair ongoing collective bargaining negotiations."

From my perspective, it is doubtful that the County could justify a denial of access. 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 suggested in the response to your request and appeal, 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." In my view, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding a contract.

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. In the traditional competitive bidding process, 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 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, even before a contract has been signed.

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 several of the submitters resulting in alterations in proposals or costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

In this case, the County has selected the contractor; it is not negotiating and evidently has no intent to negotiate with any other submitter of an RFP. If that is so, I do not believe that there would be a basis for withholding, for disclosure would not in any apparent way "impair" the contracting process. I point out that it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable

expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. While the cited decision involved a request for the winning bid and related documents, I believe that it is implicit the other bids would be available, for disclosure would have no impact, i.e., "impairment", relative to this process.

Claims have been made in situations similar to that described in your letter that proposals and other records pertaining to the RFP process may always be withheld prior to the final award of a contract. In general, I have disagreed with those kinds of blanket assertions. Again, unlike the bid process in which an agency essentially has no choice but to accept the low appropriate bid, in the RFP process, the figures offered by submitters are subject to negotiation and change; they do not reflect the "bottom line." In view of the flexibility of the process, it is difficult to envision how disclosure of those figures would adversely affect an agency's ability to engage in the best contractual arrangement on behalf of the taxpayers.

It has also been contended that the kinds of records at issue should be withheld because the negotiations with the apparently successful submitter may not culminate in an agreement or may be rejected by the ultimate decision maker, such as the County Legislature in this instance. It is my understanding that the RFP process is intended to encourage creativity on the part of submitters so that they can offer the best possible solutions in terms of an agency's needs or goals. That being so, and because proposals are subject to negotiation and alteration, even if the apparently successful proposal is rejected or set aside for some reason, the agency is not bound but rather is free to continue to attempt to engage in an optimal agreement. If anything, disclosure might encourage submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal. Rather than impairing the process, disclosure might enhance it.

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, I recognize that the County referred to the impairment of collective bargaining negotiations. It is unclear whether the responses merely referred to the elements of §87(2)(c) in their entirety, or whether collective bargaining negotiations are in some way pertinent to the matter. Nevertheless, in view of the disclosures that have already been made, particularly the County's public expression of its intent to privatize and its selection of a contractor, it does not appear that the component of §87(2)(c) relating to collective bargaining is especially critical.

In an effort to encourage the County to reconsider its position, copies of this opinion will be forwarded to County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard F. Mackey
John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9752

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 30, 1996

Mr. Edwin Ortega
94-A 3689
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 information presented in your correspondence.

Dear Mr. Ortega:

I have received your letter of September 28, which, for reasons unknown, did not reach this office until October 16. In brief, you complained with respect to failures to respond to your requests for records maintained by facilities of the Department of Correctional Services, and you have sought guidance in the matter.

In this regard, I offer the following comments.

First, since the correspondence attached to your letter indicates that requests were made to senior counselors at your facilities, I point out that the Department regulations state that a request for records kept at a facility should be directed to the facility superintendent or his designee. If the counselors are not so designated, while I believe that they should have responded in accordance with the Freedom of Information Law or forwarded your requests to the appropriate persons, it is suggested that you resubmit your requests to the proper persons.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9753

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1996

Mr. Ryan Porter
95-A-5659
P.O. Box T
Brocton, NY 14716-0679

Dear Mr. Porter:

I have received your recent undated letter in which you requested information concerning the means by which you may obtain records under the "FOIA" relating to a number of renowned individuals, as well as your biological mother. You added that, due to your incarceration, you cannot pay any fees.

In this regard, I offer the following comments.

First, the "FOIA", or Freedom of Information Act, is a federal statute that pertains to records maintained by federal agencies. This office is a New York State agency with the authority to provide advice concerning the State counterpart, the Freedom of Information Law. That statute applies to records maintained by entities of state and local government.

Second, to seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that you believe maintains the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. I note 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 staff to locate and identify the records.

A similar procedure exists under the federal Act. Under that Act, each agency has designated a freedom of information officer, and a request may be made to that person at the appropriate federal agency.

Lastly, while the federal Freedom of Information Act contains provisions involving the waiver of fees, the state Freedom of Information Law includes no such provision. Further, it has been held that an agency may charge its established fee, even though a request is made by an indigent inmate [Whitehead v.Morgenthau, 552 NYS 2d 518 (1990)].

As you requested, enclosed are copies of the Freedom of Information Law and an explanatory brochure that may be useful to you, for it contains a sample letter of request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3676
FOIL-AO-9754

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1996

Ms. Linda A. Mangano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Mangano:

I have received a series of letters from you, as well as a variety of material relating to them. You have raised a number of issues concerning the implementation of the Freedom of Information and Open Meetings Laws by the Town/Village of Ossining. In the following paragraphs, I will attempt to deal generally with them.

You asked "how important" it may be to include in the approved minutes of a meeting comments made by members of the audience. In my view, while the minutes may include reference to those kinds of comments or statements, there is no requirement that they be included. The Open Meetings Law provides what might be viewed as minimum requirements concerning the content of minutes. Section 106(1) of that statute provides that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting or that they include reference to each remark that might have been made.

However, if a public body or its clerk as a matter of practice or policy refers in some way to speakers in minutes, it has been suggested that any such references by consistent. For instance, if some kind of reference is intended to be made with respect to speakers, I believe that the reference should relate to all such speakers; minutes should not include or exclude reference to comments because of the points of view expressed.

A related matter concerning meetings of the Village Board of Trustees involves your statement that the meetings are videotaped by a person paid by the Village to do so. You wrote that the fees for copies of videotapes varies, and you have contended that the tapes must be retained by the Village.

It is unclear on the basis of your letter whether the videotapes are prepared for the Village and can be considered to be Village records. If they are the private property of the person who prepares the videotapes, the Freedom of Information Law would not apply and that person could do with those tapes or charge for copies as she sees fit. On the other hand, if the videotapes are produced for the Village, I believe that they would constitute Village records subject to rights conferred by the Freedom of Information Law. I note that the fee for copies of a videotape would, according to §87(1)(b)(iii) of the Freedom of Information Law, be based on the actual cost of reproduction.

Similarly, if the videotape is a Village record, it would be subject to the records retention requirements imposed by Article 57-A of the Arts and Cultural Affairs Law. To the best of my knowledge, audio and videotapes of meetings must be retained for a minimum of four months. At that time they may be destroyed or reused.

Next, you referred to a request for a time sheet, and that you were sent a "smidgeon" of what you requested, and you asked what you may do in that event. As a general matter, I believe that time sheets or similar records indicating when a public employee arrives at or leaves work, as well as the days and dates of leave time used or accrued, must be disclosed [see Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986)].

If you believe that a response to a request is incomplete and that a portion of a record or records might have been withheld, you would have the right to appeal the denial of access 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."

You also referred to situations in which you have made requests where the receipt of those requests has been acknowledged but where you "have no idea when [you] can expect the information."

Under §89(3) of the Freedom of Information Law, if an agency needs more than five business days to determine rights of access to records, it may acknowledge the receipt of the request in writing within that period and extend the time for reaching its determination. However, when the agency chooses to do so, the cited provision requires that the letter of acknowledgement include an estimate of the date when the agency believes it will be able to grant or deny the request.

In one series of requests, you sought information by raising a variety of questions. In this regard, as you may be aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. Similarly, while I believe that an agency is required to respond to a request for existing records, agency officials in my view in a technical sense are not required to answer questions or to provide information that does not exist in the form of a record or records in response to questions.

Since the questions relate to a building construction and permits, in general, I believe that permits or records reflective of violations of a building code, for example, must be disclosed.

One of your inquiries involves a request for the Village's laws concerning fire escapes. While laws, codes, regulations and the like are clearly available under the Freedom of Information Law, a potentially relevant issues involves the requirement in the Freedom of Information Law, §89(3), that an applicant "reasonably describe" the records sought. Whether a request meets that standard may be dependent upon the nature of an agency's filing or recordkeeping system. If, for instance, there are sections of the Village Code that relate directly to fire escapes, it would likely be easy to locate the applicable provisions. However, if references to fire escapes are made in a variety of provisions that are not indexed in a manner that would enable Village officials to locate each that might apply, a request likely would not meet the standard of reasonably describing the records.

Another area of concern relates to situations in which some people are required to request records in writing, while others may obtain records in response to oral requests. Pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), an agency may require that a request be made in writing, but in its discretion, it may also accept oral requests. From my perspective, an agency should have flexibility to respond to requests in a manner that is efficient and sensible. In some instances, requests might involve a search for records or an evaluation of their content to determine rights of access. In those instances, it may be fully appropriate to require that a request be made in writing. On the other hand, there may be other cases in which records are unquestionably public and readily retrievable. For example, if a person enters the clerk's office and asks for the minutes of the last meeting, the clerk might simply direct that person to the

minute book rather than requiring a written request. In my view, that would be fully appropriate.

You raised a similar issue with respect to the assessment of fees for copies of records. In short, you have contended that some people must pay for copies, while others receive copies at no charge. Again, I believe that an agency should carry out its duties reasonably and consistently. If a particular record or number of records is made available to one applicant for free, I believe that other applicants should receive the same treatment.

A possible exception might arise in conjunction with the legislative declaration appearing at the beginning of the Freedom of Information Law which refers to the public being "represented by a free press." Because the news media serves as the eyes and ears of the public, and because a disclosure to the news media may effectively be a disclosure to thousands of people, it is not unusual for an entity of government to provide information free or even unsolicited to the news media. From my perspective, disclosures of that nature would be consistent with the thrust and intent of the Freedom of Information Law.

I point out that the printed materials that you enclosed dealing with fee waivers pertain to the federal Freedom of Information and Privacy Acts (5 U.S.C. §552 and 552a respectively), which apply to federal agencies only. As you may be aware, the state counterpart contains no provision concerning fee waivers.

Lastly, you referred to a "list of pet peeves" to which allusion was made at a meeting. It is unclear whether such a list exists in writing. In this regard, as indicated earlier, since the Freedom of Information Law pertains to existing records, if there is no such list, that statute would not apply. If it does exist, it would fall within the coverage 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gennaro Faiella, Village Manager
Marie A. Fuesy, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9755

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1996

Mr. Mark James
96-A-2884
Box 500
Elmira, NY 14902-0500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. James:

I have received your letter of October 14. You have sought an advisory opinion concerning whether personnel files and employment histories, as well as your files, maintained by the Legal Aid Society of Westchester County must be disclosed.

In this regard, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

Having contacted the Legal Aid Society of Westchester County on your behalf, I was informed that is not part of County government but rather is separate entity. That being so, I do not believe that it would be required to comply with the Freedom of Information Law or otherwise disclose its records to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9755A

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

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 information presented in your correspondence, unless otherwise indicated.

Dear Mr. Mentzer:

I have received your letter of October 17, as well as the materials attached to it. You have questioned a response to a request directed to the New York State Teachers' Retirement System.

You requested "breakdown of FAS [final average salary], by year, for each of the applicable years, that shows what categories of income (and how much of each) contributed to the FAS" relative to certain teachers formerly employed by the Wappingers Central School District. The Retirement System indicated that it does not maintain the kind of information that you requested. It is your view that the Retirement System must have the information in question "in order to arrive at the FAS value for each of the applicable years."

Having contacted Roger Fink, the Retirement System's newly designated records access officer, he confirmed that his agency does not maintain the information sought and does not have the capacity to generate it. In short, the Retirement System acquires information concerning retired teachers from their former employers, and it does not routinely acquire the kind of detailed data in which you are interested. It is suggested that the repository of the information you seek would be the Wappingers Central School District, the employing agency.

You also raised a question concerning your request for "a copy of the listing of public records maintained by NYSTRS per Freedom of Information requirements." You were informed that "additional time" would be needed to respond. It is assumed that the request relates to the "subject matter list." In this regard, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of

Information Law [see §89(3)]. One of the exceptions relates to a list of records maintained by an agency. Specifically, §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. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roger Fink, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2078
FOIL-AO-9756

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

Ms. Rita Randall
[redacted]

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 Ms. Randall:

I have received your letter of October 18. You have raised a series of questions pertaining to the Town of Lake Luzerne that relate to both the Open Meetings Law and access to records under the Freedom of Information Law.

The first concerns meetings held prior to each Planning Board meeting during which the Zoning Enforcement Officer and "at least two Planning Board members" gather to discuss the agenda. In this regard, if less than a majority of the Planning Board is present, the Open Meetings Law would not apply, and the gathering could be conducted in private. However, if a majority is present to discuss public business, I believe that the gathering would constitute a "meeting" subject to the Open Meetings Law.

By way of background, it is emphasized that the definition of "meeting" [see Open Meetings Law, §102(1) has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals, the state's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," held for the purpose of discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In considering 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 convenes to discuss the public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, notice of the time and place of every meeting must be given to the news media and to the public by means of posting in accordance with §104 of the Open Meetings Law, which 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, 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.

You also referred to situations in which the Town Board enters into an executive session and requires that the public leave the room. Since there are no other places to sit, you asked whether it is proper to make the public leave the room. In my view, the Board would clearly have the ability to exclude the public from its executive session. If the meeting room is the only location in which the executive session can be held, the Board may have no reasonable option other than requiring that members of the public leave the room. However, if a different room is available to the Board for its executive session, in consideration for the public, it would be reasonable in my opinion for the Board to conduct the executive session in the other room in order that members of the public could remain in the meeting room until the open meeting continues after the executive session.

Reference was made to the Town Clerk, who leaves the meeting when the Board goes into executive session, and you asked "who is supposed to take the minutes after the Clerk leaves..." In this regard, §105(2) of the Open Meetings Law states that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, although the Town Board could choose to enable the town clerk or others to attend an executive session, only the members of the Town Board have the right to attend an executive session. However, §30(1) of the Town Law specifies that the town clerk "shall attend all meetings of the town board, act as clerk thereof, and keep a complete and accurate record of the proceedings of each meeting..." In my opinion, §30 of the Town Law is intended to require the presence of the clerk to take minutes in situations in which motions and resolutions are made and in which votes are taken.

To give effect to both the Open Meetings Law and §30 of the Town Law, which imposes certain responsibilities upon a town clerk, it is suggested that there may be three options. First, the Town Board could permit the clerk to attend an executive session in its entirety. Second, the Town Board could deliberate during an executive session without the clerk's presence. However, prior to any vote, the clerk could be called into the executive session for the purpose of taking minutes in conjunction with the duties imposed by the Town Law. And third, the Town Board could deliberate toward a decision during an executive session, but return to an open meeting for the purpose of taking action.

Lastly, following an application that you made to the Planning Board, a person who sent a letter to a member of the Board requested "confidentiality", and your request for a copy of the letter was denied on that basis. You asked whether marking a document "confidential" serves to enable an agency to withhold it.

Here I direct your attention to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my opinion, an assertion, a request or a claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §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 justify withholding a record. In this instance, I am unaware of any statute that would render the report exempted from disclosure by statute. It is also noted that it has been held that a rule or regulation promulgated by an agency cannot be cited as a "statute" that would serve to exempt records from disclosure [see 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) and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)].

Notwithstanding the absence of any justification for withholding the letter based on a claim of confidentiality, it is possible, depending on the facts, that some aspects of the letter might properly be withheld. Section 87(2)(b) of the Freedom of

Information Law permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." If the letter was written by a member of public who sought to express his or her point of view concerning the application, it is likely that identifying details pertaining to that person could be deleted to protect privacy. The remainder of the letter might be available. If the letter was written by or for a business entity, an organization or association of some sort, there would likely be no personal privacy implications. In that event, it appears that the letter would be accessible in its entirety.

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Law, copies of this opinion will be forwarded the Town Board and the Planning Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9757

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

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 information presented in your correspondence.

Dear Mr. and Ms. Uciechowski:

I have received your letter of October 20. You indicated that the Office of the Sullivan County District Attorney failed to respond to a request made under the Freedom of Information Law within five business days, and you asked that I "inform the District Attorney's office that they are acting in violation" of that statute and provide assistance in the matter.

In this regard, the Committee on Open Government is not a court and it has no authority to determine that an agency has violated any provision of law. This office is empowered to provide advice and opinions, however, and 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, you indicated that you would be charged fifty cents per page for copies of records. In short, unless a statute, i.e., an act of the State Legislature, provides otherwise, an agency can charge no more than twenty-five cents for photocopies up to nine by fourteen inches [Freedom of Information Law, §87(1)(b)(iii)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Attorney Lungen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9758

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

Mr. Robert Vogel
88-A-9768
P.O. Box 999
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 information presented in your correspondence.

Dear Mr. Vogel:

I have received your letter of October 15 in which you sought assistance in obtaining your pre-sentence report and related materials.

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 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. It is suggested that you review that statute.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy E. Miller
David R. Huey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9759

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

Mr. John Liberatore
95-C-0155 F-02-26
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 information presented in your correspondence.

Dear Mr. Liberatore:

I have received your letter of October 15. You described a series of difficulties in obtaining medical records pertaining to yourself from your correctional facility and the Department of Correctional Services, and you have sought assistance in the matter.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by the Department and its facilities. In terms of rights granted by the Freedom of Information Law, the Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With regard to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by Department personnel could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g) of the Freedom of Information Law. To the extent that such materials consist of advice, opinion, recommendation and the like, I believe that the Freedom of Information Law would permit a denial.

Second, a different statute, §18 of the Public Health Law, is of greater significance than the Freedom of Information Law. In brief, that statute generally grants rights of access to medical records to the subjects of the records. As such, that statute may

provide greater access to medical records than the Freedom of Information Law. It is suggested that you refer to §18 of the Public Health Law in any request for medical records.

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

> Access to Patient Information Coordinator
> New York State Department of Health
> Division of Public Health Protection
> Corning Tower Building - Room 2517
> Empire State Plaza
> Albany, New York 12237

Lastly, in view of the alleged failures to respond to your requests, it appears that you have been constructively denied access to the records sought. If that is so, I believe that you may appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Director of Health Services
Nurse Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT FOIL-AO-9760

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

Mr. Carlos Samper
93-A-2614
P.O. Box 700
Wallkill, NY 12589-0700

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Samper:

I have received your letter of October 14. You wrote that you are interested in obtaining "statistics of those that have been found guilty of criminal actions in the State of New York, but who were later found to be not guilty of those charges." You wrote that you are "particularly interested in those convicted of murder, later found to be innocent - through say, the 1950's till now."

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 that statute provides in part that an agency is not required to create a record in response to a request. I point out, 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 some fifteen 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, 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 the information that you seek does not now exist or cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

Assuming that the statistics that you seek do exist or can be generated, I believe that they would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed.

Lastly, if any agency maintains the statistics of your interest, I believe that it would be the Division of Criminal Justice Services. It is suggested that a request be directed to the records access officer at that agency, which is located at Executive Park Tower, Stuyvesant Plaza, Albany, NY 12203.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9761

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 1, 1996

Mr. S. A. Jackson
92-B-2901
Box 500
Elmira, NY 14902-0500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 14 in which you requested assistance in your efforts in obtaining records from Onondaga County.

The first issue involves requests for grievances that you submitted during a certain period. Although the front pages of those documents were disclosed, the remainder was apparently withheld. 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. Assuming that grievances were prepared and submitted by yourself, it does not appear that any ground for denial could justifiably be asserted.

When a request is denied in whole or in part, an agency is required to inform the applicant of the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

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)].

I believe that the person designated in Onondaga County Government to determine appeals is the County Attorney.

A second issue involves an unanswered request for medical records. It is assumed that those records were prepared during your stay at the Onondaga County Jail. Medical records pertaining to you would generally be available pursuant to §18 of the Public Health Law. In brief, that provision requires that a physician or medical facility provide access to medical records to the subjects of those records.

Next, you referred to a request for a copy of an incident report relating to a fall in your cell. Potentially relevant with respect to rights of access would be §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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Kevin Welsh
Deputy Sheriff Elaine Evans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9762

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 4, 1996

Nicholas J. Sargent, P.C.
Attorneys and Counsellors at Law
1300 Key Tower
50 Fountain Plaza
Buffalo, NY 14202-2270

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, unless otherwise indicated.

Dear Mr. Sargent:

As you are aware, I have received your letter of October 31. You have sought my views in your capacity as attorney for the Barker Central School District and its Board of Education concerning its ability or obligation to disclose a certain report.

By way of background, you wrote that the Board:

> "hired an attorney to investigate allegations of administrators requesting teachers to erase incorrect answers on the District's third grade PEP test. The attorney's investigative report identified several students, witnesses and teachers by name. In addition, attached to the report were several exhibits. The Board of Education requested our opinion whether the report was subject to a FOIL request. We rendered an opinion that the final report was not subject to the disclosure requirement of FOIL..."

It is your view that the report in question consists of intra-agency material and that it falls within the scope of the attorney-client privilege, and that it may be withheld in conjunction with either of those claims.

Nevertheless, the Board recently adopted a resolution expressing its desire to release the report: "with names redacted pending [my] opinion whether a redacted report would results in the release of (a) childrens' names, (b) witnesses' names, (c)

teachers' names, (d) exhibits or (e) none, all or part of the foregoing..." It is my understanding based upon conversations with you and others that the Superintendent has tendered his resignation and that the names of those who are the subject of the investigation or charges have been made known to the public.

From my perspective, the Board has the following options:

> (1) if the report falls within the scope of the attorney-client privilege, it may be withheld in its entirety;
>
> (2) the Board may waive the privilege and disclose the report, except to the extent that it includes personally identifiable information pertaining to students;
>
> (3) the Board may waive the privilege and withhold personally identifiable information regarding students, as well as others insofar as disclosure would constitute "an unwarranted invasion of personal privacy"; or
>
> (4) if the attorney-client privilege does not apply, the report could be withheld insofar as it consists of opinions or recommendations and personally identifying details the disclosure of which would consist of an unwarranted invasion of personal privacy, and it must withhold personally identifiable information pertaining to students.

In this regard, I offer the following analysis of the matter.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, although the District could in my opinion withhold the report in great measure or perhaps in its entirety, I point out that the Freedom of Information Law is permissive. In other words, with one exception, an agency has the discretionary authority to disclose records, even though the records or portions thereof fall within the grounds for denial referenced above [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

The one exception under which an agency would not have the authority to disclose would involve a case in which a statute forbids disclosure. The first ground for denial, §87(2)(a), deals with that kind of situation, for it relates 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."

Further, the federal regulations promulgated under the FERPA 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", portions of records must be kept confidential if they pertain to a student or to a student's parent, for the disclosure of the parent's name would identify the student.

I note that 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..."

Nevertheless, in my opinion, records prepared in conjunction with an investigation of a staff member or 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, to the extent that 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. Therefore, insofar as the records at issue include information identifiable to students, I believe that

those portions must be withheld in order to comply with federal law, unless a parent of a student consents to disclosure.

Section 87(2)(a) also is pertinent with respect to the attorney-client privilege. 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.

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)].

If indeed the report prepared by the attorney for the District falls within the scope of the attorney-client privilege, I believe that the Board could withhold it. However, the Board, as the client, would have the discretionary authority to waive the privilege. As such, the Board could choose to disclose the entire report, again, with the exception of those portions that are personally identifiable to students.

Also pertinent is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Even if FERPA is inapplicable, I believe that disclosure of those portions of the records identifiable to students could be withheld on the basis of §87(2)(b).

That provision might also apply with respect to others named or identified in the records. For instance, you referred to witnesses and teachers. It is not entirely clear who the witnesses might be or what the involvement of teachers might have been. I note, however, that 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 following a private hearing 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 the context of the situation at issue, while the names of those under investigation or charged may ordinarily be withheld, in view of the disclosures that have already occurred, it would appear that the Board could choose to disclose the identities of those persons and other staff members named in the report.

Lastly, notwithstanding the likelihood that the report falls within the coverage of the attorney-client privilege, it is assumed that the report in question was prepared by an attorney acting as a consultant. 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. Again, to the extent that the report consists of advice, opinions or recommendations offered by the attorney, the Board could withhold it. Nevertheless, for reasons described earlier, the Board could choose to disclose those elements of the report due to the permissive nature of the Freedom of Information Law.

In sum, based upon my understanding of the matter, the Board would have the authority to disclose the report in its entirety, except to the extent that it includes personally identifiable information pertaining to students.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9763

Albany, New York 12231
(518) 474-2518
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November 4, 1996

Ms. Janice M. Pennington
[redacted]

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 Ms. Pennington:

I have received your letter of October 16 and the materials attached to it. As I understand the matter, the Wende Correctional Facility provided access to the records that you sought, but failed to provide the certification that you requested. You considered such failure to be a denial of your request and appealed the denial to Counsel to the Department of Correctional Services.

From my perspective, a failure to provide the requested certification would not constitute a denial of access to records, but rather a procedural inadequacy. When a request for a record is approved, §89(3) of the Freedom of Information Law states in part that:

> "Upon payment 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."

Based upon the foregoing, an agency is required to certify that a copy of a record made or to be made available is a true copy upon request to do so. In my view, 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. As I understand the facts, the records were disclosed; there was no denial of access. Consequently, it is suggested that you contact the person who disclosed the records and seek the requisite certification.

I note that you indicated in one of your requests that "willful non-compliance with this request is a violation Public Officers Law §89(8) and Penal Law §240.65." In my view, those provisions do not apply to every "willful" failure to comply with the Freedom of Information Law. I believe that they apply in two situations: when an agency indicates that it does not maintain a requested record and knows that does maintain such record, or when an agency destroys a requested record in order prevent disclosure of the record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel
T. Dietsch, Corrections Counselor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9764

Albany, New York 12231
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November 4, 1996

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 information presented in your correspondence.

Dear Mr. Mentzer:

I have received your letter of October 19. You referred to a request directed to the Wappingers Central School District for a list of teachers who are not members of a certain union. You indicated that the request was denied by the District's records access officer based on a conversation that he had with me, and you questioned why the information in question is not available under the Freedom of Information Law.

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.

From my perspective, the issue is whether disclosure of the information sought would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. 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. 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); 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 last decision cited, Wool, dealt with a request analogous to yours. In that case, the issue involved a request for a record that identified public employees by name and salary, and the same record included a column indicating which among the employees had deductions made for payment of union dues. The court held that salary information is clearly available, but that the column 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 the functioning of his or her employer." In Wool, certain employees had the option of joining a union or not doing so. Consequently, it was held that the portion of the record indicating the payment or non-payment of union membership dues constituted an unwarranted invasion of personal privacy.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph DiDonato, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9765

Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 4, 1996

Mr. Daniel E. Boyer
94-A 7753
Washington Correctional Facility
Lock 11 Road
P.O. Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Boyer:

I have received your letter of October 17 and the materials attached to it. You have complained that the Department of Correctional Services has failed to respond to an appeal made under the Freedom of Information Law of September 23. The appeal pertains to a denial of a request for the Comprehensive Alcohol and Substance Abuse Treatment (CASAT) manual.

In this regard, §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

It has been held that 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)].

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 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 §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial may be relevant to an analysis of rights of access.

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. It would appear that the 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 §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 persons to evade detection or engage in illegal activity 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.

The remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of Department staff or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the manual might be available, others must in my opinion be withheld in conjunction with the preceding commentary.

As you requested, your correspondence is being returned to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9766

Albany, New York 12231
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November 12, 1996

Mr. Saynoral Jackson
92-B-2901
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Jackson:

I have received your letter of October 20 in which you complained with respect to the "blatant disregard" of your requests for records by the Onondaga County Department of Corrections. You referred particularly to requests made to the grievance coordinator for copies of three grievances that you submitted.

In this regard, I offer the following comments.

First, I point out that each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating the agency's response to requests for records, and requests should ordinarily be made to that person. While I believe that the person in receipt of your requests should have forwarded your requests to the records access officer or responded directly in a manner consistent with the Freedom of Information Law, it might be worthwhile to resubmit your request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request

> and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Third, 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.

From my perspective, there would be no basis for withholding records that you prepared or that had been made available for your inspection in the past. However, insofar as the request involves records that you did not prepare or have not seen, it is possible that one or more of the grounds for denial would be pertinent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Groce

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9768

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 27, 1996

Mr. David Hulse
88-T-2686
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. Hulse:

I have received your letter of October 22 and the materials attached to it. In brief, you indicated that the New York City Police Department has failed to respond to your request for records in a timely manner, and 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 by the Department to determine appeals is Karen A. Pakstis, Assistant Deputy Commissioner for Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9768

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1996

Mr. Charles McCallister
96-A-1243
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 information presented in your correspondence.

Dear Mr. McCallister:

I have received your letter of October 21 addressed to William Bookman, chairman of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on behalf of its members.

As I understand the matter, you are seeking "reports and investigational interviews" from the New York City Police Department concerning an incident in which deadly force was allegedly used.

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. 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." 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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

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". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness, or persons other than yourself.

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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9769

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1996

Mr. Davie Ramsey
93-A-1454/6-2
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. Ramsey:

I have received your letters of October 22 and November 18. Please accept my apologies for the delay in response. You indicated that certain agencies have failed to respond to your requests for records relating to your arrest in a timely manner.

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."

Based on the foregoing, the New York City Police Department and the Offices of the Kings County District Attorney, for example, would constitute "agencies" required to comply with the Freedom of Information Law. However, a private corporation would fall outside the coverage of the Freedom of Information Law.

Second, as it applies to agencies, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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.

Since you referred to 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 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. 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 §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, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi
Yuriy Kogan, Records Access Officer
Urban Strategies, Inc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9770

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1996

Mr. Walter S.J. Wenger
[redacted]

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. Wenger:

I have received your letter of October 21 and the materials attached to it. You have complained with respect to the treatment of your requests for records by the Canastota Central School District and asked that I "investigate this matter and cause this agency to begin complying with FOIA law."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. While the Committee cannot compel an agency to comply with that statute, in an effort to enhance compliance with and understanding of its provisions, I offer the following comments, and a copy of this response will be forwarded to District officials.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law provides in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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, 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. From my perspective, two of the grounds for denial are likely relevant to an analysis of rights of access to the kinds of records that you requested.

Section 87(2)(b) 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.

With respect to access to a resumé, 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 my opinion, to the extent that records sought contain information pertaining to the requirements that must have been met to be employed, 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.

It was also recently held that one's educational background is accessible, for that kind of information is not so intimate that disclosure would offend a person of reasonable sensibilities [see Ruberti, Girvin and Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 415, __ AD2d __ (1996)].

Also pertinent 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Sam P. Tucci, Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9771

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 4, 1996

Mr. Michael F. McAndrew
Reporter
The Post-Standard and Herald Journal
Clinton Square - PO Box 4915
Syracuse, NY 13221-4915

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McAndrew:

I have received your letter of October 28. Please accept my apologies for the delay in response. You have sought guidance concerning rights of access to a variety of records.

The initial issue pertains to a request for records relating to a 1988 suicide investigation that was denied by the Division of State Police. The denial states that "[t]he records you seek are intra agency records for which an exemption from disclosure is provided. In addition, the release of these records would constitute an unwarranted invasion of the personal privacy of those concerned."

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. While some aspects of the records in question might properly be withheld, a recent decision by the Court of Appeals, the State's highest court, indicates that a blanket denial of access to records characterized as intra-agency materials would likely be inappropriate.

The case involved "complaint follow-up reports" prepared by the New York City Police Department officers that were denied on the basis of §87(2)(g) of the Freedom of Information Law. 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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their

opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of

> interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

The other provision of apparent significance, §87(2)(b), permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." There are no decisions rendered under the Freedom of Information Law of which I am aware that have dealt squarely with the privacy of the deceased. Having discussed the issue with national experts, there is no clear consensus. Some contend that when a person dies, the ability of an agency to withhold records to protect his or her privacy disappears. Others suggest that privacy of a deceased should be protected for a certain, arbitrary period of time (i.e., two years, five years, ten years, etc.). Perhaps the greatest degree of agreement involved the point of view that records about a deceased are generally public, but that those portions which if disclosed would "disgrace the memory" of the deceased may be withheld.

From my perspective, the last suggestion is most appropriate. I believe that a great deal of information pertaining to a deceased essentially becomes innocuous by virtue of his or her death. In rare circumstances, however, intimate details of an individual's life might indeed disgrace his or her memory, and arguably, those kinds of details might justifiably be withheld. In the context of a suicide, the privacy of others might also be considered. If, for example, a suicide victim left a note indicating that he killed himself because his mother loved his brother but not himself, that element of the note might be withheld to protect not only the memory of the deceased, but also his mother and brother. On the other hand, if the note simply said that he killed himself because the world was too much to bear, there would be no significant privacy implications, and the note should be disclosed.

A second issue involves a denial of access to "gun permit applications and permit records." By way of background, §400.00 of the Penal Law pertains to the licensing of firearms. Subdivision

(3) of §400.00, entitled "Applications", states in relevant part that:

> "Blank applications shall, except in the city of New York, be approved as to form by the superintendent of state police. An application shall state the full name, date of birth, residence, present occupation of each person or 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. An application shall be signed and verified by the applicant. Each individual signing an application shall submit one photograph of himself and a duplicate for each required copy of the application. Such photographs shall have been taken within thirty days prior to filing the application. In case of a license as gunsmith or dealer in firearms, the photographs submitted shall be two inches square, and the application shall also state the previous occupation of each individual signing the same and the location of the place of such business, or of the bureau, agency, subagency, office or branch office for which the license is sought, specifying the name of the city, town or village, indicating the street and number and otherwise giving such apt description as to point out reasonably the location thereof."

Subdivision (4) relates to the investigation of statements made in an application before it may be approved. That provision includes a requirement that fingerprints be taken and states in part that "No such fingerprints may be inspected by any person other than a peace officer, who is acting pursuant to his special duties, or a police officer, except on order of a judge or justice of a court of record..."

Subdivision (5), entitled "Filing of Approved Applications", was recently amended. Until November 1 of last year, §400.00(5) stated in part that: "The application for any license, if granted, shall be a public record." No longer does the statute so state; as amended, it now provides that: "The name and address of any person to whom an application for any license has been granted shall be a public record." Other than the preceding statement and the direction in subdivision (4) concerning fingerprints, I am unaware of any aspect of §400.00 that specifies that the remaining portions of an approved application are available to the public or that they

must be withheld. Due to the absence of specific direction in that statute, I believe that those remaining portions of an approved application are subject to the Freedom of Information Law. This is not to say that they must be disclosed; on the contrary, I am suggesting that they may be accessible or deniable, depending on their nature and the effects of disclosure.

Of potential significance is §87(2)(b), which, again, authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) describes a series of examples of unwarranted invasions of personal privacy. In my opinion, numerous aspects of an approved application could be withheld based on the provisions cited above, such as personal physical characteristics, social security number, character references, information regarding health and mental condition, alcoholism and drug use, and similar intimate personal information. However, other information must in my view be disclosed, such as the date and county of issue, expiration date, the name and title of the licensing officer, and applicable restrictions. I do not believe that those kinds of items would constitute intimate or personal details regarding a licensee and that they would, therefore, be available under the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(f), states that an agency may withhold records to the extent that disclosure "would endanger the life or safety of any person." Arguably, the portion of the application describing a pistol or revolver might be withheld under §87(2)(f) based on a contention that disclosure would endanger the life or safety of licensees and potentially others as well.

In sum, while the names and addresses of licensees are clearly available and their fingerprints are clearly confidential, I believe that the remaining portions of approved applications are accessible, in part, under the Freedom of Information Law in accordance with the preceding commentary. Again, highly personal information would, in my opinion, constitute an unwarranted invasion of personal privacy if disclosed. Further, notations regarding particular firearms could likely be withheld due to considerations of safety and security.

The third area of inquiry involves access to "jail visitation logs." If a visitors log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that the log could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

Lastly, you sought an opinion concerning access to "felony conviction docket books" maintained by the Tompkins County Clerk and the Clerk of the Supreme Court. In this regard, I note that the Freedom of Information Law excludes the courts and court records from its coverage [see definitions of "judiciary" and "agency", §86(1) and (3) respectively]. This is not to suggest, however, that court records need not be disclosed. On the contrary, other statutes may provide broad rights of access to court records. For instance, §255 of the Judiciary Law states, in brief, that a clerk of court must search for and make available the records in his possession. Perhaps more relevant is §255-b, which states, in its entirety, that "A docket-book, kept by a clerk of a court, must be kept open, during the business hours fixed by law, for search and examination by any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Col. Hanford Thomas
Timothy B. Howard
County Clerk, Tompkins County
Supreme Court Clerk, Tompkins County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 6, 1996

Ms. Katy Odell Wilson
Staff Writer
Adirondack Daily Enterprise
P.O. Box 318
Saranac Lake, NY 12983-0318

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 Ms. Wilson:

I have received your letter of October 25. Please accept my apologies for the delay in response.

You indicated that the Enterprise has requested records containing detailed information from the Olympic Regional Development Authority (ORDA) relating to revenues, expenses and net income from concerts performed by Phish that ORDA hosted. In response to an initial oral request, you were informed by an ORDA spokesperson that "because of contract requirements with the promoter...he could not say what fees they pay", and that "the promoter's contract agreement calls for confidentiality, claiming that the promoter handles each concert separately, and publicity about its venue fees at each site could impact its future contract negotiations."

You have sought an advisory opinion concerning the matter. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, it has been held 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. Similarly, in a decision rendered by the Court of Appeals, the State's highest court, 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)].

In a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), 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.

In short, insofar as an agreement to maintain the confidentiality of records is inconsistent with the Freedom of Information Law, I believe that it is invalid. Consequently, in my view, the records sought must be disclosed, except to the extent that one or more of the grounds for denial appearing in §87(2) may properly be asserted.

Third, from my perspective, its unlikely that the kinds of records to which you referred could justifiably be withheld.

Section 87(2)(c) relates to contractual matters, but I do not believe that it would be applicable in this instance. That provision states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." Any negotiations relating to ORDA's involvement ended long ago; there can be no impairment of a contract award, because the contract was signed and the concerts held. Further, I believe that §87(2)(c) may be asserted in appropriate situations to protect taxpayers as represented by a government agency or commercial entities seeking to engage in a contractual relationship with government. Protection of taxpayers' interests involve ensuring that a government agency is not placed at a disadvantage at the bargaining table when negotiating. Again,

the negotiations leading to a contract ended long ago. With respect to fairness to commercial entities, if 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)]. In short, in my view, §87(2)(c) could not be asserted to withhold the records sought.

The other provision of potential significance, §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 submitted from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." As I understand your request, it involves records reflective of revenues from the concerts, expenses, net income and payments made by ORDA. If that is so, those kinds of minimal details would not fall within the scope of the exception. On the contrary, I believe that they must be disclosed, for none of the grounds for denial would apply. Certainly records reflective of payments or expenses incurred by an agency such as ORDA would be accessible under the Freedom of Information Law.

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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to ORDA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Don Krone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 11, 1996

Mr. David L. Hunt
83-A-4739
Woodburne Corr. Facility
Riverside Drive
Woodburne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hunt:

I have received your correspondence of November 4 and the materials attached to it. You have sought my opinion concerning rights of access to a building plan and any alterations to the plan. The building in question appears to be a hotel.

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:pb

cc: Hon. Joel A. Miele
Charles Sturcken, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 11, 1996

Mr. Carmen Merlino
[redacted]

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. Merlino:

As you are aware, I have received your letter and the correspondence attached to it.

You have questioned the propriety of a denial of your request for a tape recording of an oral examination administered by Suffolk County. While the County determined that you could review certain records relating to the exam, it denied access to the tape of the exam on the basis of §87(2)(h) of the 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.

Section 87(2)(h) authorizes an agency to withhold records that:

> "are examination questions or answers which are requested prior to the final administration of such questions."

Since the denial of your request indicates that County intends to use the questions on the exam in question in the future, it appears that the denial of the request was consistent with the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Derrick J. Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 11, 1996

Mr. Howard Ostrander
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ostrander:

I have received your letter of October 25 and the materials attached to it. Please accept my apologies for the delay in response.

The materials relate to a public hearing during which representatives of several towns were present, as well as the Chief of a fire company with which the towns contract. When you asked the Fire Chief for a copy of the fire company's budget, he indicated that it was not public and that he could not release a "line item sheet".

From my perspective, the budget and any "line item" breakdown must be disclosed. 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 §87(2)(a) through (i) of the Law.

A budget adopted by an agency would clearly be public. In addition, related records insofar as they consist of statistical or factual information 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.

You also questioned whether a public hearing may be properly be conducted when less than a quorum is present. Here I point out that there is a distinction between a hearing and a meeting. A hearing is usually held in order to offer members of the public an opportunity to express their views on a particular subject. A meeting [see Open Meetings Law, §102(1)] is a gathering of a quorum of a public body to discuss public business, to deliberate as a body, and, potentially, to take action. There must be a quorum of a public body present to conduct a meeting in accordance with the Open Meetings Law, and action can be taken by a public body only at meeting by means of an affirmative vote of a majority of its total membership. I know of no provision of law, however, that requires the presence of a quorum of a public body at a public hearing.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Chief of the Borden Hose Company and the Town of Guilford.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Chief Miles
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9776

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Terrence Losicco
81-B-1188
Eastern Corr. 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 information presented in your correspondence.

Dear Mr. Losicco:

I have received your letter of December 4. According to your letter, you have twice requested records from the New York City Police Department, but the Department has failed to respond. As such, you have sought guidance 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 by the Department to determine appeals is Karen A. Pakstis, Assistant Deputy Commissioner for legal matters.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9777

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Ms. Lucille Held
[redacted]

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 Ms. Held:

I have received your recent letter in which you raised an issue relating to the implementation of the Freedom of Information Law by the Town of Harrison.

You referred to a situation in which a town, by statute, is required to maintain, an ongoing basis, certain records concerning its accounts. Nevertheless, disclosure of those kinds of records has been delayed, and it appears that, as a matter of practice, the Town delays granting or denying all requests in the same manner, irrespective of the nature of the record sought.

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..."

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.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the

Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

In an effort to enhance compliance with 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: Norma Ponce, Town Clerk
Town Boards

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2683
FOIL-AO 9778

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Gordon Dutter
Metro Justice
36 St. Paul Street
Suite 112
Rochester, NY 14604

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Dutter:

I have received your letter of October 25, in which you sought an advisory opinion concerning the implementation of the Open Meetings Law and the Freedom of Information Law by the County of Monroe Industrial Development Authority ("the Authority").

The initial issue involves the Authority's "practice of holding 'pre-meetings' closed to the public, before every monthly board...meeting." You added that "[i]t is clear, from discussion in the parts of the meetings open to the public that substantive discussions have been held and decisions made in the 'pre-meetings'."

From my perspective, the "pre-meetings" must be conducted in public in accordance with the Open Meetings Law. I point out 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 conducted open to the public, whether or not there is an intent to have action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 Ad 2d 409, aff'd 45 NY 2d 947 (1978)].

The decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings, such as "agenda sessions," 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 Authority is present to discuss Authority business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, because the "pre-meeting" is a "meeting", it must be preceded by notice of the time and place given to the news media and by means of posting pursuant to §104 of the Open Meetings Law. Therefore, if a pre-meeting is scheduled to begin at 11:45, notice must be given to that effect.

The second issue involves the Authority's approval of an amendment to its by-laws permitting its meetings to be held and decisions made "by telephone or teleconference."

While there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone, a series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

As indicated earlier, §102(1) 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". 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 that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Commission. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at a remote location by telephone, it has consistently been advised that a member of a public body cannot cast a vote unless he or she is physically present at a meeting of the body.

It is noted, too, that 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. In this regard, the term "quorum" is defined in §41 of the General Construction Law, which has been in effect since 1909. 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 duly held upon reasonably notice to all of the members. As such, it is my view that a public body has the capacity to carry out its duties only at meetings during which a majority of the total membership has convened.

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."

Based on the foregoing, the Open Meetings Law is intended to provide the public with the right to *observe* the performance of public officials in their deliberations. That intent cannot be realized if members of a public body conduct public business as a body or vote by phone.

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 may 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.

Your remaining questions pertain to a request made under the Freedom of Information Law. While numerous records that you requested were made available, you were informed there was no documentation concerning other aspects of your request and asked whether the Authority should have so indicated in writing.

In my view, an agency must respond to a request by making the records sought available, denying the request in whole or in part in writing, or by indicating in writing that records are not maintained by the agency or do not exist (see regulations promulgated by the Committee on Open Government, 21 NYCRR Part 1401). I note that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law provides in part that an agency need not create or prepare new records in response to a request.

Lastly, you asked whether there is a particular length of time during which a request for records "is good" and how many times requested records may be inspected. While it has been held that an agency must permit an applicant to review records throughout its

regular business hours [see Murtha v. Leonard, 210 AD 2d 441 (1994)], I know of no provision or decision that deals with the number of times that a record may be inspected or how long a request may be considered to be active. From my perspective, the principle of reasonableness should govern. If a request involves a great number of records, I do not believe that an agency can restrict inspection to a single day; rather, it should provide an opportunity to the applicant to review all of the records, perhaps on a piecemeal basis so as not to unduly interfere with the agency's ability to perform its duties. Similarly, I know of no limitation concerning the inspection of records. However, I do not believe that an agency must make the same records available over and over if such disclosure would unnecessarily interfere with its capacity to carry out its duties.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County of Monroe Industrial Development Authority
Martin Lawson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9779

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Anthony Vitello
441-950-7041
Riker's Island
1500 Hazen Street
E. Elmhurst, NY 11370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vitello:

I have received your letter, which reached this office on October 31.

You indicated that you are interested in obtaining the rap sheet of the victim in your case, in which you were convicted of attempted murder. In addition, you wrote that the victim had been arrested, and you want to obtain records involving the investigation of that person.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, with respect to criminal history records, the first ground for denial, §87(2)(a) is pertinent. That provision concerns records that "are specifically exempted from disclosure by state or federal statute." 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 arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Third, assuming that records relating to the arrest of the victim have not been sealed, the Freedom of Information Law would appear to govern rights of access. 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9780

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Orlando Cepedas
84-A-3759
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cepedas:

I have received your correspondence of October 28 in which you requested "judicial intervention" with respect to a denial of your request for a copy of a rap sheet pertaining to a witness by the Office of the Kings County District Attorney.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to records. It is not empowered to judicially intervene or otherwise compel an agency to grant or deny access to records.

With respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from 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 arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I note, too, that the reasoning expressed in the Reporters Committee decision cited by the Appeals Officer was rejected in Capital Newspapers.

In an effort to assist you, a copy of this response will be forwarded to the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mary Faldich
Yuriy Kogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9781

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Hon. Harold C. Berean, Jr.
Supervisor
Town of Lloyd
P.O. Box 897
Highland, NY 12528

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Supervisor Berean:

I have received your correspondence of November 4 in which you asked whether, in my view, a letter transmitted by an attorney retained by the Town addressed to the Town Board "fall[s] under freedom of information." You transmitted a copy of the letter to me.

From my perspective, when the letter was sent to the Town, it could have been withheld in its entirety 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.

Second, it appears that two of the grounds for denial would have served to enable the Town to deny access to the record.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;

> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Since the record consists of a legal opinion prepared by the Town's attorney, the other ground for denial of possible relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by statute." One such statute is §4503 of the Civil Practice Law and Rules, which makes confidential the communications between an attorney and a client, such as a municipal official in this instance, under certain circumstances.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, when the privilege has not been waived, and a record consists of legal advice provided by counsel to the client, it would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law.

Since the letter in question has been disclosed to a party other than the client, i.e., the Town Board, I do not believe that the Town could any longer assert the attorney-client privilege as a basis for a denial of access. However, §87(2)(g) would remain applicable, unless the letter has been publicly disclosed.

I hope that I have been of assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9782

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Bernard J. Zolnowski, Jr.
Legal Assistant
New York Civil Liberties Union
P.O. Box 475
Niagara Square Station
Buffalo, NY 14201

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Zolnowski:

I have received your letter of November 1 in which you raised issues relating to the implementation of the Freedom of Information Law by the Town of Lewiston.

The initial issue involves a requirement by the Town that applicants use its form to request records.

In this regard, 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.

Second, the Town apparently requires that an applicant indicate his or her intended use of the records. In general, I do not believe that the Town may impose such a requirement. 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, 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)].

Based on the foregoing, the intended use of records requested under the Freedom of Information Law is largely irrelevant.

Third, the form seeks to elicit whether an applicant is willing to pay "research fees." In my opinion, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for researching or searching for records, or charging more than twenty-five cents per photocopy for records up to nine by fourteen inches, no such fees may be assessed.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

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.

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 referred to a request for audiotapes of a town board meeting and the Town's absence of facilities to make copies. If the Town cannot reproduce the tapes, it has been advised that an applicant may listen to them or place his or her tape recorder next to the agency's recorder so that the audiotape can be recorded.

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 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 9783

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Mr. Stephen G. McGlone
96-A-0028
Camp Pharsalia
South Plymouth, NY 13844

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. McGlone:

I have received your undated letter, which reached this office on November 4. You have sought assistance in obtaining a copy of a police report from the Suffolk County Police Department, and you indicated that the report was given to your attorney during your trial.

In this regard, in Moore v. Santucci [151 AD 2d 677 (1989)], it was held that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law.

However, it was also found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9784

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 11, 1996

Ms. Mollyann Goldstein
[redacted]

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 Ms. Goldstein:

I have received your letter of November 8, as well as a variety of related materials.

You indicated that you have attempted without success to obtain records from the Westchester County Industrial Development Agency and the Village of Scarsdale relating to the "Kids Base/Little School" bond issue, specifically as follows:

"1. Official Statement of Bond

2. Preliminary Bond Statements

3. Description, purpose, source use of bond money, $1,800,000

4. Bond Counsel's opinion

5. Copies of public notice of meetings held by IDA re: K.B/L.S."

While I am unfamiliar with the precise contents of the records in question, insofar as they 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.

With regard to items 1, 2, 3 and 5, again, if such records exist, it appears that none of the grounds for denial would be applicable and that the records should be disclosed.

With respect to item 4, it appears that the record in question, the opinion of the board counsel, would fall within the coverage of the attorney-client privilege. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that the record consists of legal advice provided by counsel to the client, the record would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, §87(2)(a) of the Freedom of Information Law.

Finally, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Hastings
Board of Trustees, Village of Scarsdale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9785

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1996

Mr. Matt LaFera
[redacted]

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. LaFera:

I have received your letter of October 25, as well as a variety of related materials. You have sought assistance concerning the treatment of your request for records by the NYS Department of Taxation and Finance. The request involves the names and addresses appearing on 1989 NYS Residential Tax Returns filed by employees of two Burger King restaurants in Glens Falls. The Department denied the request and indicated that it was unlikely that the records continue to exist.

In this regard, I offer the following comments.

First, assuming that the records sought exist, I believe that the Department would have been required to deny 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 §87(2)(a) through (i) of the Law.

Of primary significance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §697(e) of the Tax Law, which is entitled "Secrecy requirement and penalties for violation" states in paragraph (1) in relevant part that:

> "Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any commissioner, any officer or employee of the department of taxation and finance...or any person who, pursuant to this section, is

> permitted to inspect any report or return, or to whom a copy, an abstract or a portion of any report or return is furnished, to divulge or make known in any manner the amount of income or any particular set forth or disclosed in any report or return required under this article..."

Similarly, paragraph (2) states that:

> "The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission in an action or proceeding under the provisions of this chapter or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the tax commission is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the reports, returns or facts shown thereby are directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said reports, returns or of the facts shown thereby, as are pertinent to the action or proceeding and no more."

As I interpret the provisions quoted above, it is clear that the Department cannot ordinarily disclose any information contained in a report or return, including an individual's name and address. In addition, in responding to a request for records regarding a named individual, it would appear that a denial of access to record, i.e., an inferential admission that a such record exists, would involve a disclosure of information prohibited by §697(e).

It might be contended that the Department could respond to a request by indicating that a record sought does not exist. Nevertheless, since the Department can neither grant access to a report or return nor confirm the existence of such a record by denying access to it, the kind of response that you seek would likely defeat the purpose of the secrecy requirements imposed by §697(e). Consequently, the Department's action appears to be appropriate.

Lastly, I note that there are provisions of law dealing with the retention and disposal of records, and that agencies may destroy or dispose of records following certain periods of time.

I hope that the foregoing serves to enhance your understanding of the matter and that been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jude Mullins
Terrence Boyle

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9786

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1996

Mr. Michael Jones
90-A-5292
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. Jones:

I have received your letter of October 23. You have asked whether "there is some kind of agency...that keeps track and investigates on properties and its owners in and around the Brooklyn area". You indicated that you are interested in knowing whether a particular owner was investigated in relation to the use of his property as a crack den. Both the Police Department and the Office of the District Attorney informed you that they could not help you without some sort of docket number.

In this regard, as a general matter, the agency that investigates criminal activity in Brooklyn is the New York City Police Department. When a person is arrested and charged, the prosecuting agency is the Office of the District Attorney. In that event, it is likely that both the Police Department and the District Attorney would maintain records relating to the incident.

When seeking records under the Freedom of Information Law, §89(3) requires that an applicant "reasonably describe" the records sought. Therefore, a request should contain sufficient detail to enable agency staff to locate the records, such as names, addresses, descriptions of events, docket or other identification numbers, etc.

In terms of rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Often relevant to an investigation 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."

It is noted too, that if a person is charged with a crime nd the charge is later dismissed in his favor, the records become sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9787

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1996

Mr. Jody Allen
86-B-2551
Auburn Corr. Facility
PO Box 618
Auburn, NY 13021-0618

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

I have received your letters of October 27 and November 22. You have sought assistance in obtaining records which in your view would be exculpatory.

In this regard, I offer the following comments.

First, 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, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is 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 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].

Most recently, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law (Gould v. New York City Police Department, __NY 2d__, decided November 26, 1996).

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, 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 a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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).

As you requested, your letter is being returned to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-Ao 206
Foil-Ao 9788

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1996

Ms. R. Penelope Phillips
HOWL of the Grey Wolf
PO Box 217
Rock City Falls, NY 12863

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 Ms. Phillips:

I have received your letter of November 1, as well as the materials attached to it. Please accept my apologies for the delay in response.

You have sought my opinion concerning the property of a denial access by the Division of Housing and Community Renewal to a list of tenants residing in a certain mobile home park. You referred to a provision that enables an agency to withhold "personnel, medical and similar files,...the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" and contend that a list of tenants "does not fall into this category". You also suggested that "more personal information" is frequently released "in the form of motor vehicle records and voter registration databases..."

In this regard, I offer the following comments.

First, the provision that you highlighted is part of the federal Freedom of Information Act, which pertains only to records maintained by federal agencies. While the governing provisions of the pertinent law applicable to a New York State agency are similar, they can be distinguished from the federal Act. Further, while it is true that records pertaining to motor vehicle licenses and voter registration list are public, they are available under the Vehicle and Traffic Law, §202, and the Election Law, §5-602, respectively. I note that statutes involving access to or the confidentiality of records are not necessarily consistent. For instance, while home addresses of licensed drivers and registered

voters are public under the statutes cited earlier, §89(8) of the Freedom of Information Law specifies that agencies are not required to disclose the home addresses of present or former public employees, even though numerous items relating to the performance of their governmental duties must be disclosed.

As a general matter, to put the matter in perspective, it is noted that 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. One of the grounds for denial, §87(2)(b), enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

Also relevant to an analysis of rights of access or, conversely, the ability of a state agency to deny access to the records sought, is the Personal Privacy Protection Law. That statute deals in part with the disclosure of records or personal information by agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, 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)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions, §96(1)(c), involves a case in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Consequently, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law; alternatively, if disclosure of a record would <u>not</u> constitute an

unwarranted invasion of personal privacy and if the record is available under the Freedom of Information Law, it may be disclosed under §96(1)(c).

Therefore, the sole question in my view is whether or the extent to which disclosure would result in an unwarranted invasion of personal privacy. In my view, names and addresses of individuals identified in state agencies' records may frequently be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. I am unaware of the reason for which the Division of Housing and Community Renewal maintains the names. If the names are incidental to its primary functions, it is likely in my opinion that a court would sustain a denial of access. Further, if the tenants are identified due to some sort of financial qualification or criterion, there is precedent indicating that disclosure of names is such a circumstance would constitute an unwarranted invasion of personal privacy (Tri-State Publishing Co. v. City of Port Jervis, Supreme Court, Orange County, March 4, 1992).

Lastly, 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)].

The only exception to the principle described above involves a provision pertaining to the protection of personal privacy. As indicated earlier, §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. Although the status of an applicant and the purposes for which a request is made are irrelevant to rights of access and an agency cannot ordinarily inquire as to the intended use of records, 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)].

For the reasons described in the preceding commentary, it appears that the denial of access by the Division was appropriate.

I hope that the foregoing serves to enhance your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

cc: Frank Gannon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9789

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of October 26 pertaining to reference to a study prepared for the New York City Teachers' Retirement System.

While I know nothing of the matter, I offer the following remarks concerning the kind of record to which you referred.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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)(g) pertaining to "inter-agency" and "intra-agency materials." 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.

The same provision would apply to a report or study prepared by a consultant. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9790

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1996

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 information presented in your correspondence.

Dear Dr. Silberman:

I have received your letters of November 4 and December 7. Please accept my apologies for the delay in response.

You have asked that I "rule on the availability" of a request made under the Freedom of Information Law to the New York City Department of Homeless Services. You have sought:

> "the name, race, competitive civil service status, provisional status, and educational qualifications of the individual chosen or if no person has yet been chosen, I request the race, comp. civil service status, provision status and educational qualifications of the acting incumbent."

In addition, you requested the name and salary of the incumbent in the position.

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, only one of the grounds for denial is pertinent to the matter. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Based on the judicial interpretation of the Freedom of Information Law, 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 those individuals are required to be more accountable than others. The courts have found that, as a general rule, records that are relevant to the performance of the official duties of a public officer or employee 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 items relating to public officers or employees are irrelevant to the performance of their 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, dealing with membership in a union; Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981, involving the back of a check payable to a municipal attorney that could indicate how that person spends his/her money; Selig v. Sielaff, 200 AD 2d 298 (1994), concerning disclosure of social security numbers].

From my perspective, the only item among those sought that could properly be withheld would be the race of an individual. In my view, race has nothing to do with the performance of a public employee's duties, and reference to one's race could properly be withheld.

I note that it was recently held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, ___ AD 2d ___ (1996)]. Further, salary information identifiable to public employees must be prepared and disclosed pursuant to §87(3)(b) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: LeRoy Allen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9791

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1996

Mr. David Hulse
88-T-2686
Fishkill Correctional Facility
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 information presented in your correspondence.

Dear Mr. Hulse:

I have received your letter of October 22, which reached this office on November 4. You referred to delays by the New York City Police Department in responding to 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 Department to determine appeals is Karen A. Pakstis, Assistant Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9792

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1996

Ms. Jacqueline Murphy
Montgomery County Department
of History and Archives
P.O. Box 1500
Fonda, NY 12068-1500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Murphy:

I have received your letter of November 6. Please accept my apologies for the delay in response. In your capacity as Montgomery County Historian and head of the County's Department of History and Archives, you have raised a series of issues relative to vital records.

The initial issue relates to a letter from the Montgomery County Association of Town Clerks and Tax Collectors in which it was contended that only the Department of Health and towns "should legally have" birth and death records. As such, you were asked to return the records. You have questioned whether they may remain in your possession.

From my perspective, assuming that the records in question were acquired legally, there is no requirement that they be returned. I note that the provisions of the Public Health Law, particularly those involving death records, were not as restrictive in terms of disclosure as they are now. Once legally acquired, I believe that the recipient of the records may do with them as he, she or the agency sees fit.

Second, if the clerks seeking return of the records acquire them, you asked whether they may confiscate the records. In this regard, provisions of the Arts and Cultural Affair Law, Article 57-A, deal with the retention and disposal of records. As you are likely aware, those provisions are implemented by the State Archives and Records Administration (SARA) and include retention schedules that indicate minimum periods for which agencies must retain records. If you are unfamiliar with the schedules, you may obtain copies from SARA by calling 474-6926.

Lastly, you sought guidance concerning public rights of access to the records in question. Although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to fees for records sought for genealogical or research purposes that may be imposed by "any person authorized" by the State Commissioner of Health, i.e., municipal registrars of vital records. That provision states that:

> "For any search of the files and records conducted for authorized genealogical or research purposes, the commissioner or any person authorized by him shall be entitled to, and the applicant shall pay, a fee of ten dollars for each hour or fractional part of an hour of time for search, together with a fee of one dollar for each uncertified copy or abstract of such records requested by the applicant or for a certification that a search discloses no record."

Enclosed is a copy of an article (with which I disagree in part) concerning access to genealogical records.

In my view, it is doubtful that the rules described in the article are applicable to your agency, because the agency is not a registrar of vital records and has no specific legal relationship with the Department of Health.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Diane Rumrill-Hall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9793

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1996

Mr. Duane Harrison
94-R-1772
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12831

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. Harrison:

I have received your letter of November 7. You referred to ongoing delays by the New York City Police Department concerning your requests for records, which began more than a year ago.

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 that statute states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. Similarly, if an agency acknowledges the receipt of a request but fails to provide a "statement of the approximate date when such request will be granted or denied," the agency in my view would have failed to comply with §89(3). In an analogous situation in which the court found that a request was constructively denied, it was stated that:

> "The acknowledgement letters in this proceeding neither granted nor denied petitioner's request nor approximated a determination date. Rather, the letters were open ended as to time as they stated, 'that a period of time would be required to ascertain whether such documents do exist, and if they did, whether they qualify for inspection'.
>
> "This court finds that respondent's actions and/or inactions placed petitioner in a 'Catch 22' position. The petitioner, relying on the respondent's representation, anticipated a determination to her request. While the petitioner may have been well advised to seek an appeal...this court finds that this petitioner should not be penalized for respondent's failure to comply with Public Officers Law §89(3), especially when petitioner was advised by respondent that a decision concerning her application would be forthcoming...
>
> "It should also be noted that petitioner did not sit idle during this period but rather made numerous efforts to obtain a decision from respondent including the submission of a follow up letter to the Records Access Officer and submission of various requests for said records with the different offices of the Department of Transportation.
>
> "Therefore, this court finds that respondent is estopped from asserting that this proceeding is improper due to petitioner's failure to appeal the denial of access to records within 30 days to the agency head, as provided in Public Officers Law §89(4)(a)" (Bernstein v. City of New York, Supreme Court, NYLJ, November 7, 1990).

When a request is constructively denied or denied in writing, 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 for the Department is Karen A. Pakstis, Assistant Deputy Commissioner for Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Sgt. Louis Lombardi
Joseph Desiderio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2687
FOIL-AO 9794

41 State Street, Albany, New York 12231
(518) 474-2518
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December 16, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of October 24 concerning the meetings and records of the Investment Committee of the New York City Teachers' Retirement System.

In this regard, since you asked that I attempt to acquire information from the Director of the Retirement System, I note that the Committee on Open Government is not an investigatory body and that it has no investigative powers. The staff of the Committee consists of myself and two secretarial assistants. As such, we have neither the staff nor the authority to engage in the kind of examination that you seek. Nevertheless, in conjunction with your commentary, I offer the following remarks.

First, as you suggested, every public body must provide notice in accordance with §104 of the Open Meetings Law. Specifically, that provision states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place 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.

Second, for reasons discussed in another opinion addressed to you, rights of access to the kinds of records to which you referred would be governed by §87(2)(g) of the Freedom of Information Law. I agree that you should have the ability to review records indicating the performance of "Variable A", the asset mix of the Pension Fund and how well or poorly the Fund is performing. Insofar as those records consist of "statistical or factual tabulations or data", I believe that they must be disclosed pursuant to §87(2)(g)(i). However, a person's membership in the Retirement System does not necessarily provide that person with the right to review all records of the System or attend every aspect of meetings conducted on its behalf. Again, advice, opinions and recommendations prepared by staff or consultants may properly be withheld. Similarly, §105 of the Open Meetings Law authorizes public bodies to conduct executive sessions in circumstances with which you are familiar.

Lastly, there is no requirement that a verbatim transcript of a meeting must be prepared. Section 106 of the Open Meetings Law provides what might be considered as minimum requirements concerning the contents of minutes and states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of what is said at a meeting.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald Miller

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9795

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 19, 1996

Mr. Melvin Wesson
43392-86
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 information presented in your correspondence.

Dear Mr. Wesson:

Your letter addressed to Secretary of State Treadwell has been forwarded to the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on behalf of its members.

Your commentary is not entirely clear. However, as I understand the matter, you are interested in obtaining letters prepared by a former assistant district attorney that were transmitted to the Inspector General and Superintendent at a correctional facility. Without knowledge of the contents of the letters in question, I cannot offer specific guidance. However, it would appear that §87(2)(g) of the Freedom of Information Law would be pertinent. 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.

Also of potential significance 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."

If my understanding of the matter is inaccurate, you may contact me. I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Penelope D. Clute

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9796

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 19, 1996

Ms. Barbara Blitz
[redacted]

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 Ms. Blitz:

I have received your letter of November 6 and the correspondence attached to it. Please accept my apologies for the delay in response.

As I understand the matter, you requested information concerning the officer that issued a violation to you, and the Department denied the request on the basis for §50-a of the Civil Rights Law. Without an indication of the nature of the information in which you are interested, I cannot offer specific guidance. However, to provide general information that may be useful, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 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)].

Aside from §50-a, other grounds for denial appearing in the Freedom of Information Law may be pertinent to consideration of rights of access to records relating to a police officer.

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.

In terms of the judicial interpretation of the Freedom of Information Law, as suggested earlier, 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., Prisoners' Legal Services, supra; also 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9797

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 20, 1996

Mr. Ralph Neama
[redacted]

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. Neama:

As you are aware, I have received your letter of November 8. Please accept my apologies for the delay in response.

Attached to your letter is a copy of the "Resource Recovery Facility Operations Monitoring Report" that was, as indicated on the cover of the report, "prepared for" the Town of Babylon by a professional engineer. You wrote that the Town has claimed that the report is "confidential", and you asked that I review the report and offer advice concerning public rights of access to its contents.

In this regard, it is emphasized that the ensuing comments should be considered wholly advisory. It is rare that the Committee or its staff reviews a record that is the subject of a request; only a court has the power to determine rights of access via a private or *in camera* inspection of records. Having read the report, from my perspective, although portions could justifiably be withheld, the great majority would be accessible under the Freedom of Information Law in conjunction with the following analysis.

First, based on judicial decisions, 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, again, 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.

Second, 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, supra, 564). Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant.

Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

Most recently, the Court of Appeals found that materials received by a corporation providing services for a branch of the State University that were kept on behalf of the University constituted "records" falling with the coverage of the Freedom of Information Law. I point out that the Court rejected "SUNY's contention that disclosure turns on whether the requested information is in the physical possession of the agency", for such a view "ignores the plain language of the FOIL definition of 'records' as information kept or held 'by, with or for an agency'" [see Encore College Bookstores, Inc. v. Auxiliary Services Corporation of the State University of New York at Farmingdale, 87 NY 2d 410, (1995)]. Therefore, if a document is produced for an agency, as in the case of a report "prepared for" the Town by an engineer or firm, it constitutes an agency record, even if it is not in the physical possession of the agency.

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 is assumed that the report in question was prepared by a person or firm retained as a consultant. 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.

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)].

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.

Some aspects of the report consist of opinions and, therefore, could in my view be withheld. For example, on page I-3, certain functions are characterized as "good" or that they "operated well"; near the end of the report (page VI-6), opinions and advice are offered by characterizing a function as "satisfactory" or by stating that a problem "should be resolved." The great majority of the remainder of the report consists of "statistical or factual tabulations or data", which I believe would be accessible to the public under §87(2)(g)(i) of the Freedom of Information Law.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9798

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 20, 1996

Mr. Robert Sommers
Regional Manager
WJJas Assets
5256 S. Mission Road, Suite #802
Bonsail, CA 92003

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, unless otherwise indicated.

Dear Mr. Sommers:

I have received your letter of November 5 in which you questioned the propriety of a response to your request directed to Monroe County. The records sought involve outstanding checks and warrants.

Having contacted the County on your behalf, I was informed that it has no means of generating the data in which you are interested, except by engaging in significant and time consuming programming. From my perspective, the County would not be required to do so. In this regard, I offer the following comments.

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. 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 some fifteen 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, 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 the information that you seek cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest.

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

cc: Richard F. Mackey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9799

41 State Street, Albany, New York 12231
(518) 474-2518
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December 20, 1996

Mr. Harold Goodman
[redacted]

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. Goodman:

I have received your letters of October 25 and December 7, as well as related materials. You have sought a "determination" concerning the propriety of a response to a request directed to Nassau County under the Freedom of Information Law.

As I understand the matter, you requested a variety of records, some of which were made available, from the Nassau County Industrial Development Agency (the "Agency") concerning an application for a tax exemption by Gallo Wine Distributors ("Gallo"). You were informed that the records in which you are particularly interested were returned by the Agency to Gallo and that, even if the Agency continued to maintain the records, they would have been withheld under §87(2)(d) of the Freedom of Information Law.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. It is not empowered to render a binding "determination" or otherwise compel an agency to grant or deny access to records. Therefore, the ensuing remarks should be considered advisory in nature.

First, it is questionable in my view whether the Agency could validly have returned records to Gallo. The "Local Government Records Law", Article 57-A of the Arts and Cultural Affairs Law, deals with the retention and disposal of records by local governments. For purposes of that Article, the phrase "local government" is defined to include a "public benefit corporation." Section 856 of the General Municipal Law indicates that an industrial development agency is a public benefit corporation. Therefore, I believe that the Agency is required to comply with the provisions of Article 57-A.

It is noted that §57.17(4) of the Arts and Cultural Affairs Law defines "record" to mean:

> "...any book, paper, map, photograph, or other information-recording device, regardless of physical form or characteristic, that is made, produced, executed, or received by any local government or officer thereof pursuant to law or in connection with the transaction of public business. Record as used herein shall not be deemed to include library materials, extra copies of documents created only for convenience of reference, and stocks of publications."

Further, §57.25 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 on the foregoing, records cannot be disposed of or destroyed without the consent of the Commissioner of Education, and local officials must "have custody" and "adequately protect" records until the minimum period for the retention of the records has been

reached. To implement the provisions referenced above, the State Archives and Records Administration (SARA), a component of the State Education Department, prepares schedules indicating minimum retention periods for various classes of records. I am unfamiliar with the retention periods concerning records of industrial development agencies. To obtain information on the subject, you may write to SARA or telephone at (518) 474-6926.

Second, with respect to the contention concerning the Agency's ability to withhold records if it continued to maintain them, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 indicated by the County, §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."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities that have responded to the RFI.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or

business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" [Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410, (1995). In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

"FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...

"As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

"Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as

> part of FOIA's principal aim of promoting openness in government (id.).
>
> "The reasoning underlying these considerations is consistent with the policy behind (2)(d)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL" (id., 419-420).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Leffer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9800

41 State Street, Albany, New York 12231
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December 23, 1996

Mr. Dennis Ferraro
100-96-01125
Brooklyn Correctional Facility
136 Flushing Avenue
Brooklyn, NY 11205

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. Ferraro:

I have received your undated letter in which you complained that the New York City Police Department had not responded to your 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)].

For your information, the person designated by the Department to determine appeals is Karen A. Pakstis, Assistant Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9801

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 23, 1996

Mr. Michael Ocasio
94-A-3130
Green Haven Correctional Facility
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 information presented in your correspondence.</u>

Dear Mr. Ocasio:

I have received your letter of November 6, which reached this office on November 14. Please accept my apologies for the delay in response. You have sought assistance in obtaining records concerning payments to your attorney, who represented you in accordance with Article 18-B of the County Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Further, §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 Freedom of Information Law does not apply to the courts or court records, or to records of a private attorney or organization.

Second, with respect to attorneys assigned pursuant to Article 18-b, under §722 of the County Law, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

When an entity falls within the coverage of the Freedom of Information Law, its records are presumptively available. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the records in which you are interested are maintained by an agency, they would likely be available to you, for none of the grounds for denial would appear to apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9805

41 State Street, Albany, New York 12231
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Fax (518) 474-1927

December 23, 1996

Mr. Peter Quinn
Energy Analyst
Long Island Progressive Coalition
Citizen Action on Long Island
90 Pennsylvania Avenue
Massapequa, NY 11758-4978

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. Quinn:

I have received your letter of November 7 in which you sought assistance in obtaining information from the Suffolk County Industrial Development Agency ("SCIDA"). Having reviewed your request to the SCIDA, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request for information. For example, in the context of your request, if there is no "breakdown in dollar amounts for any and all perks...provided through your IDA arrangements", SCIDA would not be required to prepare new records in an effort to accommodate you.

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 §87(2)(a) through (i) of the Law. While I am unfamiliar with the specific contents of the SCIDA's records, it appears that most of the information sought would be accessible, for none of the grounds for denial of access to records would be applicable.

With regard to litigation, legal papers filed against SCIDA would not have been prepared by SCIDA, its officials or its agents. As such, in my opinion, those papers would not privileged. For similar reasons, the answers prepared by SCIDA 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 an agency'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, they would also be available under the Freedom of Information Law from SCIDA.

Lastly, since you characterized the SCIDA as having engaged in "stonewalling", 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Pachman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2690
FOIL-AO 9803

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 23, 1996

Mrs. W.R. Powell
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Powell:

I have received your letter of November 13, which reached this office on November 13. Please accept my apologies for the delay in response.

You raised a series of issues concerning the State Review Panel created by Chapter 145 of the Laws of 1995 and asked whether it is required to comply with the Freedom of Information and Open Meetings Laws.

In this regard, for reasons discussed in an advisory opinion addressed to you on May 14, I believe that the Review Panel is a "public body" subject to the Open Meetings Law. Since you referred to attendance at its executive sessions, I note 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. While the public has no general right to attend an executive session, §105(2) of that statute provides that: "Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body." Therefore, the only people who have the right to attend an executive session are the members of the public body, i.e., the Review Panel. However, a public body, such as the Review Panel, may authorize others to attend. Often the attendance of certain others is routine and occurs informally. For example, while a superintendent is not a member of a board of education, that person may attend executive sessions as a matter of course. In other cases, a public body may authorize the attendance of non-members by means of a motion and vote to permit a particular person or persons to attend.

I believe that the records of the Review Panel are clearly subject to the Freedom of Information Law as well. That statute

pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

From my perspective, a statutorily created entity such as the Review Panel clearly performs a governmental function for the state and/or a public corporation, the Roosevelt School District.

Viewing the matter from a somewhat different perspective, §86(4) 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 on the language quoted above, any documentation maintained by the review panel would have been acquired or produced by or for an agency, i.e., either the State Education Department or the Roosevelt School District and therefore would constitute a "record" that falls within the coverage of the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since you referred to "abuses" relating to money, I note that records involving the expenditure of public monies are typically accessible, for none of the grounds for denial of access would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: State Review Panel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9804

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Ms. Ray Miller
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Miller:

I have received your letter of December 4. You indicated that you have encountered a series of delays in your attempts to gain access to records of the Westchester County Department of Health. In addition, as I understand your remarks, the staff of that agency informed you that it is required to withhold the names of those who file complaints with that agency.

In an effort to assist you, copies of this response will be sent to Department officials. Based on the information that you provided, 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be

granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in 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 County's designated appeals officer is the County Attorney.

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.

When a complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is most 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Ebersole
Valerie Goldstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9805

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Vincent Malerba
82-A-2059
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Malerba:

I have received your letter of November 30 in which you sought assistance in obtaining DD5's from the New York City Police Department and the Office of the Kings County District Attorney. You also expressed interest in obtaining a witness statement after the witness testified in court.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While some aspects of the records in question might properly be withheld, a recent decision by the Court of Appeals, the State's highest court, indicates that a blanket denial of access to DD5's based on their characterization as intra-agency materials was inappropriate.

The provision at issue, §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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and

deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only

> that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply.

For instance, 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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi, Records Access Officer
Karen A. Pakstis, Assistant Deputy Commissioner
Virginia Modest, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9806

41 State Street, Albany, New York 12231
(518) 474-2518
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December 27, 1996

Mr. Mark Washington
80-A-0649
Southport Correctional Facility
Box 2000
Pine City, NY 14871

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Washington:

I have received your letter of November 26. Please accept my apologies for the delay in response.

You referred to our earlier correspondence and indicated that representatives of the Queens County District Attorney indicated that your trial file is lost. In addition, although the receipt of a request directed to the New York City Police Department was acknowledged, you had received no further response from that agency as of the date of your letter to this office.

In this regard, having reviewed the opinion addressed to you in June, there is little that I can add to it. I note, however, that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for

the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Horwitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9807

41 State Street, Albany, New York 12231
(518) 474-2518
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December 27, 1996

Mr. Walter F. Greening
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Greening:

I have received your letter of November 27 in which you sought my opinion in relation to several issues arising under the Freedom of Information Law.

The first involves a delay in disclosing a record on the part of the Valley Central School District due to its inability to have a staff member "sit" with you while you inspected a record.

In this regard, as you are 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..."

Based on the foregoing, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days of receipt of a request. When an acknowledgement is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgement by the records access officer did not make reference to such a date.

I note that 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 perhaps the availability of staff assigned to insure the custody and integrity of records while the records are being inspected. 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. Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, and if they are readily retrievable, there may be no basis for a lengthy delay in disclosure.

Second, you wrote that the District refuses to grant access to records "until [you] complete a special Valley Central FOIL request form." In my view, an agency cannot 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.

Lastly, you referred to an investigation regarding allegations made against you and contended that individuals "lied with the intent to discredit or destroy [you] and [your] family." Having requested the names of those who made the allegations, you were informed that their identities could be withheld on the basis of §87(2)(f), which enables an agency to deny access to records insofar as disclosure "would endanger the life or safety of any person." It is your view that, in the public interest, their identities should be exposed.

While I have no knowledge of the basis for a denial of access grounded upon §87(2)(f), I note that it has generally been advised that those portions of a complaint which identify complainants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. As indicated earlier, §89(2)(b) contains 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 withheld. If the deletion of identifying details would not serve to protect the privacy of an individual, I believe that a record may be withheld in its entirety.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Beverly Ouderkirk
Susan Reichardt
John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9808

41 State Street, Albany, New York 12231
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December 27, 1996

Mr. Dale D'Amico
95-A-4203
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929-2002

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. D'Amico:

I have received your letter of November 24 and the materials attached to it.

You referred to a request directed to the Nassau County Police Department in which you sought its "Uniform Arrest Guide" and rules and regulations. You added that you are interested in an explanation of the use of the Department's forms.

In this regard, I offer the following comments.

First, since you cited the federal Freedom of Information and Privacy Acts in your request, I point out that those statutes pertain only to federal agencies; they do not apply to entities of state or local government, such as Nassau County. The pertinent statute under the circumstances is the New York Freedom of Information Law.

In a related vein, it is noted that, unlike the federal Freedom of Information Act, its New York counterpart contains no provisions concerning the waiver of fees. Further, it has been held that an agency may charge its established fees, even when the applicant is an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Second, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. If, for example, there are no written explanations of forms or other records, the Department would not be required to prepare explanations or new records on your behalf.

Third, based on a letter sent to you on October 15, a copy of the "Uniform Arrest Guide" was sent to you. As such, the ensuing remarks with deal with the remaining existing records that you requested.

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 §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

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. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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, 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 records in question, it would appear that those portions which, if disclosed, would enable potential lawbreakers to evade detection could likely be withheld. It is noted that in another decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

Lastly, the remaining ground for denial of possible relevance is §87(2)(f). That provision permits an agency to withhold records when disclosure "would endanger the life of safety of any person." To the extent that disclosure would endanger the life of safety of officers or others, it appears that §87(2)(f) would be applicable.

In sum, while some aspects of the records, if they exist, might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

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

cc: Detective Sergeant Thomas J. King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9809

41 State Street, Albany, New York 12231
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December 27, 1996

Mr. Michael W. Kilian
Metro Editor
Utica Observer-Dispatch
221 Oriskany Plaza
Utica, NY 13501

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kilian:

I have received your letter of November 25. Please accept my apologies for the delay in response. You have sought an advisory opinion concerning rights of access to records indicating the names of persons arrested by the City of Utica Police Department, as well as the names of complainants.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains 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."

Based on the foregoing, irrespective of whether a document is characterized as an arrest record, incident report or in some other manner, or whether it is maintained on paper or electronically, I believe that it would constitute a "record" subject to rights of access conferred by the Freedom of Information Law.

Second, an applicant, in my view, is not required to identify with particularity exactly which record, or perhaps which portion

of a record he or she may be interested in reviewing. The Freedom of Information Law as originally enacted in 1974 required an applicant to seek "identifiable" records [see original Law, §88(6)]. The current provision, §89(3), however, merely requires that an applicant "reasonably describe" the records sought. According to two decisions rendered by the Court of Appeals, the State's highest court, if an agency can locate and identify the records based upon the terms of a request, the applicant has met the responsibility of reasonably describing the records [see M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984); Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Therefore, I do not believe that a journalist or member of the public can be required to seek a record by referring to a specific incident. Rather, an applicant could, in my opinion, request a record or records as they pertain to particular days or dates.

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.

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 record might properly be denied, the remainder might nonetheless be available and would have to be disclosed.

From my perspective, unless an arrest or booking 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 of an accused, the records relating to the arrest ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)].

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 statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, several 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)].

With respect to the names of complainants or victims, rights of access, or conversely, the ability to deny access, would in opinion be dependent on attendant facts. It is emphasized, however, that whether a complainant prefers to authorize or preclude disclosure is irrelevant. 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)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a claim or promise of confidentiality in my opinion is irrelevant to an analysis of rights of access to records.

If a burglary occurs at a private home and police officers visit the premises, their presence, particularly when police vehicles are present or officers interview neighbors, the event becomes somewhat public, and I cannot envision how an agency could justify withholding the name or address of the resident. Further, if a crime is committed at a business establishment, there would likely be no issue involving personal privacy. In cases in which a series of burglaries occurs in a neighborhood, for example,

police departments frequently encourage the dissemination of information in order that citizens can be more vigilant.

In some situations, a denial of access to the name of a complainant or victim may be appropriate. Under §50-b of the Civil Rights Law, police and other public officers are prohibited from disclosing the identity of the victim of a sex offense. If a complainant is in some way associated with organized crime or is a confidential source, that person's identity could likely be withheld under §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." The same provision might apply when the victim of a burglary is a senior citizen who lives alone. However, in many instances, the name of a complainant involved in a crime must be disclosed, and a general policy of withholding names of complainants or victims would, in my opinion, be inconsistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David T. Ashe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9810

41 State Street, Albany, New York 12231
(518) 474-2518
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December 27, 1996

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of November 25 and the correspondence attached to it. Please accept my apologies for the delay in response.

Since the correspondence was apparently prepared in response to an appeal, and since there is no indication that a copy was sent to this office, you asked that I contact Mr. James A. Beirne of the New York City Office of the Actuary "so that he can comply" with the Freedom of Information Law. You also objected to his request for payment of a deposit before the agency prepares copies of records.

In this regard, I offer the following comments.

First, the provision concerning appeals directs that copies of appeals and the determinations that follow is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open

> government a copy of such appeal and the ensuing determination thereon."

Second, it has been held that an agency may require payment in advance of photocopying, particularly when a request involves a voluminous number of records (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

As you requested, a copy of this response will be forwarded to Mr. Beirne.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James A. Beirne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9811

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December 27, 1996

Mr. Victor Rodriguez
94-A-5406
135 State Street
Auburn, NY 13021-0618

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. Rodriguez:

I have received your letter of November 17 and the correspondence attached to it.

You complained that you have requested a copy of the transcript of the proceedings leading to your conviction but that the County Clerk has returned the fees that you attempted to pay. You have sought assistance in the matter. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and 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 the "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 outside the coverage of the Freedom of Information Law. This is not to

suggest that court records may not be available to the public. On the contrary, they are often available pursuant to statutes other than the Freedom of Information Law. For instance, under §255 of the Judiciary Law, clerks of courts are generally required to disclose records in their custody.

Second, since you also requested the records from the Office of the Queens County District Attorney, I note that it was held in Moore v. Santucci [151 AD2d 677 (1989)], which involved the Queens County District Attorney, that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that the foregoing serves to clarify 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

OML-AO-2693
FOIL-AO-9812

41 State Street, Albany, New York 12231
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December 27, 1996

Mr. Donald S. Stefanski
[redacted]

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. Stefanski:

I have received your undated letter, which reached this office on November 26. You asked that I advise the Town of Elba of its obligations under the Freedom of Information Law, and I will do so by sending copies of this response to Town officials.

As I understand the matter, you opposed an application for an area variance. Although you furnished written comments in which you expressed your view, you were unable to attend the meeting during which the matter was considered by the Zoning Board of Appeals. Consequently, you asked that a transcript of the meeting be sent to you. You wrote that legal challenges to determinations of zoning boards of appeal must be initiated within thirty days, and that the Town failed to respond to your request within that period. Further, the response that you finally received was in your view inadequate, for it consisted of minutes of a meeting rather than a transcript.

In this regard, I offer the following comments.

First, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. If more than five business days is needed to locate or review records, the agency must acknowledge the receipt of the request and provide "a statement of the approximate date when such request will be granted or denied..." The Committee on Open Government, by means of regulations promulgated in 1978 pursuant to §89(1)(b)(iii) of the Public Officers Law, sought to insure timeliness of response by requiring agencies to grant or deny access to records within ten business days of the acknowledgement of the receipt of a request [21 NYCRR 1401.5(d)]. However, the court in Lecker v. New York City Board of Education

[157 AD 2d 486 (1990)] invalidated that portion of the regulations on the ground that the Freedom of Information Law does not include a time limitation within which agencies must determine to grant or deny access to records following the acknowledgement that a request has been received. As such, the requirement in the Committee's regulations that agencies grant or deny access to records within ten business days after acknowledging the receipt of a request is no longer binding.

However, an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days. If an agency fails to respond in any manner, within five business days, such failure would constitute a constructive denial of access that may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. When an 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.

Second, the Open Meetings Law pertains to minutes of meetings and §106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, minutes must be prepared and made available within two weeks. I note 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 they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change.

Lastly, it is also clear that minutes need not consist of a verbatim account of all that is said at a meeting. Further, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, while the Open Meetings Law requires minutes of meetings be prepared and made available within two weeks of a meeting, there is no requirement that a transcript be prepared. If no transcript exists, the Freedom of Information Law would not be applicable. If, however, the meeting was tape recorded by the Town, I believe that the tape would be accessible, and that it should have been made available promptly.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Zoning Board of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9813

41 State Street, Albany, New York 12231
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December 27, 1996

Ms. Elizabeth S. Ehling
Greenwood Lake Associates
298 Green Ridge Road
Franklin Lakes, NJ 07417

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 Ms. Ehling:

I have received your letter of November 25, as well as the materials attached to it. Please accept my apologies for the delay in response.

You referred to requests made under the Freedom of Information Law beginning in June and directed to the Village of Greenwood Lake and the Town of Warwick. In addition to experiencing delays in response, you indicated that "the Village's position is that FOIL requests that are made when litigation is imminent are not fulfilled without subpoenas."

In this regard, I offer the following comments.

First, since you referred to the federal Freedom of Information Act in your correspondence, I note that the Federal Act pertains only to federal agencies; it does not apply to entities of state or local government. The New York Freedom of Information Law, however, is applicable to state and local government agencies, such as villages and towns.

Second, assuming that the Village's position has been accurately presented, based on judicial decisions, I disagree. As stated in a decision rendered 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 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.

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)].

Fourth, having reviewed your requests, I emphasize that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. If, for example, the Village maintains no list of tax assessments regarding non-residential properties, it would not be required to prepare such a list on your behalf. Similarly, if there is no accounting of funds expended on certain activities, the Village would not be obliged to prepare an accounting to accommodate you.

I point out, too, that the same provision also states 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.

One aspect of your request involves all records of any communication "between any Village representative and any representative of the Grand Union Company between April 1987 to present pertaining to [your] property." If the Village maintains all such records in a file pertaining to you, for example, it is likely that the request would meet the standard of reasonably describing the records sought. However, if records are kept in a variety of files and are maintained chronologically rather than by name or similar identifier, the requisite standard might not have been met.

Lastly, I know of no State agency that has the general authority or responsibility to investigate public officials for misconduct.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Village and the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees, Village of Greenwood Lake
Town Board, Town of Warwick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9814

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Hon. Shirley Murray
Town Clerk
Town of Wilton
22 Traver Road
Gansevoort, NY 12831-9127

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Murray:

I have received your letter of November 20 in which you sought guidance concerning a request made under the Freedom of Information Law.

Specifically, you were asked to provide copies of a voter registration list that the Town purchased from the Saratoga County Department of Data Processing. You indicated that the person requesting the list intends to use the list as a mailing list for commercial activity.

In this regard, as a general matter, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that if records are accessible, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City, 62 NYS 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. However, §89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold "lists of names and addresses if such list would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses may be relevant, and case law indicates that an agency can ask that an applicant certify that the list would not be used for commercial purposes as a condition precedent to disclosure [see Golbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980); also, Siegel Fenchel and Peddy v. Central Pine Barrens Joint

Planning and Policy Commission, Sup. Cty., Suffolk Cty., NYLJ, October 16, 1996].

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 a right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access [see e.g., Szikszay v. Buelow, 436 NYS 2d 558, 583 (1981)]. Of potential relevance in this instance is §5-602 of the Election Law, entitled "Lists of registered voters; publication of", which states that voter registration lists are public. Specifically, subdivision (1) of that statute provides in part that a "board of elections shall cause to be published a complete list of names and residence addresses of the registered voters for each election district over which the board has jurisdiction"; subdivision (2) states that "The board of elections shall cause a list to be published for each election district over which it has jurisdiction"; subdivision (3) requires that at least fifty copies of such lists shall be prepared, that at least five copies be kept "for public inspection at each main office or branch of the board", and that "other copies shall be sold at a charge not exceeding the cost of publication." As such, §5-602 of the Election Law directs that lists of registered voters be prepared, made available for inspection, and that copies shall be sold. There is no language in that statute that imposes restrictions upon access in conjunction with the purpose for which a list is sought or its intended use.

Since §5-602 of the Election Law confers unrestricted public rights of access to voter registration lists, in my opinion, nothing in the Freedom of Information Law could be cited to restrict those rights. Further, as a general matter, I believe that a statute pertaining to a specific subject prevails over a statute pertaining to a general subject. A statute in the Election Law that pertains to particular records would in my view supersede a statute pertaining to records generally, such as the Freedom of Information Law.

It is emphasized that the provisions of the Election Law cited above pertain to voter registration lists prepared and maintained by county boards of elections, not to agencies generally. Therefore, if the list in question would clearly be used for a commercial purpose, it might be contended that the Town could deny access in accordance with §89(2)(b)(iii) of the Freedom of Information Law. However, the same information could be acquired by any person, irrespective of the intended use, from the County Board of Elections. In short, while the Town may have the

authority to deny access, a denial might merely delay an inevitable disclosure by the County Board of Elections.

Lastly, the Freedom of Information Law is permissive. Stated differently, even when a local government agency has the ability to withhold a list of names and addresses that is sought for a commercial purpose, it is not required to do so and may choose to disclose.

I hope that I have been of assistance. Should any questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9815

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Victor Riccardi
96-R-0366
Orleans Correctional Facility
35-31 Gaines Basin Road
Albion, NY 14411

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Riccardi:

I have received your letter of November 15 in which you sought assistance in obtaining information concerning the time credited to your attorney, who represented you in accordance with Article 18-B of the County Law, as well as the prosecution.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Further, §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 Freedom of Information Law does not apply to the courts or court records, or to records of a private attorney or organization.

Second, with respect to attorneys assigned pursuant to Article 18-b, under §722 of the County Law, the governing body of a county and the City Council in New York City are required to adopt plans for providing counsel to persons "who are financially unable to obtain counsel." Those plans may involve providing representation by a public defender, by a legal aid organization, through a bar association, or by means of a combination of the foregoing.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

When an entity falls within the coverage of the Freedom of Information Law, its records are presumptively available. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the records in which you are interested are maintained by an agency, they would likely be available to you, for none of the grounds for denial would appear to apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9816

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. F. William Valentino
President and Acting Chairman
NYS Energy Research and Development
Authority
Corporate Plaza West
286 Washington Avenue Extension
Albany, NY 12203-6399

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. Valentino:

I have received your letter of November 21, as well as the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a request made under the Freedom of Information Law relating to records identifying employees of the New York State Energy Research and Development Authority (NYSERDA) who are or may be eligible for the early retirement incentive. The applicant for the records, Mr. Peter Henner, has contended that the information sought "is clearly relevant to the performance of duties of a public employee" and should, therefore, be disclosed. Your view, however, "is that the names -- and associated personal information in the form of birth dates and ages as of a particular date -- of persons who might be eligible for the early retirement incentive, but have not given notice of or otherwise made public an interest in taking advantage of it, is entirely unrelated to the performance of their duties" and may be withheld.

While I am unaware of any judicial decision that deals squarely with the issue, I would agree that the information in question may be withheld. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that

records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, as you are aware, the issue is whether disclosure of the information sought would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. 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. 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. 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].

From my perspective, the age of a public employee is largely irrelevant to the performance of one's official duties and, therefore, disclosure of a name or other details that would enable the public to know of one's age would constitute an unwarranted invasion of personal privacy. It is noted that age is among the characteristics appearing in the Human Rights Law that could result in a discrimination claim if used in determining to reject an applicant for employment. Further, having contacted the Department of Civil Service, I was informed that when an individual seeks initial employment with the State of New York or is interviewed, there is no requirement that the applicant provide his or her age or date of birth. In that context, the age of a prospective employee would, by law, be essentially irrelevant to the prospective performance of that person's official duties. In other contexts, it has been advised that personally identifying details based on age may justifiably be withheld based on considerations of privacy. For instance, lists of senior citizens who participate in a municipality's program for the aging or lists of children who participate in a summer recreation program, indicate, by their nature, that certain people fall with small age ranges. In those instances, since a class of persons would be identified by means of age, it has been advised that disclosure would result in an unwarranted invasion of personal privacy.

I recognize that reasonable people frequently have different views, especially when dealing with issues involving personal privacy, and it is emphasized that my opinion is just that, an opinion. While it is not my goal to encourage litigation and I hope that no litigation will be initiated in this instance, only a court could offer unequivocal guidance.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Henner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9817

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. William J. Broedel
[redacted]

Dear Mr. Broedel:

I have received your letter of November 16, which pertains to your continuing efforts to attempt to acquire records relating to disciplinary action taken against you in 1993. You contend that you have "due process rights" to the records at issue.

In this regard, having reviewed your correspondence and the materials attached to it, I see no basis for altering the advisory opinion addressed to you on July 28, 1995. I note that your rights under the Freedom of Information Law may differ from rights that you might enjoy as a litigant or as the subject of a disciplinary proceeding. When a person seeks records under the Freedom of Information Law, that person is acting as a member of the public. 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)].

While some of the points that you raised may have merit, I do not believe that they necessarily result in an augmentation of your rights, as a member of the public, under the Freedom of Information Law. It is possible that you may have the ability to acquire records withheld under the Freedom of Information via different disclosure devices available to you due to your position as a former employee pursuant to a collective bargaining agreement, or perhaps due to your status as a litigant. It is suggested, therefore, that you discuss the matter with your attorney.

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-9818

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Daniel Ward
91-A-9680
P.O. Box AG
Fallsburg, NY 12733

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Ward:

I have received your letter of November 6, which reached this office on November 19.

You have sought an advisory opinion concerning the propriety of a denial of your request by the Division of Criminal Justice Services (DCJS) for a rap sheet pertaining to a deceased person who allegedly testified against you during a grand jury proceeding.

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.

In Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989), it was held that conviction records maintained by DCJS are confidential in view of the legislative history of the statutes that govern the practices of that agency. Specifically, the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute", and it was found that:

> "Both the language of the statute and the consistent history of limited access to the criminal records maintained by DCJS lead this court to conclude that an exception to the mandate of FOIL exists with respect to the disclosure sought by petitioner."

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

cc: Richard Ross, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9819

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Ira J. Cohen
Sullivan County Attorney
County Government Center
P.O. Box 5012
Monticello, NY 12701

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cohen:

As you are aware, I have received your letter of November 12 and the materials attached to it. Please accept my apologies for the delay in response.

You indicated that your inquiry was made at the request of the Sullivan County Treasurer and a correspondent for a local radio station. The issue relates to a section of the Tax Law, §1202-j, which authorizes the County to impose a tax on hotels and motels, and provisions of a local law enacted to implement the enabling state legislation. Section 503 of the local law, entitled "Returns to be Secret", essentially prohibits the Treasurer from disclosing information relating to the business of a submitter of a return absent a judicial order. It also authorizes the imposition of a penalty upon a County officer or employee who discloses information in violation of §503. The reporter has requested a list "merely naming taxpayers who have failed to either file a report and/or pay all or a portion of the tax due upon filing said report." It is your view that the request is not specifically addressed in either the local law or the enabling statute, and you have sought my views on the matter.

In this regard, I offer the following comments.

First and perhaps most importantly, 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 every aspect of every record used, developed or acquired in conjunction with the implementation of the tax provisions 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.

Second, assuming that the local enactment would not serve as a bar to disclosure based on the rationale offered in the preceding paragraph, I believe that the information sought by the reporter would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 some circumstances, it is possible that detailed information concerning occupancy rates, revenues and the like might justifiably be withheld pursuant to §87(2)(d), the so-called "trade secret" exception. That provision permits an agency to withhold records insofar as disclosure would cause "substantial injury to the competitive position of a commercial enterprise." From my perspective, that would not be so instance in this instance, for the information sought would not involve detailed financial information, but merely the fact that a taxpayer has failed to file a report or pay some or all of the tax owed the County. If my contention is accurate, §87(2)(d) could not validly be asserted to withhold the information in question.

The other provision of possible significance, §87(2)(b), permits an agency to deny access to records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective and based upon judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the Court of Appeals that focuses upon the privacy provision, the court referred to the authority to withhold "certain personal information about private citizens" [see Matter of Federation of New York State Rifle and Pistol Clubs, Inc. v. The New York City Police Department, 73 NY 2d 92 (1989)]. In a decision involving a request for a list of names and addresses, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets,

Supreme Court, Albany County, May 10, 1989). More recently, in a case concerning records pertaining to the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, because the information sought relates to commercial activity, I do not believe that the provisions in the Freedom of Information Law pertaining to the protection of personal privacy could be asserted to withhold the information in question or that any other ground for denial would justify a denial of access.

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 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..." [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Therefore, even when an agency may withhold records, it could nonetheless choose to disclose. In this instance, for reasons described in the preceding commentary, I believe that the information sought is accessible under the Freedom of Information Law.

I hope that I have been of assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Daniel L. Briggs, Sullivan County Treasurer
Glenn Pontier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9820

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Jerry Brixner
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brixner:

I have received your letter of November 16 addressed to Comptroller McCall and myself.

As you may be aware, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information and Open Meetings Laws. This office has neither the jurisdiction nor the expertise to respond with respect to restrictions on the ability of a municipality to borrow money. As such, my comments will be restricted to consideration of the issue involving the denial of a request for records by the Town of Chili.

Specifically, you asked the Town Clerk for a list of the names and legal addresses of persons who applied to fill a vacancy on the Town Ethics Committee. She indicated that I advised that disclosure would, in my opinion, constitute "an unwarranted invasion of personal privacy" and that, therefore, the information could be withheld.

From my perspective, certain provisions of the Freedom of Information Law, although not directly on point, serve to provide guidance on the matter. First, as you may be aware, §87(3)(b) requires each agency to maintain a record that includes the name, public office address, title and salary of every officer or employee of the agency. As such, basic information concerning public officers and employees is clearly public, and the courts have determined in a variety of contexts that many items found within records that are relevant to the performance of the official duties of public officers and employees are available. Second, however, §89(7) provides that nothing in the Freedom of Information Law requires the disclosure of the home address of a public officer

or public employee, or the name or home address of an applicant for public employment.

In my view, home addresses of public officers and employees need not be disclosed because they are largely irrelevant to the performance of one's duties. Names and addresses of applicants for appointment to public employment need not be disclosed, in all likelihood, due to the possibility of embarrassment if an applicant is not selected, and because, very simply, that person would not yet have been hired.

While an applicant for a position on the Ethics Committee would not be seeking public employment, it would seem that he or she, as a private citizen, should be accorded privacy protection in a manner analogous to an applicant for a position as a public employee.

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: Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9821

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Ernest Icesom
241-96-10533
George R. Vierno Center
09-09 Hazen Street
East Elmhurst, NY 11370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Icesom:

I have received your letter of November 1, which reached this office on November 15. You have sought assistance in obtaining a waiver of fees imposed by the Division of Parole in connection with your request for records under the Freedom of Information Law.

In this regard, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy and there is nothing in that statute pertains to the waiver of fees. Further, in a decision involving a request for a waiver of fees by an inmate who sought records from an office of a district attorney, it was held that an agency may assess a fee in accordance with the Freedom of Information Law, notwithstanding the inmate's status as an indigent person [Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)]. Therefore, irrespective of one's status, i.e., as a litigant or a poor person, I believe that an agency is authorized by the Freedom of Information Law to charge for photocopying in accordance with its rules promulgated under §87(1)(b)(iii) of that statute.

I note that the provisions pertaining to fees waivers to which you alluded in your correspondence relate to the federal Freedom of Information Act, which is applicable only to federal agencies; it has no application with respect to entities of state or local government.

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

cc: David Molik, Senior Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9822

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 27, 1996

Mr. Daryl Jackson
93-A-3229
Greenhaven Correctional Facility
Hosp.2nd Floor, Room 15
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 information presented in your correspondence.

Dear Mr. Jackson:

I have received your undated letter, which reached this office on November 14. You have asked for the name of an organization or court that might provide you with information concerning your adoption.

In this regard, first, I know of no such organization. Perhaps your counselor, attorney or facility librarian could assist you in locating such an organization.

Second, the first ground for denial of access to records in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §114 of the Domestic Relations Law, which generally requires that adoption records be sealed and confidential. As such, the Freedom of Information Law would not be applicable to those records. Section 114 states in part that:

> "No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and

to such additional persons as the court may direct."

Based on the foregoing, only a court by means of an order could unseal records relating to an adoption.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9823

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 30, 1996

Mr. Anthony Anzalone
89-A-7888
Green Haven Corr. Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Anzalone:

I have received your letter of November 29 in which you questioned whether laboratory reports prepared in conjunction with your arrest must be disclosed.

In this regard, I offer the following comments.

First, your request was directed to the records access officer at the New York City Police Lab. Unless I am mistaken, the New York City Police Department has designated one records access officer, Sgt. Louis Lombardi, whose office is located at One Police Plaza, New York, NY 10038. While I believe that the person in receipt of your request should have responded in accordance with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the designated records access officer.

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 records pertain to you, your arrest and your eventual conviction, it appears that two of the grounds for denial would be pertinent to an analysis of rights of access.

Section 87(2)(g) permits an agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 likely that laboratory reports would consist in great measure of statistical or factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted.

The other provision of significance, §87(2)(e), authorizes an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, if the arrest resulted in a conviction, it is unlikely that any of the harmful effects of disclosure described in §87(2)(e) would occur at this juncture.

Lastly, the Freedom of Information Law pertains to existing records. I am unaware of the length of time that the kinds of records that you are seeking must be retained. Since the arrest

occurred nearly ten years ago, it is possible that some records might have been discarded.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Dr. Richard Wilk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9824

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 2, 1997

Mr. Edwin Arthur
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Arthur:

I have received your letter of December 1, which deals with a request for a "master index" from the New York City Department of Probation. You were informed that the Department maintains no such record.

In this regard, the phrase "master index" is used in the regulations promulgated by the State Department of Correctional Services under the Freedom of Information Law. Those regulations are based upon §87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

> "a reasonably detailed current list by subject matter, of all records in the possession of the agency, whether or not available under this article."

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather, I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, although a subject matter list is not prepared with respect to records pertaining to a single individual, such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested.

Rather than seeking a "master index" from the agency in question, it is suggested that you request the subject matter list maintained pursuant to §87(3)(c) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donna Dodds, Associate General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9855

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 3, 1997

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 information presented in your correspondence.

Dear Mr. Shelly:

I have received your letter of November 17, which reached this office on December 5. Please accept my apologies for the delay in response.

You have asked whether the "Special Funds Conservation Committee" is subject to the Freedom of Information Law. You indicated that the entity in question is affiliated with the New York Compensation Rating Board and "is headed by an individual who is appointed by the Chairman of the Workers' Compensation Board." In this regard, having reviewed the statutes that you cited and others, I contacted the Workers' Compensation Board on your behalf to attempt to acquire additional information on the subject. I note that there is no reference in any provision of law to the Special Funds Conservation Committee, and I was informed that the Committee is largely independent of government.

Pursuant to §25-a(5) of the Workers' Compensation Law, the Chairman of the Workers' Compensation Board is required to appoint an individual as representative of a fund. However, when insurance carriers collectively designate an attorney, the cited provision specifies that the Chairman is required to appoint that person. In that event, which I was told is the case currently, the Chairman of the Workers' Compensation Board has no discretion in terms of the selection, and the appointment is *pro forma*. Consequently, the relationship between the Workers' Compensation Board and the entity in question and the degree of control on the part of the Board are not substantive in nature. In short, based upon my understanding of the matter, I believe that the Committee in question would not constitute an "agency" subject to the Freedom of Information Law, for it is not a governmental entity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9826

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 3, 1997

Ms. Kathleen J. Cochran
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Cochran:

I have received your letter of November 22. Please accept my apologies for the delay in response. You have questioned the propriety of a denial of your request for a financial disclosure statement filed with Niagara County by a former County legislator.

The County's denial of access is based on a section of its Code of Ethics, which states in part that disclosure statements are confidential. From my perspective, to the extent that the Code of Ethics is inconsistent with the Freedom of Information Law, it could be found to be invalid. While I do not intend to analyze the issue in a manner that is overly complex, it is important to review the history of certain statutes and their relationship to one another in order to offer appropriate guidance. In this regard, I offer the following comments.

First, it appears that the provision in the Code of Ethics at issue was enacted in conjunction with the Ethics in Government Act ("the Act"). 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 the matter, it is necessary to interpret certain provisions of the General Municipal Law.

The central 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 provided 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 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.

In my opinion, the governing statute is the Freedom of Information Law. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant to the matter is §87(2)(a), which 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, the State's highest court, that an agency's regulations or the provisions of a local law, 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)].

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.

Since you referred to the former legislator and "the amount of money he has", I believe that specific information concerning the value of his assets could be withheld. For example, while the law would require a disclosure of the fact that a county officer owns shares in a particular corporation, the number of shares or their value could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Similarly, the amount of money held in a bank would represent information which, in my view, could clearly be withheld. In essence, typically, financial disclosure statements must be disclosed insofar as they indicate the sources of one's assets, but they may be withheld from the public insofar as they indicate the value of the assets.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas M. Jaccarino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1827

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 7, 1997

Mr. James D. Hicks
85-A-0498
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 information presented in your correspondence.

Dear Mr. Hicks:

I have received your letter, which reached this office on December 6. You have sought assistance in obtaining an autopsy report and related records pertaining to your aunt from the Office of the Chief Medical Examiner of New York City.

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.

Relevant is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." It has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts the records in question from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were subject to neither the Freedom of Information Law nor §677 of the County Law, which pertains to autopsy and related records maintained by counties outside of New York City. However, the court found that the applicant in that case was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to the records in question would be dependent upon your capacity to

demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ellen Borakove
Sarah Scott

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 982

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 7, 1997

Mr. Ralph Lee
92-T-0350
Green Haven Corr. Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lee:

I have received your letter of December 4 in which you referred to my response to you of October 25 concerning access to DD5's. At the time, it was suggested that an analysis of the issue would be premature due to the pendency of a case before the Court of Appeals. Because a decision has since been rendered, you asked for my assistance in obtaining two DD5's.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee cannot enforce that statute or compel an agency to grant or deny access to records. Under the circumstances, it is suggested that you renew you request for the records and ask for a reconsideration of the Department's earlier response based on the direction provided by the Court of Appeals. In an effort to offer guidance on the matter, 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 some aspects of the records in question might properly be withheld, the recent decision by the Court of Appeals, as you are aware, indicates that a blanket denial of access to DD5's based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to

protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by

> the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply.

For instance, 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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sgt. Louis Lombardi, Records Access Officer
Karen A. Pakstis, Assistant Deputy Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9829

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 8, 1997

Mr. Roy H. Schneggenburger
[redacted]

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. Schneggenburger:

As you are aware, I have received copies of your correspondence with the Town of Lancaster Department of Police. In brief, the Chief has informed you that he will not respond to your request for records unless and until you complete the agency's request form.

In this regard, by way of background, I note that the Freedom of Information Law provides direction concerning the time 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)].

In conjunction with the foregoing, 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 requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the agency possesses and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the

statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Chief Fowler.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas E. Fowler, Chief of Police
Robert Thill, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9830

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 8, 1997

Mr. Kevin Harlin
The Ithaca Journal
123 W. State Street
Ithaca, NY 14850

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Harlin:

I have received your letter, which reached this office on December 9. You have requested an advisory opinion concerning the propriety of a fee that the City of Ithaca seeks to charge for copies of certain records.

Specifically, in response to a request for a copy of the City of Ithaca Municipal Codes and Regulations, you were informed that the fee would be $250 for either a two volume set in hard copy or computer disk. From my perspective, it is likely that the fee for a copy of the materials on disks should be significantly lower than $250. In this regard, I offer the following comments.

By way of background, it is emphasized that the Freedom of Information Law pertains to agency records and 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 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).

With respect to fees, §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, (i.e., electronic information), or any other fee, such as a fee for search or overhead costs. 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, a fee for reproducing electronic information would involve the cost of computer time, plus the cost of an information storage medium (i.e., a computer tape or disk) to which data is transferred. If, for example, the duplication of the data involves a transfer of data from one disk to another, computer time is minimal, likely a matter of seconds. If that is so, the actual cost may involve only the cost of the disks.

Lastly, 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)].

In short, the fee sought to be charged by the City appears to be excessive and inconsistent with the Freedom of Information Law and its judicial interpretation.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the City Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9831

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 9, 1997

Mr. Michael Hurley
82-C-0913
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. Hurley:

I have received your letter of December 5. You indicated that you have requested records from the Office of the District Attorney of Ontario County and that you have not received either the records or "even an acknowledgement" of the receipt of your requests.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with the Freedom of Information Law, a copy of this opinion will be forwarded to the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9832

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 9, 1997

Mr. Richard Quinn
89-T-3132
Box 500
Elmira, NY 14902-0500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Quinn:

I have received your letter of November 27 addressed to William Bookman, Chairman of the Committee on Open Government. I note that your correspondence was initially delivered to the wrong office, and I hope that you will accept my apologies for the lateness of this response.

You complained that you have encountered delays in response your request for a record at your facility and asked that the Committee ensure that the Department of Correctional Services complies with the Freedom of Information Law.

In this regard, the Committee is authorized to advise with respect to the Freedom of Information Law. This office is not empowered to enforce that statute or otherwise compel an agency to grant or deny access to records. However, in an effort to offer guidance, 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)].

For your information, the person designated to determine appeals for the Department of Correctional Services is Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel
Ms. McKibben, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9832A

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 9, 1997

Mr. Anthony Youmans
94-A-4511
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. Youmans:

I have received a copy of your letter of December 4 addressed to the Appellate Division in which you requested records under the Freedom of Information Law.

I note that the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information

Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

If you have not yet received the records sought, it is suggested that you resubmit a request, citing an applicable provision of 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 9833

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 9, 1997

Mr. Daniel E. Boyer
94-A-7753
Washington Correctional Facility
P.O. Box 180
Comstock, NY 12821-0180

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Boyer:

I have received your letter of December 8 and the correspondence attached to it. You have asked that I contact the Rensselaer County Clerk in order to assure that she complies with the Freedom of Information Law by disclosing a certain "Court Certified Disposition Slip" to you.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an entity to grant or deny access to records.

I note, too, that the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

If you have not yet received the record sought, it is suggested that you resubmit a request, citing an applicable provision of 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

cc: Doreen M. Connolly, County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9834

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 9, 1997

Mr. Bernard J. Morosco
Executive Director
Utica Neighborhood Housing Service, Inc.
322 South Street
Utica, NY 13501

<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 information presented in your correspondence.</u>

Dear Mr. Morosco:

I have received your letter of December 6. Please accept my apologies for the delay in response.

You have asked whether the Utica Neighborhood Housing Service, Inc, "a private not-for-profit organization", is subject to the Freedom of Information Law. You indicated that the organization "operate[s] utilizing grants from State and Federal coffers."

In this regard, the Freedom of Information Law applies to agencies, 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."

If 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 it. As such, although you may choose to disclose records, you would not be required to do so by the Freedom of Information Law, despite the receipt of grant monies from state and federal agencies.

Since you did not specify the nature of the organization, I point out that so-called community action agencies are likely required to disclose information to the public. It is my understanding that community action agencies are created by means of the authority conferred by the Economic Opportunity Act of 1964. According to §201 of the Act, the general purposes of a community action agency are:

> "to stimulate a better focusing of all available local, State, private and Federal resources upon the goal of enabling low-income families, and low-income individuals of all ages, in rural and urban areas to attain the skills, knowledge, and motivations and secure the opportunities needed for them to become fully self-sufficient..." [§201(a)]
>
> "to provide for basic education, health care, vocational training, and employment opportunities in rural America to enable the poor living in rural areas to remain in such areas and become self-sufficient therein..." [§201(b)].

When community action agencies are designated, §211 indicates that they perform a governmental function for the state or for one or more public corporations. It is noted that a public corporation includes a county, city, town, village, or school district, for example. As such, by means of the designation as community action agencies, those agencies apparently perform their duties for the state or at least one public corporation.

Section 213 of the enabling legislation expresses an intent to enhance public participation as well as disclosure of information regarding the functions and duties of community action agencies. Specifically, subdivision (a) of §213 states in relevant part that:

> "[E]ach community action agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. Each community action agency shall also provide for reasonable public access to information, including but not limited to public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible..."

Again, while it is unclear that the Freedom of Information Law applies to records maintained by a community action agency, I

believe that the federal legislation quoted above indicates an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency."

Whether the Freedom of Information Law applies or otherwise, I believe that it offers guidance concerning disclosure by a community action agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2698
FOIL-AO-9835

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 10, 1997

Mr. Frederick E. Fitte
[redacted]

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. Fitte:

I have received your letter of December 11. You have raised a series of questions concerning the Freedom of Information and Open Meetings Laws and their application to a volunteer rescue squad that is a not-for-profit corporation. You wrote that the entity in question is funded by both donations and through taxing districts in at least two towns that it serves.

Based on judicial interpretations, I believe that the rescue squad is required to comply with both statutes. In this regard, I offer the following comments.

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."

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, 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 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)].

Second, §1402 of the Not-for-Profit Corporation Law, which pertains to volunteer fire corporations, states in part that:

> "(d) Any fire, hose, protective or hook and ladder corporation heretofore organized under any general law with the consent of the town board in the territory served by such corporation is hereby legalized and confirmed, notwithstanding the omission of any town board to appoint or confirm the members of such corporations as town firemen. Any such corporation shall hereafter be subject to the provisions of this section.
>
> (e)(1) A fire, hose, protective or hook and ladder corporation heretofore incorporated under any general law or 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 corporation...
>
> (3) The emergency relief squad of a fire corporation incorporated under this section or subject to the provisions thereof shall have power to furnish general ambulance service when duly authorized under the provisions of section two hundred nine-b of the general municipal law."

In turn, section 209-b(2)(a) of the General Municipal Law states that:

> "General ambulance service. A. The governing board of any city, town which has a fire department, village or fire district which has in its fire department an emergency rescue and first aid squad composed mainly of volunteer firefighters, by resolution, may authorize any such squad to furnish general ambulance service for the purpose of (1) transporting any sick, injured or disabled resident or person found within city, town, village or fire district to a hospital, clinic, sanatorium or other place for treatment and care and returning any such person therefrom if still sick, injured or disabled and (2) transporting any sick, injured or disabled resident of the city, town, village or fire district from a hospital, clinic, sanatorium or other place where such person has received

> treatment and care to any other place for treatment and care or to such person's home..."

As such, it appears that a volunteer fire company that includes an ambulance corps consisting "mainly of volunteer firemen" would be treated by law in a manner similar to a volunteer fire company and would, therefore, be subject to the Freedom of Information Law.

Further, in a decision in which it was held that several volunteer fire companies are subject to the Freedom of Information Law, it was stated that:

> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has by law, control over these volunteer organizations which reprovide a public function" (S.W. Pitts Hose Company et al. v. Capital Newspapers, Supreme Court, Albany County, January 25, 1988)."

Since the relationship between the rescue squad and certain towns is apparently based upon the statutes described above, I believe that the entity in question is an "agency" required to comply with the Freedom of Information Law.

Perhaps most relevant to the matter is a recent decision in which the Appellate Division affirmed a lower court finding that a volunteer ambulance company is an "agency" required to comply with the Freedom of Information Law [Ryan v. Mastic Volunteer Ambulance Company, 212 AD2d 716 (1995)].

While there are no judicial decisions of which I am aware that focus directly on the status of meetings of the governing bodies of volunteer fire, ambulance or rescue companies, due to the direction provided by the courts concerning the application of the Freedom of Information Law, I believe that the same conclusion would be reached with respect to the Open Meetings Law.

That statute is applicable to meeting of public bodies, and §102(2) defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or

subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the boards of the companies referenced above. Such a board is clearly an entity consisting of two or more members. I believe that it is required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law. Further, in my view, a volunteer fire or ambulance company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined to include a municipality, such as a town or village, for example. Since each of the elements in the definition of "public body" would pertain to the boards, it appears that each would constitute a "public body" subject to the Open Meetings Law.

Both the Freedom of Information Law and the Open Meetings Law are based upon a presumption of access. Stated differently, under the former, all records 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. Under the latter, meetings are presumed to be open to the public, except to the extent that a public body has the ability to enter into a closed or "executive session." The grounds for entry into executive session are specified and limited in paragraphs (a) through (h) of §105(1) of the Open Meetings Law.

Since you referred to financial information, it is unlikely that records involving the finances of a volunteer rescue squad or similar entity could be withheld. Contracts, ledgers, books of account and similar records reflective of an entity's finances must ordinarily be disclosed [see Freedom of Information Law, §87(2)(g)(i)].

In an effort to provide additional detail concerning the Freedom of Information and Open Meetings Laws, enclosed are copies of both statutes, as well as an explanatory brochure pertaining to them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9836

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

Subject: FOIL Request
Date: January 10, 1997
From: Robert J. Freeman, Executive Director, NYS Department of State Committee on Open Government, 41 State Street, Albany, NY 12231 - Phone (518) 474-2518
To: [redacted]

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.

The Department of State has received your E mail message of December 25 in which you indicated that your requests made under the Freedom of Information Law to the State Education Department have not been answered.

It is suggested that you appeal on the ground that your request has been constructively denied.

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, in the case of the State Education Department, an appeal should be directed to the Commissioner, Richard P. Mills.

I hope that I have been of assistance.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9837

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 13, 1997

Mr. Edward F. Gonzalez
95-R-3020
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 information presented in your correspondence.

Dear Mr. Gonzalez:

I have received your letter of December 9. You have complained with respect to the refusal by the Office of the Westchester County District Attorney to provide access to certain records.

Your initial contention is that the agency in question failed to disclose records that should have been made available pursuant to the Freedom of Information Law and provisions of the Criminal Procedure Law (CPL).

In this regard, 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, and discovery in criminal proceedings under the CPL. The principle is 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 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].

Most recently, as you are aware, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law (Gould v. New York City Police Department, __NY 2d__, decided November 26, 1996).

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, 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 a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 concerning access to those records.

You also contend that provisions of the federal Freedom of Information Act are applicable and that records should be disclosed under that statute. You wrote that "unless disclosure is prohibited the request must be promptly granted under both N.Y. and U.S. FOILS."

In short, I disagree. The federal Freedom of Information Act pertains only to records maintained by federal agencies; it does not apply to records of an entity of state or local government.

Lastly, you wrote that "at the very least", the Office of the District Attorney must provide you with "a detailed list of all documents in their possession, and state exactly the reason why and which are being excluded from disclosure." There is a federal case, Vaughn v. Rosen [484 F2d 820 (1973)], rendered under the federal Freedom of Information Act dealing with the kind of index to which you referred. 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: Richard Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9838

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 13, 1997

Mr. Freddie Cup
91-A-7110
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582-0010

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cup:

I have received your letter of December 9. You have questioned your ability to obtain complaints and similar records pertaining to a correction 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 §87(2)(a) through (i) of the Law.

Most relevant in this instance is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §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 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" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals upheld a denial of access and found 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)].

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 v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty. March 25, 1981; Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988) and Sinicropi v. County of Nassau, 76 AD 2d 838 (1980)].

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., Prisoners' Legal Services, supra; also 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.

In sum, it is suggested that you review the provisions of §50-a of the Civil Rights Law, for that statute would in my view govern disclosure of the records in which you are interested. I believe that §50-a would require a judicial review of the records, and it is, therefore, suggested that you discuss the matter with your attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9839

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 13, 1997

Mr. Joseph A. Fero, Jr.
90-T-2401
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 information presented in your correspondence.

Dear Mr. Fero:

I have received your letter of November 26. Please accept my apologies for the delay in response. You complained that the Office of Disability Determinations of the Department of Social Services in Buffalo had failed to respond to your request for records in a timely manner.

In this regard, I have contacted that office on your behalf. In short, since that agency receives thousands of items of correspondence, without the name of the person who handles requests, I was informed that your request likely did not reach that person. As such, it is suggested that you resubmit your request to the same address to the attention of Ms. Jane Herman.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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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http://www.dos.ny.gov/coog

January 13, 1997

FOIL AO 9840

Mr. Barrett Chandler
92-A-3147
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 information presented in your correspondence.

Dear Mr. Chandler:

I have received your letter of December 8 and the correspondence attached to it. You indicated that you requested a variety of records concerning your arrest from the 114th Precinct of the New York City Police Department, but that you had received no response.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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. In the case of the New York City Police Department, there is one records access officer, Sgt. Louis Lombardi, whose office is located at Room 110C, One Police Plaza, New York, NY 10038. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the records access officer.

Second, for future reference, I note 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals concerning DD5's and police officers' memo books in which it was held that a denial of access

based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §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.

In its analysis of the matter, the decision states that:

"...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or

determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...

"...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, 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.

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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9841

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 13, 1997

Mr. Craig Steven Rose
95-A-7042
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rose:

I have received your letter of December 10 and the correspondence attached to it. You have sought assistance in your efforts to review your "O.M.H. records" at your facility.

In this regard, since you referred to the Freedom of Information Law, §18 of the Public Health Law and 5 U.S.C. 552 and 552a, it appears that those statutes would not govern access in this instance. I note, too, that 5 U.S.C. 552 and 552a are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes pertain only to federal agencies and do not apply to records maintained by entities of state and local government. Nevertheless, I offer the following comments.

Although the Freedom of Information Law provides broad rights of access, the first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." One such statute is §33.13 of the Mental Hygiene Law, which generally requires that clinical records pertaining to persons receiving treatment in a mental hygiene facility be kept confidential.

However, §33.16 of the Mental Hygiene Law pertains specifically to access to mental health records by the subjects of the records. Under that statute, a patient may direct a request for inspection or copies of his or her mental health records to the "facility", as that term is defined in the Mental Hygiene Law, which maintains the records. It is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities" and are operated by the New York

State Office of Mental Health. Further, I have been advised that requests by inmates for records of such "satellite units" pertaining to themselves may be directed to the Director of Sentenced Services, Bureau of Forensic Services, Office of Mental Health, 44 Holland Avenue, Albany, NY 12229. Lastly, it is noted that under §33.16, there are certain limitations on rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wayne Crosier

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9843

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 13, 1997

Mr. Joseph Sorce
93-A-8163
Greenhaven Correctional Faciltiy
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 information presented in your correspondence.

Dear Mr. Sorce:

I have received your letter of December 6. You wrote that the only incriminating evidence against you was a statement, "a full confession, which had a forged statement on it." Although you were permitted to inspect the statement at your trial, you wrote that "[t]he photostat copy that was given to [you] had [your] signature on it, in a superimposed version." You have asked whether you have the right to obtain a "photographic copy of this statement."

In this regard, it was held in Moore v. Santucci [151 AD 2d 677 (1989)] that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains a record that had previously been disclosed, the agency would be required to respond to a request for the record in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9843

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 14, 1997

Mr. Charles McCallister
[redacted]

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. McCallister:

I have received your correspondence of December 9. According to your letter, despite the decision rendered in Gould et al. v. New York City Police Department (Court of Appeals, November 26, 1996, ___ NY2d ___), your request for records of the New York City Police Department had not been answered as of the date of your letter to this office, some sixty days after submitting 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 Karen A. Pakstis, Assistant Deputy Commissioner, Legal Matters.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9844

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 15, 1997

Mr. Thomas Grace
[redacted]

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. Grace:

I have received your letter of December 11, which reached this office on December 16. Please accept my apologies for the delay in response.

You have questioned the propriety of a denial of your request for a survey by the Chenango County Attorney. You wrote that the survey was prepared three years ago in conjunction with the Millbrook Watershed Project. The County Attorney denied access for the following reasons:

"• such survey is intra-agency material which is not statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; external audits;

• such survey, if disclosed, would impair present or imminent contract negotiations as the survey is an element of the proposed consideration for the exercise of the option;

• such survey is the work product of an independent professionally licensed land surveyor whose competitive position would be subject to substantial injury if disclosed without a direct relationship between the receivor of the work product and the licensed professional and the

payment of a fee for such professional services;

- the survey constitutes attorney work produce as it was prepared for use of the County Attorney in relation to the Millbrook project and the drafting of various options, agreements and easements which have yet to be concluded;

- the survey cost several hundred dollars in public moneys and is an intrinsically valuable document, the release of which, without full consideration for the cost thereof, would constitute a gift of public funds in violation of the New York State Constitution, Article 8, Section 1."

From my perspective, it is questionable whether the contentions offered by the County Attorney could be justified. 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.

The first ground for denial to which the County Attorney alluded, §87(2)(g), pertains to intra-agency materials. Assuming that the survey was prepared for the County by a surveyor, it would appear to constitute intra-agency material [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)]. 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.

If the survey in question is typical of land surveys generally, it would likely consist entirely of factual information that must be disclosed under §87(2)(g)(i), unless a different ground for denial could properly be asserted. According to Black's Law Dictionary, a survey is "the process by which a parcel of land is measured and its contents ascertained; also a statement of the result of such survey, with the courses and distances and the quantity of the land." Based on the definition, again, the survey would appear to consist of factual information. Further, the Court of Appeals, the State's highest court, held recently that "[f]actual data... simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process" (Gould et. al v. New York City Police Department, ___ NY 2d ___, decided November 29, 1996).

Another ground for denial, §87(2)(c), states that an agency may withhold records insofar as disclosure would "impair present contract awards..." That provision has been appropriately asserted in situations involving real property transactions when an agency would have been required to disclose its findings or opinions regarding the value of property [see e.g., Murray v. Troy Urban Renewal Agency, Sup. Ct., Rensselaer Cty., April 24, 1980, rev'd 84 AD 2d 612, 56 NY 2d 888 (1982) and Town of Oyster Bay v. Williams, 134 AD 2d 267 (1987)]. In the cases cited above, the records sought were appraisals prepared by or for agencies, and it was determined that their denials of access were appropriate, for disclosure would have enabled potential purchasers to know of the agencies' views concerning the value or optimal purchase price of the parcels. In short, the survey does not contain the kind of information found to be deniable.

A third exception to which the County Attorney alluded is §87(2)(d), which 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 which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

The intent of the language quoted above is to enable government to withhold records prepared by a commercial enterprise that would be valuable to competitors of that enterprise. In a recent decision rendered by the Court of Appeals [Encore College Bookstores, Inc.

v. Auxiliary Services Corporation of the State University, 87 NY 2d 410 (1995)], the Court held that when government disclosure is sole means by which competitors can obtain the requested record, the inquiry ends with consideration of how valuable the information would be to a competing business and the extent to which disclosure would damage its competitive position. In this instance, the information would not be available solely from government; presumably any surveyor could prepare a similar record. When a record is available from another source at some cost, consideration must be given not only to the commercial value of such information but also to the cost of acquiring it through other means, because competition in business turns on the relative costs and opportunities faced by members of the same industry, which might be substantially different if one could obtain information by paying the copying cost rather than the cost of replication (id. at 420). The Court observed that the reasoning underlying these considerations is consistent with the policy behind §87(2)(d) to protect businesses from the deleterious consequences of disclosing confidential commercial information so as to further the state's economic development efforts and attract business to New York (id.). In applying those considerations to Encore's request, the Court concluded that the submitting enterprise was not required to establish actual competitive harm; rather, it was required, in the words of Gulf and Western Industries v. United States, 615 F.2d 527, 530 (D.C. Cir., 1979) to show "actual competition and the likelihood of substantial competitive injury" (id., at 421). In my view, since equivalent information could be acquired or prepared, it seems unlikely that disclosure would cause substantial injury to the competitive position of the firm that prepared the survey. Further, the request clearly has not been made by a competitor or in a context in which competition from a person or firm in the business of surveying is pertinent.

It was also contended that the survey constitutes an attorney work product that may be withheld. It is questionable in my view whether records prepared by a surveyor could be characterized as the work product of an attorney. Further, while material prepared solely for litigation may be exempt from disclosure [see Civil Practice Law and Rules, §3101(d)], it has been held that when records are prepared for multiple purposes, one of which might include eventual use in litigation, an agency cannot claim the exemption [see Westchester Rockland Newspapers v. Mosczydlowski, 58 AD 2d 234 (1977)]. In my view, the same principle would apply here.

The final claim is that disclosure would constitute an unconstitutional gift. In this regard, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert D. Briggs, Chairman of the Board
Richard W. Breslin, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9845

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Mr. Jerry Reynolds
93-A-9588 (D-8-2)
P.O. Box 500
Elmira, NY 14902-0500

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Reynolds:

I have received your letter of December 17 in which you raised a variety of issues concerning your requests for records.

You asked initially for the name of the proper agency to which you may appeal when a request is denied by an office of a district attorney in New York City. In this regard, because district attorneys are elected and their offices are largely independent, in each of the five boroughs appeals are made to a person designated by the district attorney whose office maintains the records sought. Therefore, an appeal may be made to the appropriate district attorney with a request that it be forwarded to the person designated by the district attorney to determine appeals.

Second, you indicated that the information sought under the Freedom of Information Law "could have been obtained through a Discovery Request made prior to trial, so it cannot be claimed to be exempt." In this regard, 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, and discovery in criminal proceedings under the Criminal Procedure Law (CPL). The principle is 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 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].

Most recently, as you may be aware, the Court of Appeals held that the CPL does not limit a defendant's ability to attempt to obtain records under the Freedom of Information Law (Gould v. New York City Police Department, __NY 2d__, decided November 26, 1996).

In sum, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, 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. Therefore, even though records may be available in

discovery, they may be deniable in whole or in part, and *vice versa*.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 concerning access to those records.

Third, you asked for the name of the agency to contact to obtain a "subject matter listing" of forms generated by agencies pursuant to NYCRR. I know of no agency that would maintain an index regarding such forms. It is suggested that you request blank forms that would be used for the events of your interest by the office of the district attorney that prosecuted.

Lastly, you asked for the "address to the Central Office or Headquarters of the Office of Stenographic/Court Reporters for the State of New York (in Albany)..." and for policy that might deal with absences on the part of court reporters. I know of no agency having the name to which you referred, and this office maintains no copies of policies concerning court reporters. I note that the courts and court records are not subject to the Freedom of Information Law, for the courts are not "agencies" [see definitions of "agency" and "judiciary" in §86(3) and (1) of the Freedom of Information Law]. I poiny out, however, that the Office of Court Administration, located at Agency Building 4, Empire State Plaza, Albany, NY 12223, has general oversight of the court system. If there are general policies on the subject of your interest, that agency might be able to make them available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9846

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Mr. James Edwards
87-T-1630
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Edwards:

I have received your letter of January 14 in which you requested information concerning the disbarment of an attorney who represented you.

In this regard, the Committee on Open Government is authorized to provide information concerning access to government records. The Committee does not maintain possession of records generally, such as those in which you are interested, and it is not empowered to compel an entity to grant or deny access to records. Nevertheless, in an effort to assist you, I offer the following comments.

First, it is noted 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.

Since you indicated that your attorney was disbarred, it is suggested that you seek the records from the Appellate Division having jurisdiction. Because the attorney practiced in Amityville, he likely would have been within the jurisdiction of the Second Department Appellate Division, which is located at 45 Monroe Place, Brooklyn, NY 11201.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9847

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Ms. Sarah D. Todd
[redacted]

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 Ms. Todd:

I have received your letter of December 17, as well as the correspondence attached to it. Please accept my apologies for the delay in response.

The materials reflect your efforts in obtaining assessment records from the Town of Hebron, which began on August 1. Despite a variety of communications with and promises by Town officials, you wrote that some of the records sought have not yet been made available. You have asked what additional recourse you might have and whether you would be entitled to an award of attorneys' fees should you initiate a judicial proceeding to attempt to compel disclosure. In this regard, in conjunction with the correspondence, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to agency records, and that §86(4) of that statute defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, if records are kept, help or produced by, with or for the Town of Hebron, they are Town records, irrespective

of where they are maintained or who maintains them [see Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University, 87 NY 2d 410 (1995)]. Therefore, even though the records sought might be or have been kept by persons or at locations other than the office of the Town Clerk, they clearly constitute Town records that fall within the coverage of the Freedom of Information Law. I note, too, that a town clerk, pursuant to §30 of the Town Law, is the legal custodian of all town records, irrespective of where they are kept.

Second, the correspondence indicates that the Town Clerk is the designated records access officer. In that capacity, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which have the force and effect of law, she has the duty of coordinating the Town's response to requests for records. Consequently, if a request is made for Town records that are not in her physical custody, I believe that she has the duty of directing the person in possession of the records to make them available for inspection or copying in accordance with the Freedom of Information Law or of acquiring the records promptly for the purpose of disclosing the records in a manner consistent with 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. On the basis of the correspondence, there appears to be no issue concerning rights of access to the records. In short, it does not appear that any of the grounds for denial could appropriately be asserted to withhold the records, which historically have been available long before the enactment of the Freedom of Information Law.

Fourth, it is noted 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)].

It is also noted that the statement of legislative intent appearing at the beginning of the Freedom of Information Law, §84, refers to the requirement that agencies make records available "wherever and whenever feasible." From my perspective, a delay in disclosure of records that are clearly public for a period of months is inconsistent with the spirit if not the letter of the law.

In terms of recourse, it is my hope that opinions rendered by this office serve to enhance compliance with and foster understanding of the Freedom of Information Law, thereby eliminating the necessity of litigation. I point out, too, that when an agency asserts that it does not maintain or cannot locate requested records, an applicant may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I note that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Lastly, should you initiate litigation, a court would have discretionary authority to award attorneys's fees in accordance with the conditions set forth in §89(4)(c) of the Freedom of Information Law. That provision states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public; and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Frances Sloan, Town Clerk
Benjamin R. Pratt, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9848

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Ms. Yvonne Bartlett
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Bartlett:

I have received your letter of December 17 and the materials attached to it. You have sought assistance in obtaining records from the South Seneca Central School District.

You referred initially to a request made on November 4. Although you received much of the information sought, you did not obtain certain of the items requested, specifically those numbered 8, 9 and 10. Item 8 involves attendance reports in which fifty or more students were absent. You were informed that the daily attendance sheets include the students' names and, therefore, cannot be disclosed. Item 9 pertains to student sign out sheets and were withheld for the same reason. Item 10 involves records indicating days on which more than five teachers were absent due to illness. In response, you were informed that the District can track personal, conference and sick leave, and that "[t]here is no record other than what goes into each individual's personal use of leave, so no non-confidential record exists."

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 the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that there may be instances in which a single record may contain both accessible and deniable information.

Moreover, that phrase imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld. When certain aspects of records may properly be withheld, they may be deleted, and the remainder must be disclosed.

Relevant with respect to records identifiable to students is the initial ground for denial, §87(2)(a), which pertains to records that are "specifically exempted from disclosure by state or federal statute." In this instance, insofar as disclosure of the records in question would or could identify a student or students other than your child, I believe that they must be withheld. A 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.

I am unaware of the specific contents or the means by which the records sought under items 8 and 9 are kept. If there is a method of ascertaining and disclosing information that you requested following the deletion of names of students or other

identifying details, I believe that the District would be obliged to do so. Of some relevance may be a decision rendered by the Appellate Division. In Kryston v. Board of Education, East Ramapo School District [430 NYS 2d 688, 77 AD 2d 896 (1980)], the court in presenting the facts stated that:

> "The petitioner, a parent of a student in the respondent school district, seeks disclosure of certain standardized reading and mathematics test scores of children who attended grade 3 in the El Dorado School during 1977-1978 school year. Specifically, the petitioner expressed an interest in the scores of six tests. Of these, the scores on four were tabulated and recorded alphabetically by student surname. The remaining test scores were not compiled in alphabetical order.
>
> "When respondents refused to release any of the scores, the petitioner instituted a proceeding pursuant to CPLR Article 78, *inter alia*, to compel disclosure. The court granted the petition in part by directing, *inter alia*, that the respondents release those scores not compiled in alphabetical order after first deleting the names of the students."

The lower court, however, determined to uphold the denial as it involved records that contained names listed alphabetically because some students, particularly those whose names are at the beginning and the end of the alphabet, might be identified, even if names were deleted. Nevertheless, the Appellate Division ordered a "rearranging or 'scrambling' the test scores so as to change the order in which they are listed" (id., 689), stating that:

> "Disclosure of the test scores here, in a 'scrambled' order and with names deleted, would protect the privacy of the students, provide the petitioner with the records she seeks, and impose no onerous burden upon the agency. It would, therefore, be fully consistent with the policy considerations and objectives underlying the Freedom of Information Law as well as appropriate Federal statutes" (id., 690).

With respect to records of sick leave claimed by teachers, if the response is suggesting that records identifying teachers coupled with the days and dates of sick leave may be withheld, I note that the State's highest court has held to the contrary. Relevant to an analysis of the matter is §87(2)(b) of the Freedom of Information Law, 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)].

In a decision dealing with attendance records indicating the days and dates of sick leave claimed by a particular employee that was affirmed by the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an illness or medical problem found in records, could be withheld or

deleted from a record otherwise available, for disclosure of so personal a detail of a person's life would likely constitute an unwarranted invasion of personal privacy and would not be relevant to the performance of an employee's duties. A number, however, which merely indicates the amount of sick time or vacation time accumulated or used, or the dates and times of attendance or absence, would not in my view represent a personal detail of an individual's life and would be relevant to the performance of one's official duties. Therefore, I do not believe that §87(2)(b) could be asserted to withhold that kind of information contained in an attendance record.

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Next, in response to a request for a tape recording of a conversation involving yourself, the Superintendent and one other person, the Superintendent wrote that "[t]he tape is not a public document and is not subject to the freedom of information law." In short, I disagree. The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a tape recording of a conversation that is maintained by an agency, such as a school district, clearly in my

opinion constitutes a "record" subject to rights of access. Further, since you were a participant in the conversation, I do not believe that any of the grounds for denial could appropriately be asserted to withhold it from you.

Lastly, you asked whether the School District can waive the fees for copying records requested by a parent whose children "qualify for reduced lunches through the Federal Government." While an agency may waive fees for copies of records, it has no obligation to do so. In a case involving an indigent inmate, it was held that an agency could charge its established fee for copying, despite the applicant's indigency [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

In an effort to enhance compliance with and understanding of applicable law, a copy of this opinion will be forwarded to the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Plume, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-3705
FOIL-AO-9849

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Mr. Gary L. Rhodes
[redacted]

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. Rhodes:

I have received your letter of December 18 in which you requested an advisory opinion concerning certain actions of the Town of Henderson.

By way of background, you wrote that the Association Island, which is located in the Town, is the possible site for "an RV park", and that there is substantial opposition to the proposal. Due to its controversial nature, even though no litigation has yet been commenced, the minutes of a recent meeting of the Town Board referred to a recommendation by the Town Attorney "that all meetings regarding Association Island be done in executive session."

From my perspective, the statement, as the minutes reflect it, is inconsistent with law. As a general matter, the Open Meetings Law is based on a presumption of openness. Stated differently, the Law requires that meetings of public bodies be conducted in public, except to the extent that a closed or executive session may properly be held. Paragraphs (a) through (h) of §105(1) of the Law specify and limit the subjects that may be considered in an executive session, and it is clear in my view that those provisions are generally intended to enable public bodies to exclude the public from their meetings only to the extent that public discussion would result in some sort of harm, perhaps to an individual in terms of the protection of his or her privacy, or to a government in terms of its ability to perform its duties in the best interests of the public.

The provision pertaining to litigation, §105(1)(d), permits a public body to enter into executive session to discuss "proposed,

pending or current litigation." While the courts have not sought to define the distinction between "proposed" and "pending" or between "pending" and "current" litigation, they have provided direction concerning the scope of the exception in a manner consistent with the description of the general intent of the grounds for entry into executive session suggested in my remarks in the preceding paragraph, i.e., that they are intended to enable public bodies to avoid some sort of identifiable harm. For instance, it has been determined that the mere possibility, threat or fear of litigation would be insufficient to conduct an executive session. Specifically, it was held that:

> "The purpose of paragraph d is 'to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to 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. Again, §105(1)(d) would not permit a public body to conduct an executive session due to a possibility or fear of litigation. As the court in Weatherwax suggested, if the possibility or fear of litigation served as a valid basis for entry into executive session, there could be little that remains to be discussed in public, and the intent of the Open Meetings Law would be thwarted.

In the instant situation, in my view, only to the extent that the Board discusses its litigation strategy would an executive session be properly held.

I note, too, that the courts have provided direction with respect 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].

Further, in a recent decision rendered by the Appellate Division, Third Department, one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue", and it was held that:

> "...the public body must identify the subject matter to be discussed (see, Public Officers Law § 105 [1], and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY2d 807)" [Gordon v. Village of Monticello, 207 AD 2d 55, 58 (1994)].

The remaining issue that you raised involves your request for free copies of minutes. You wrote that those who attend meetings can obtain copies at no cost, "but if [you] come in the next day, [you] have to pay." In this regard, I know of nothing in the Freedom of Information Law that would encourage or prohibit the practice that you described. I believe that there are often instances in which records or handouts are distributed at meetings to those who attend, but where, after the meetings, people may be required to request them in a more formal manner in accordance with the Freedom of Information Law. So long as you are not being

singled out and that all others who request copies after meetings receive the same treatment, the practice would appear to be valid.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Dennis Whepley, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9850

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 21, 1997

Mr. Orlando Deuras
93-A-3790
Attica Correctional Facility
Attica, NY 14011-0149

Dear Mr. Deuras:

I have received your undated letter in which you requested records, especially those involving suspension or dismissal, pertaining to two police officers who worked in Manhattan at a particular location on certain dates.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to records. The Committee does not maintain possession or control of records generally, and it is not empowered to compel an agency to grant or deny access to records. Nevertheless, in an effort to assist you, 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 of your interest. The records access officer has the duty of coordinating an agency's response to requests. Since the records in question would appear to be maintained by the New York City Police Department, it is suggested that a request may be made to Sgt. Louis Lombardi, Records Access Officer, Room 110C, One Police Plaza, New York, NY 10038.

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, several grounds for denial may be relevant in consideration of 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 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)].

In view of its legislative history and judicial decisions, I do not believe that §50-a would serve as a basis for denial with respect to a person no longer serving as 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.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9851

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 17, 1997

Ms. Frances 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 information presented in your correspondence.

Dear Ms. Thompson:

I have received your letter of December 12 and the correspondence attached to it. You asked that I inform Mr. Philip Bibla of the New York City Department of Citywide Services that you "can inspect the documents [you] requested pursuant to F.O.I.L. without paying for them first" (emphasis yours).

In this regard, when a record is available in its entirety under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the grounds for denial appearing in §87(2). In those instances, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

As you requested, a copy of this opinion will be forwarded to Mr. Bibla.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Philip J. Bibla

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9852

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 24, 1997

Ms. Laurie Thomson
[redacted]

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, unless otherwise indicated.

Dear Ms. Thomson:

I have received your letters of December 16 and January 16, as well as a variety of correspondence. In brief, you have questioned why you cannot obtain the same records prior to a meeting of the Sandy Creek Board of Education as the Teachers Association.

In this regard, as a general matter, when records are accessible under the Freedom of Information Law, they must be made equally available to any person, notwithstanding one's status or interest. Based upon conversations with Jon Van Eyk, the Superintendent, it is my understanding that you enjoy the same rights of access to the District's records as any other member of the public. Mr. Van Eyk specified, however, that the District has an obligation pursuant to a collective bargaining agreement with the Teachers Association to make information available to and engage in ongoing communication with the Teachers Association. Consequently, the District is obliged to treat the Teachers Association differently than the public generally and to supply information to the Association that the public may or may not have the right to acquire.

I note that a collective bargaining agreement or a contract could not in any way serve to diminish rights of access conferred upon the public by the Freedom of Information Law. However, a contract could, as in this instance, provide greater access to records to an organization, such as the Teachers Association, due to its legal relationship with the District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jon VanEyk
Rhonda Barron

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-9853

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 24, 1997

Mr. Vincent Collins
89-B-1929 C15-35
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021-0618

Dear Mr. Collins:

I have received your letter of January 12.

You wrote that "hospitals are considered public corporations" and that, therefore, you have requested the address of a hospital to which you were taken from Southport Correctional Facility for treatment in 1992. You also indicated that you want a copy of medical treatment records either upon payment of a fee or for free.

In this regard, the Committee on Open Government is authorized to provide advice concerning access to government records. The Committee does not maintain records generally, and it does not maintain any of the information that you seek. Nevertheless, I offer the following comments.

First, I believe that your initial statement is inaccurate. While hospitals may treat the public, few, if any, could be characterized as "public corporations." A state or municipal hospital, for example, would be governmental in nature and would be required to comply with the Freedom of Information Law. However, private hospitals are not subject to that statute.

Second, since you were sent by your facility to a hospital, I would conjecture that the facility prepared a record identifying that hospital. It is suggested that you seek such record in accordance with the regulations promulgated by the Department of Correctional Services. I note that the regulations indicate that a request for records maintained at a correctional facility should be directed to the facility superintendent or his designee. Further, I believe that the kind of record in question would likely have been transferred with you to the facility in which you are now incarcerated.

Third, a specific statute, §18 of the Public Health Law, provides rights of access to medical records to the subjects of those records. That provision authorizes a physician or hospital to charge fees for copies of medical records but also states that copies of records cannot be withheld solely due to the patient's inability to pay.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9854

41 State Street, Albany, New York 12231
(518) 474-2518
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January 27, 1997

Mr. Donald F. Pember
[redacted]

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, unless otherwise indicated.

Dear Mr. Pember:

I have received your letter of December 16 and the news article attached to it. You have sought an advisory opinion concerning the propriety of a denial of your request for a certain record by the Lewisboro Town Board, specifically, a report prepared for the Board by the Town Attorney.

As I understand the matter, an anonymous complaint was made that a dentist was operating his practice in violation of the Town codes, and the Board asked its attorney to prepare a report on the subject. In response to requests for the report, the Town denied access on the grounds that it fell within the attorney-client privilege, and in the words of the news article, "because the report contained a legal opinion, the whole document was an opinion from one town agency to another." The article also indicates that portions of the report were disclosed to the dentist who is the subject of the complaint. Further, one of the Board members suggested, without prevailing, the Board review the report "line-by-line" for the purpose of releasing those portions consisting of factual information.

In this regard, it is emphasized that I have not seen any part of the report at issue. As such, the ensuing comments should be considered as advisory only.

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. In my view, two of the grounds for denial appear to be pertinent to an analysis of rights of access.

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 Town officials in this instance, under certain circumstances.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, and that records consist of legal advice provided by counsel to the client, 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 & 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)].

From my perspective, insofar as the report has been disclosed to a person other than the client, which is the Town Board, the attorney-client privilege could not be asserted. Therefore, to the extent that the report has been disclosed to the dentist, I do not believe that it would be privileged. Conversely, insofar as the report consists of a legal opinion or opinions that have not been disclosed to a person other than the client, in my view, the Town could properly withhold those portions of the report based on the assertion of the attorney-client privilege. It is also my view that the attorney-client privilege applies only to the extent that the communication involves the rendition of services that require the expertise of an attorney. For purposes of illustration, if an attorney is asked to provide a medical opinion or to describe the color of the sky, the responses would not involve the rendition of legal advice or expertise. Similarly, to the extent that the report involves matters that do not reflect the services of an attorney acting in his or her capacity as an attorney, I do not believe that the attorney-client privilege would be applicable as a basis for denial of access.

The other provision of significance, §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. I note further that the State's highest court, the Court of Appeals, recently analyzed §87(2)(g) and specified that those portions of inter-agency or intra-agency materials consisting of statistical or factual information must be disclosed, unless a different ground for denial applies [see Gould

et al. v. New York City Police Department, ___ NY 2d ___, NYLJ, November 27, 1996].

As such, it is clear that a record may be accessible or deniable in whole or in part, depending upon its specific contents. In this instance, to the extent that the attorney-client privilege does not apply, I believe that the provisions of §87(2)(g) would be applicable. Again, under its standards, those aspects of the report consisting of advice or opinion could be withheld, but those portions consisting of statistical or factual information should in my view be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2706
FOIL-AO- 9855

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January 27, 1997

Ms. Pamela Finch
Reporter
The Evening Times
P.O. Box 1007
Little Falls, NY 13365

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 Ms. Finch:

I have received your letter of December 20, which reached this office on December 27. Please accept my apologies for the delay in response.

You have requested an advisory opinion "concerning the conduct of the Little Falls Police and Fire Board and their recent decision to suspend a police officer while leaving no formal documentation." On the basis of your article on the matter, it appears that the suspension represents a final determination reflective of disciplinary action imposed against a Little Falls Police Officer. Assuming that to be so, I believe that the Police and Fire Board, as a public body subject to the Open Meetings Law, would be required by the Open Meetings Law to take action during a meeting and prepare minutes indicating its action. Further, as an agency subject to the Freedom of Information Law, I believe that it would be required to disclose a record indicating its determination to discipline a public employee. 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 term "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an

> agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the information appearing in the news article, I believe that the Police and Fire Board clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law.

Relevant to your inquiry 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 public body cannot carry out its powers or duties, except at a meeting during which a majority of its total membership is present. As such, action taken by the Board in my opinion could only have occurred at a meeting during which a quorum was present.

Second, although the Freedom of Information Law does not ordinarily require agencies to create records, the Open Meetings Law requires that minutes of meetings be prepared. Section 106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.

> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In this instance, while consideration of discipline could validly have been discussed in an executive session [see Open Meetings Law, §105(1)(f)], minutes of the executive session indicating the nature of the action must in my view be prepared and disclosed in conjunction with the ensuing analysis concerning the Freedom of Information Law.

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 are 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)].

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, because 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 a record reflective of findings of misconduct or disciplinary action taken would be available under the Freedom of Information Law and must be included in minutes prepared by the Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Police and Fire Board
David M. Petkovsek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9856

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January 27, 1997

Mr. Donald G. Hobel
[redacted]

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. Hobel:

I have received your letter of December 21 in which you requested an advisory opinion concerning the Freedom of Information Law.

You wrote that "[t]he Niagara County Legislature is proposing to loan $1.5 million thru the Niagara County Ind. Dev. Agency, for economic development purpose. Said loan to be guaranteed by a local well known businessman. This based on his personal guarantee. He supposedly has filed a financial statement of unknown content." When you requested a copy of the statement, the Industrial Development Agency denied the request.

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. While I am unaware of the content of the record in question, it appears that two of the grounds for denial are pertinent to an analysis of the matter.

First, insofar as the record in question includes personal financial information, the provisions of §§87(2)(b) and 89(2)(b) are relevant. The former permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." The latter includes examples of unwarranted invasions of personal privacy. Based on the thrust and direction offered in those provisions, I believe that personal financial

information may typically be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Second, insofar as the record involves information relating to a business entity, such as a corporation, §87(2)(d) is likely relevant. That provision enables an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise."

As such, the question under §87(2)(d) involves the extent, if any, to which disclosure would "cause substantial injury to the competitive position" of commercial entities that have responded to the RFI.

The concept and parameters of what might constitute a "trade secret" were discussed in Kewanee Oil Co. v. Bicron Corp., which was decided by the United States Supreme Court in 1973 (416 (U.S. 470). Central to the issue was a definition of "trade secret" upon which reliance is often based. Specifically, the Court cited the Restatement of Torts, section 757, comment b (1939), which states that:

> "[a] trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers" (id. at 474, 475).

In its review of the definition, the court stated that "[T]he subject of a trade secret must be secret, and must not be of public knowledge or of a general knowledge in the trade or business" (id.). The phrase "trade secret" is more extensively defined in 104 NY Jur 2d 234 to mean:

> "...a formula, process, device or compilation of information used in one's business which confers a competitive advantage over those in similar businesses who do not know it or use it. A trade secret, like any other secret, is something known to only one or a few and kept from the general public, and not susceptible to general knowledge. Six factors are to be considered in determining whether a trade

> secret exists: (1) the extent to which the information is known outside the business; (2) the extent to which it is known by a business' employees and others involved in the business; (3) the extent of measures taken by a business to guard the secrecy of the information; (4) the value of the information to a business and to its competitors; (5) the amount of effort or money expended by a business in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. If there has been a voluntary disclosure by the plaintiff, or if the facts pertaining to the matter are a subject of general knowledge in the trade, then any property right has evaporated."

In my view, the nature of the records, the area of commerce in which a profit-making entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure of the records would "cause substantial injury to the competitive position" of a commercial 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.

Also relevant to the analysis is a recent decision rendered by the Court of Appeals, the State's highest court, which, for the first time, considered the phrase "substantial competitive injury" (Encore College Bookstores, Inc. v. Auxiliary Service Corporation of the State University of New York at Farmingdale, 87 NY2d 410 (1995)]. In that decision, the Court reviewed the legislative history of the Freedom of Information Law as it pertains to §87(2)(d), and due to the analogous nature of equivalent exception in the federal Freedom of Information Act (5 U.S.C. §552), it relied in part upon federal judicial precedent.

In its discussion of the issue, the Court stated that:

> "FOIL fails to define substantial competitive injury. Nor has this Court previously interpreted the statutory phrase. FOIA, however, contains a similar exemption for 'commercial or financial information obtained from a person and privileged or confidential' (see, 5 USC § 552[b][4]). Commercial information, moreover, is 'confidential' if it would impair the government's ability to obtain necessary information in the future or cause 'substantial harm to the competitive position' of the person from whom the information was obtained...

"As established in Worthington Compressors v Costle (662 F2d 45, 51 [DC Cir]), whether 'substantial competitive harm' exists for purposes of FOIA's exemption for commercial information turns on the commercial value of the requested information to competitors and the cost of acquiring it through other means. Because the submitting business can suffer competitive harm only if the desired material has commercial value to its competitors, courts must consider how valuable the information will be to the competing business, as well as the resultant damage to the submitting enterprise. Where FOIA disclosure is the sole means by which competitors can obtain the requested information, the inquiry ends here.

"Where, however, the material is available from other sources at little or no cost, its disclosure is unlikely to cause competitive damage to the submitting commercial enterprise. On the other hand, as explained in Worthington:

> Because competition in business turns on the relative costs and opportunities faced by members of the same industry, there is a potential windfall for competitors to whom valuable information is released under FOIA. If those competitors are charged only minimal FOIA retrieval costs for the information, rather than the considerable costs of private reproduction, they may be getting quite a bargain. Such bargains could easily have competitive consequences not contemplated as part of FOIA's principal aim of promoting openness in government (id.).

"The reasoning underlying these considerations is consistent with the policy behind (2)(b)--to protect businesses from the deleterious consequences of disclosing confidential commercial information, so as to further the State's economic development efforts and attract business to New York (see, McKinney's 1990 Sessions Laws of New York, ch 289, at 2412 [Memorandum of State Department of Economic Development]). The analogous Federal

> standard would advance these goals, and we adopt it as the test for determining whether 'substantial injury to the competitive position of the subject enterprise' would ensue from disclosure of commercial information under FOIL" (id., 419-420).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Daughton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9857

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January 27, 1997

Mr. Donald E. Gooley
Superintendent
Odessa-Montour Central School District
Odessa, NY 14869

Dear Mr. Gooley:

I appreciated receipt of a copy of your determination of an appeal by John B. Schamel rendered on December 18. In brief, you affirmed a denial of access to certain W-2 forms because those records "show how much money each administrator contributed to tax shelter annuities." As such, you concluded that "this falls under personal privacy protection."

From my perspective, the issue is whether disclosure of the information in question would constitute an "unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2) of the Freedom of Information Law. In my view, subject to certain qualifications, the records should be disclosed.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although 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, 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)].

Based on the foregoing, 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. Further, 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 many contexts, 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 two decisions, 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), the issue involved disclosure of information concerning 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.

If the test to be used is 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 chooses to defer compensation 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. 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 cited earlier. In Capital Newspapers v. Burns, supra, 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 preceding commentary offered by the State's highest court, 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 who defer compensation. 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 view of the public's significant interest in knowing the amount of public monies being expended.

In consideration of the factors that have been discussed, if indeed references to deferred compensation essentially represent payments made to public employees and expenditures of public monies, even though those references are not reported as gross wages, I believe that they should be disclosed. To find that items reflective of public employees' compensation are not available would, in my opinion, be inconsistent with the overall thrust of the Freedom of Information Law and its judicial interpretation. If my understanding of the matter is correct, references to deferred compensation are not analogous to deductions from one's wages but rather additions to wages. So long as there is no indication of how deferred compensation is invested, allocated or used, on balance, it would appear that the invasion of a public employee's privacy by means of disclosure would not be so significant or "unwarranted" as to outweigh the public's interest of knowing of the expenditure of taxpayers' money.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John B. Schamel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9858

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 27, 1997

Mr. David L. Hunt
83-A-4739
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hunt:

I have received your letter of December 17 and appreciate your kind words. You have sought my views concerning rights of access to records concerning a death prepared by the Office of the Medical Examiner of New York City.

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.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were subject to neither the Freedom of Information Law nor §677 of the County Law. The County Law does not apply to New York City. However, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of

Mitchell, it would appear that your ability to gain access to the records in question would be dependent upon your capacity to demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia J. Bailey, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9859

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 27, 1997

Mr. Cedric Partee
84-A-5009
P.O. Box 500
Elmira, NY 14902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Partee:

I have received your letter of December 16. You have sought assistance in obtaining the "rap sheet" of a prosecution witness from the Office of the New York 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 §87(2)(a) through (i) of the Law.

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 [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)].

It is noted that in a recent decision rendered by the Appellate Division, Second Department, the Court reconfirmed its position that criminal history records are, in general, exempt from disclosure (Woods v. Kings County District Attorney's Office, ___ AD 2d ___, NYLJ, December 31, 1996). In Woods, the Court upheld

a denial of a request for the rap sheets "of numerous individuals who were not witnesses at [the petitioner's] trial." However, it distinguished its determination from the holding in Thompson, supra, in which it was found that a rap sheet must be disclosed when the request is "limited to the criminal convictions and any pending criminal actions against an individual called by the People as a witness in the petitioner's criminal trial." Therefore, insofar as your request involves records analogous to those found to be available in Thompson, I believe that the District Attorney would be required to disclose.

Finally, 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 arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary A. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9860

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 27, 1997

Mr. Francis P. Castagna
[redacted]

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. Castagna:

I have received your note of December 20 as well as a copy of your letter to the Babylon Town Supervisor. You asked that I comment with respect to the letter, which focuses on the fees for copies of records charged by the Town Assessor.

In this regard, I offer the following remarks.

By way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which

> an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [see Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

The specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee states in relevant part that:

> "Except when a different fee is otherwise prescribed by statute:
>
> (a) There shall be no fee charged for the following:
> (1) inspection of records;
>
> (2) search for records; or
> (3) any certification pursuant to this Part" (21 NYCRR section 1401.8).

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute.

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, with respect to fees for postage, the Freedom of Information Law does not address the issue, and there is no statute of which I am aware that would preclude the Town from charging its postage cost when mailing records requested under the Freedom of Information Law.

Further, it has been advised that an agency may require payment of fees for copying in advance of preparing copies. If, for example, a request is voluminous, an estimate of the numbers of copies could be made, and the applicant could be informed of the approximate cost and that copies will be made upon payment of the appropriate fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Supervisor Schaffer
Town Assessor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9861

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 28, 1997

Mr. Robert Sommers
Regional Manager
WJJas Assets
5256 S. Mission Road
Suite 802
Bonsall, CA 92028

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, unless otherwise indicated.

Dear Mr. Sommers:

I have received your letter of December 30 in which you complained concerning your inability to acquire a subject matter list from Monroe County.

In this regard, as a general matter, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. An exception to that rule relates to a list maintained by an agency. Specifically, §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)]. I emphasize that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld. Again, the Law states that the subject matter list must refer, in reasonable detail, to the kinds of records maintained by an agency, whether or not they are available.

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.

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 9862

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 29, 1997

Mr. Julio Colon
92-R-9185
PO Box 168
Watertown, NY 13601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Colon:

I have received your undated letter, which reached this office on January 3. You indicated that you requested a variety of records concerning a complaint against you that apparently led to your arrest, as well as related records from the 17th Precinct of the New York City Police Department, but that you had received no response.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), 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. In the case of the New York City Police Department, there is one records access officer, Sgt. Louis Lombardi, whose office is located at Room 110C, One Police Plaza, New York, NY 10038. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate person, it is suggested that you resubmit your request to the records access officer.

Second, for future reference, I note 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals concerning complaint follow up reports, also known as DD5's, and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard

internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically

> exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, 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.

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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9863

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 29, 1997

Mr. Rubin Sira
95-A-5685
Green Haven Corr. Facility
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 information presented in your correspondence.

Dear Mr. Sira:

I have received your letter of December 29 and related correspondence. The materials concern a request for records of the Office of the Queens County District Attorney that have apparently been lost, and the degree of support necessary to offer such a claim.

In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: William R. Horwitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9864

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 29, 1997

Mr. James D. Hicks
85-A-0498
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. Hicks:

I have received your letter of December 30. You have sought assistance in obtaining records pertaining to your mother from the Office of the Medical Examiner of New York City.

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.

Relevant to the matter is the initial ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." In this regard, it has been held that §557(g) of the New York City Charter has the effect of a statute and that it exempts records from the Freedom of Information Law [see Mullady v. Bogard, 583 NYS 2d 744 (1992); Mitchell v. Borakove, Supreme Court, New York County, NYLJ, September 16, 1994]. I note that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were subject to neither the Freedom of Information Law nor §677 of the County Law. The County Law does not apply to New York City. However, the court found that the applicant was "not making his request merely as a public citizen" under the Freedom of Information Law, "But, rather, as someone involved in a criminal action that may be affected by the content of these records and thereby has a substantial interest in them." On the basis of Mitchell, it would appear that your ability to gain access to the records in question would be dependent upon your capacity to

demonstrate that you have a substantial interest in the records in accordance with §557(g) of the New York City Charter.

I hope 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 9865

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 29, 1997

Mr. Washington Davis
84-A-6907
Fishkill Corr. Facility
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 information presented in your correspondence.

Dear Mr. Davis:

I have received your letter of December 27. You indicated that you have had difficulty obtaining records from the Bronx County Court under the Freedom of Information Law.

In this regard, I note that the Freedom of Information 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 on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to

the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. It is suggested that you might want to resubmit your request to the clerk of the court, citing an applicable provision of law.

I hope 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 9866

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 29, 1997

Mr. Steven Elling
[redacted]

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, unless otherwise indicated.

Dear Mr. Elling:

I have received your letter of December 27 concerning a request made under the Freedom of Information Law to the Town of Canaan.

You wrote that you requested plans in October prepared by an engineering firm for construction of a new town hall, that the Town Supervisor has informed you that they "are the same as previously approved plans", and that you may inspect the "previous plans" on Saturday mornings at Town Hall. You indicated that it is difficult for you to view the plans on Saturdays and that you have been denied access to the "current plans."

In this regard, I offer the following comments.

First, since your request was initiated in October, I point out that the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to a request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request

> and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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 town board, to adopt rules and regulations consistent with the Law and the Committee's regulations.

Potentially 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.

Section 1401.4 of the regulations entitled "Hours for public inspection" states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Therefore, insofar as Town offices operate during regular business hours, I believe that the public should have the opportunity to request and review records during those hours.

Third, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If the current plans are the same as those previously approved, I believe that they must be disclosed, for none of the grounds for denial could appropriately be asserted. If they differ from the previous plans, as you suggested during a telephone conversation, and are not final but rather are preliminary, it would appear that §87(2)(g) would be pertinent. 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.

If, as you stated in your letter, the unapproved or preliminary plans include "factual information such as topographical elevations etc.", those portions of the plans, as well as any statistical information, would be available under §87(2)(g)(i).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Leonard Dooren, Town Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9867

41 State Street, Albany, New York 12231
(518) 474-2518
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January 30, 1997

Mr. Christopher Allen
96-A-0193
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 information presented in your correspondence.

Dear Mr. Allen:

I have received your undated letter, which reached this office on January 6. You have sought assistance in obtaining a variety of records to which you referred in your letter.

The initial request involves a copy of a "court disposition" of a particular case. 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 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(10 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 provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to

the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable. It is suggested that a request be made to the clerk of the court that maintains the records, citing an applicable provision of law.

Second, you referred to records in the nature of visitor and mail logs. Assuming that those kinds of records exist, I believe that they would be subject to rights of access conferred by 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 §87(2)(a) through (i) of the Law.

If a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found 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 logs, if they exist, are kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors or mail and each page would have to be reviewed in an effort to identify references to a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

The remaining records would appear to be available or deniable from the agencies that maintain them, in whole or in part based upon their contents.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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 some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals concerning complaint follow up reports, also known as DD5's, and police officers' memo books.

The provision primarily at issue in that case, §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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and

deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only

> that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, it was found that the Police Department could not claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, 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 person other than yourself, 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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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).

As you requested, enclosed is a copy of your letter addressed to me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9868

41 State Street, Albany, New York 12231
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January 30, 1997

Mr. Wayne Jackson

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. Jackson:

I have received your letter of January 3 in which you raised a series of issues pertaining to the Freedom of Information Law.

You referred to a meeting between yourself and state agency officials that was tape recorded. Although you were given a transcript of the proceeding, you indicated that "the transcript did not agree with [your] records", and your request to listen to the original tape was denied.

In this regard, §87(2) of the Freedom of Information Law provides the public with the right to inspect and copy accessible records. From my perspective, when a record is an audio tape recording, providing the ability to "inspect" would involve providing an opportunity to an applicant to listen to the recording. In my view, particularly if there is a question concerning the accuracy of the transcript, I do not believe that an applicant could validly be prohibited from listening to the original recording, if it is maintained by the agency.

In a related vein, you asked whether you may "review the original records of uncertified copies made by that agency and already given to [you]." In my view, it is unlikely that the agency would be required to do so. It has been held that if an applicant for a record or that person's representative has been provided with a copy of that record, the agency is not required to make a second copy of the same record [see Moore v. Santucci, 151 AD 2d 677 (1989)].

Next, having requested records from an agency, you were informed that the records could be reviewed on a particular date. Nevertheless, you wrote that not all of the records requested could be reviewed "within the allowable time." When you asked to inspect the records on an ensuing date, you wrote that you were advised that the agency determined that you could not inspect the records "for months" because "the reviewing room is also their conference room, and because this room is now unavailable for months." 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 agencies to adopt rules and regulations consistent with the Law and the Committee's regulations. Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business."

Relevant to your inquiry and the foregoing is a decision in which one of the issues involved the validity of a limitation regarding the time permitted to inspect records established by a village pursuant to regulation. The Court held that the village was required to enable the public to inspect records during its regular business hours, stating that:

> "...to the extent that Regulation 6 has been interpreted as permitting the Village Clerk to limit the hours during which public documents can be inspected to a period of time less than the business hours of the Clerk's office, it is violative of the Freedom of Information Law..." [Murtha v. Leonard, 620 NYS 2d 101 (1994), 210 AD 2d 411].

Further, I note that the legislative declaration appearing at the beginning of the Freedom of Information Law, §86(4), states in part that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." In my opinion, the foregoing indicates that, in order to comply with the Freedom of Information Law, an agency must provide reasonable accommodation for the public to inspect records and otherwise assert rights conferred by that statute. In my view, prohibiting a member of the public or the public generally from inspecting records for a period of months due to the use of a particular room would be inconsistent with the requirements of the Law. In short, I believe that an agency would be required to designate an alternative location for the inspection of records.

You wrote that some of copies of records that you requested were "not complete and that the "tops of said copies" did not appear. Although you requested complete copies, the agency refused

to do so. In my opinion, if an agency responded to a request for certain records and prepared copies that were incomplete or unreadable, it would have an obligation to provide complete readable copies at no additional charge.

Lastly, you referred to the certification of records and whether or how records should be stamped. Section 89(3) of the Freedom of Information Law pertains to certification. When a request for a record is approved, that provision states in relevant part that:

> "Upon payment of, or offer to pay, the fee prescribed therefor, the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..."

In my view, based upon the language quoted above, a certification made under the Freedom of Information Law does not pertain to the accuracy of the contents of a record, but rather would involve an assertion that a copy is a true copy. In other words, a certification prepared pursuant to §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.

It has been consistently advised, particularly when certification is requested with respect to a voluminous number of records, that a single certification, given by means of a written assertion, statement or affidavit, for example, describing or identifying the records that were copied, would be sufficient. I do not believe that each copy of records made available under the Freedom of Information Law must be stamped or "certified" separately.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9869

41 State Street, Albany, New York 12231
(518) 474-2518
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January 30, 1997

Mr. Lester Hamilton
92-A-0372
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Hamilton:

I have received your letter of December 30 and the correspondence attached to it in which you requested a barber's license pertaining to a particular person. You asked whether a "state license is disclosable."

In this regard, in view of your enclosure, I contacted the Department of State's Division of Licensing Services to ascertain the status of your request. I was told that a response was sent to you on January 7 indicating that the individual in question was not licensed.

With respect to records identifying licensees, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records 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. Pertinent to your inquiry is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy."

It has consistently been advised that licenses and similar, related kinds of records are available to the public, even though they identify particular individuals. From my perspective, various activities are licensed due to some public interest in ensuring that individuals or entities are qualified to engage in certain

activities, such as teaching, selling real estate, owning firearms, practicing law or medicine, etc., as well as owning a dog and ensuring that the dog is cared for appropriately. I believe that licenses and similar records are available, for they are intended to enable the public to know that an individual has met appropriate requirements to be engaged in an activity that is regulated by the state or in which the state has a significant interest.

The standard in the Freedom of Information Law pertaining to the protection of privacy in my opinion is flexible and agency officials must, in some instances, make subjective judgments when issues of privacy arise. However, it is clear that not every item within a record that identifies an individual may be withheld. Disclosure of intimate details of peoples' lives, such as medical information, one's employment history and the like, might, if disclosed, constitute an unwarranted invasion of personal privacy; nevertheless, other types of personal information maintained by an agency, particularly those types of information that are relevant to an agency's duties, would if disclosed often result in a permissible rather than an unwarranted invasion of personal privacy.

Names and addresses of licensees have been found to be available in Kwitny v. McGuire [53 NY 2d 968 (1981)] involving pistol licenses, American Broadcasting Companies v. Siebert [442 NYS 2d 855 (1981)] involving licensed check cashing businesses, Herald Company v. NYS Division of the Lottery [Supreme Court, Albany County, November 16, 1987] involving licensed lottery agents and New York State Association of Realtors, Inc. v. Paterson [Supreme Court, Albany County, July 15, 1981] involving licensed real estate brokers and salespeople. In short, I believe that records identifiable to licensees are generally accessible to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9870

41 State Street, Albany, New York 12231
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January 30, 1997

Mr. Wallace S. Nolen
94-A-6723
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13021-0618

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. Nolen:

I have received your letter of December 27, which reached this office on January 6. You have requested an opinion concerning rights of access to a variety of records relating to notaries public that are maintained by the Department of Correctional Services "and/or notaries employed by such agencies."

You referred initially to a log that includes inmates' names, identification numbers, signatures, and their cell locations. In my view, the issue in terms of access to the log involves the extent to which disclosure would result in an unwarranted invasion of personal privacy [see Freedom of Information Law, §89(2)(b)]. I believe that the names and cell locations would be accessible, for it has been held that those kinds of items must be disclosed [see Bensing v. LeFevre, 506 NYS 2d 811 (1986)]. However, there are two Appellate Division decisions indicating that an inmate's identification number would, if disclosed, constitute an unwarranted invasion of personal privacy [see Dobranski v. Houper. 145 AD 2d 736, 738 (1989); DiRose v. Department of Correctional Services, 640 NYS 2d 353, 354, ___ AD 2d ___ (1996)].

You referred next to a "call out sheet for notary services for each date that notaries supposedly make call outs to render notary services." You added that there are lists for inmates in the general population, "classified prisoners", and for those restricted to their cells. You also referred to requests made individually by inmates for notary services on separate sheets, notes or letters. Again, I believe that the names of inmates and

the locations where they are housed would be public, but that identification numbers could be withheld. From my perspective, a request by an inmate for notary services, without more, would not represent a significant invasion of privacy and should be disclosed. However, insofar as the kinds of records to which you referred include the reason for which an inmate seeks notary services, it would appear that disclosure of that kind of notation would constitute an unwarranted invasion of personal privacy and could be withheld.

Next, you indicated that your request for complaints or grievances relating to notary services was denied in its entirety. It is your view that names and other identification information must be disclosed. Without knowledge of the nature of the kinds of records in question, I cannot offer specific guidance. However, it has been advised in a variety of circumstances that identifying details pertaining to a person who submits a complaint may be withheld based upon considerations of privacy. Similarly, it has been advised that if a complaint or allegation against a public employee or licensee, for example, has not been substantiated, the identity of the subject of the complaint may also be withheld to protect his or her privacy. Following the deletion of identifying details, the remainder of the record, i.e., the substance or nature of the complaint, should in my opinion be disclosed. If a final determination has been made indicating that a public employee or licensee has engaged in misconduct, that kind of determination must be disclosed.

You wrote that officials at the Department claim that records of a notary are personal property rather than Department records. You pointed out that the Department, not the notary, maintains custody of the records. If your statement is accurate, I would agree that the materials in question would constitute agency records. As you are aware, §86(4) of the Freedom of Information Law defines the term "record" broadly to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based upon the language quoted above, if indeed the Department maintains custody of the records at issue, I believe that they would fall within the coverage of the Freedom of Information Law.

Lastly, you asked whether I am aware of any cases or decisions pertaining to notaries. In this regard, I have no knowledge of any such determinations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9871

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January 30, 1997

Mr. Andrew Reid
89-A-7638
Ossining 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 information presented in your correspondence.

Dear Mr. Reid:

I have received your letter of January 4 in which you sought assistance in obtaining records from the New York City Police Department that relate to your arrest. You indicated that the Department is "stone walling and foot dragging."

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 by the New York City Police Department is Karen A. Pakstis, Assistant Commissioner, Legal 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. While some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals concerning complaint follow up reports, also known as DD5's, and police officers' memo books in which it was held that a denial of access based on their characterization as intra-agency materials would be inappropriate.

The provision at issue, §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.

In its analysis of the matter, the decision states that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data'

(Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182).

"Against this backdrop, we conclude that the complaint follow-up reports contain substantial factual information available pursuant to the provisions of FOIL. Sections of the report are devoted to such purely factual data as: the names, addresses, and physical descriptions of crime victims, witnesses, and perpetrators; a checklist that indicates whether the victims and witnesses have been interviewed and shown photos, whether crime scenes have been photographed and dusted for fingerprints, and whether neighborhood residents have been canvassed for information; and a blank space denominated 'details' in which the officer records the particulars of any action taken in connection with the investigation.

"However, the Police Department argues that any witness statements contained in the reports, in particular, are not 'factual' because there is no assurance of the statements' accuracy and reliability. We decline to read such a reliability requirement into the phrase 'factual data', as the dissent would have us do, and conclude that a witness statement constitutes factual data insofar as it embodies a factual account of the witness's observations. Such a statement, moreover, is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption (see, Matter of Ingram v. Axelod, 90 AD2d 568, 569 [ambulance records, list of interviews, and reports of interviews available under FOIL as 'factual data']). By contrast, any impressions, recommendations, or opinions recorded in the complaint follow-up report would not constitute factual data and would be exempt from disclosure. The holding herein is only that these reports are not categorically exempt as intra-agency material. Indeed, the Police Department is entitled to withhold

> complaint follow-up reports, or specific portions thereof, under any other applicable exemption, such as the law-enforcement exemption or the public-safety exemption, as long as the requisite particularized showing is made" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, neither the Police Department nor an office of a district attorney can claim that DD5's can be withheld in their entirety on the ground that they constitute intra-agency materials. However, the Court was careful to point out that other grounds for denial might apply in consideration of those records, as well as others that you requested.

For instance, 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.

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.

Lastly, in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9872

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

January 31, 1997

Mr. Wane T. Barnes
77-A-2392
Collins Correctional Facility
Collins, NY 14034-0340

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. Barnes:

I have received your letter of January 7, as well as the correspondence attached to it.

You have sought assistance in obtaining certain information from the Department of Correctional Services. You indicated that your request was denied "because the information would require quite some time sorting out even with the use of a computer." You also expressed the belief that the Department denied your request because it "doesn't exactly know why [you] intend to use this information."

In this regard, I offer the following comments.

First, your intended use of the information is irrelevant to a determination of rights of access under the Freedom of Information Law. In short, when records are available under that statute, they must be made equally available to any person, notwithstanding one's status, interest or intended use of the records [see Burke v. Yudelson, 51 AD2d 673 (1976); Farbman v. New York City, 62 NY2d 75 (1984)].

Second, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. I note, 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 the 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 date 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, the Department of Correctional Services maintained the requested data in its computerized records. However, it 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 agency 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark E. Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2709
FOIL-AO-9823

41 State Street, Albany, New York 12231
(518) 474-2518
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January 31, 1997

Ms. Karen Kleparek
[redacted]

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 Ms. Kleparek:

I have received your letter of December 30, as well as the materials attached to it, all of which reached this office on January 7. In your capacity as a member of the Board of Education of the Akron Central School District, you have requested an advisory opinion relating to a number of issues concerning the practices of the Board of Education and the Superintendent.

You described a variety of issues marked as certain "sets." While I will attempt to deal with the issues raised in each set by means of describing principles or applications of law, I will not necessarily deal with them individually or in the order in which you presented them.

An initial issue relates to the Department's requirement that requests for records be made on the District's form. In my view, an agency cannot 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.

Next, questions have arisen frequently concerning the rights of members of public bodies or other government officials to obtain records from the entities that they serve. In general, the Freedom of Information Law is intended to enable the public to request and obtain accessible records. 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 the Board should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

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.

Reference was made in several instances to the use of the term "confidential", and you asked whether certain records or information could validly be characterized as "confidential." From my perspective, the term "confidential" is greatly overused and has a narrow and precise meaning in New York law. In short, for information to be considered "confidential", such claim must be based upon a statute that confers or requires confidentiality, and a "statute" is either an act of Congress or the State Legislature.

In the context of your inquiry, I believe that assertions or claims of confidentiality, unless the are based upon a statute, are 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.

It has been held by several courts, including the Court of Appeals, the State's highest court, 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)]. Therefore, a local policy or enactment cannot confer, require or promise confidentiality. The foregoing is not to suggest that the records or information to which you referred must be made available under the Freedom of Information Law, but rather that they would be subject to whatever rights of access, or conversely, the authority to deny access, might exist under that statute.

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. Similarly, the Open Meetings Law is based upon a presumption of openness. Meetings of

public bodies must be conducted open to the public, unless there is a basis for entry into executive session appearing in paragraphs (a) through (h) of §105(1) of that statute.

I note that both the Open Meetings Law and the Freedom of Information Law are permissive. While the Open Meetings Law authorizes public bodies to conduct executive sessions in certain circumstances, there is no requirement that an executive session be held, even though a public body has right to do so. 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 that procedure. If, for example, a motion is made to conduct an executive session for a valid reason, and the motion is not carried, the public body could either discuss the issue in public, or table the matter for discussion in the future. Similarly, although the Freedom of Information Law permits an agency to withhold records in accordance with the grounds for denial, it has been held by the Court of Appeals that the exceptions are permissive rather than mandatory, and that an agency may choose to disclose records even though the authority to withhold exists [Capital Newspapers v. Burns], 67 NY 2d 562, 567 (1986)].

I am unaware of any statute that would prohibit a Board member from disclosing the kinds of information to which you referred. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I reiterate that 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.

As the issue of confidentiality relates to your duties as a member of a board of education, 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 educational agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, because a statute requires

confidentiality. Again, however, no statute of which I am aware would confer or require confidentiality with respect to the matters described in your correspondence.

In a case in which the issue was whether discussions occurring during an executive session held by a school board could be considered "privileged", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participants from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987).

In short, I know of no statute that would prohibit you from discussing or disclosing the materials to which you referred to others. While there may be no prohibition against disclosure of the 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.

The records at issue appear to fall within one of the exceptions to rights of access, §87(2)(g) of the Freedom of Information Law. It is important to point out that the provision in question, due to its structure, frequently requires disclosure. 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.

A recent decision rendered by the Court of Appeals focused on §87(2)(g), and in its analysis of the matter, the Court stated that:

> "...we note that one court has suggested that complaint follow-up reports are exempt from disclosure because they constitute nonfinal intra-agency material, irrespective of whether the information contained in the reports is 'factual data' (see, Matter of Scott v. Chief Medical Examiner, 179 AD2d 443, 444, supra [citing Public Officers Law §87[2][g][111]). However, under a plain reading of §87(2)(g), the exemption for intra-agency material does not apply as long as the material falls within any one of the provision's four enumerated exceptions. Thus, intra-agency documents that contain 'statistical or factual tabulations or data' are subject to FOIL disclosure, whether or not embodied in a final agency policy or determination (see, Matter of Farbman & Sons v. New York City Health & Hosp. Corp., 62 NY2d 75, 83, supra; Matter of MacRae v. Dolce, 130 AD2d 577)...
>
> "...Although the term 'factual data' is not defined by statute, the meaning of the term can be discerned from the purpose underlying the intra-agency exemption, which is 'to protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers' (Matter of Xerox Corp. v. Town of Webster, 65 NY2d 131, 132 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549]). Consistent with this limited aim to safeguard internal government consultations and deliberations, the exemption does not apply when the requested material consists of 'statistical or factual tabulations or data' (Public Officers Law 87[2][g][i]. Factual data, therefore, simply means objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making (see, Matter of Johnson Newspaper Corp. v. Stainkamp, 94 AD2d 825, 827, affd on op below, 61 NY2d 958;

> Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182)" [Gould, Scott and DeFelice v. New York City Police Department, __ NY2d __, November 26, 1996; emphasis added by the Court].

Based on the foregoing, some aspects of the documentation that you enclosed could in my view be withheld, for they consist essentially of expressions of opinion; others, however, would consist of factual information that would be available to the public.

One aspect of your request involves bills submitted by attorneys retained by the District. 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, again, 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 sought 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.

A recent decision involved a request for "the amount of money paid in 1994" to a particular law firm "for their legal service in representing the County in its landfill expansion suit", as well as "copies of invoices, bills, vouchers submitted to the county from the law firm justifying and itemizing the expenses for 1994" (Orange County Publications v. County of Orange, Supreme Court, Orange County, June 15, 1995). Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the description material) 'including descriptions of issues researched, meetings and conversations between attorney and client'." The County offered several rationales for the redactions; nevertheless, the court rejected all of them, in some instances fully, in others in part.

The first contention was that the descriptive material is specifically exempted from disclosure by statute in conjunction

with §87(2)(a) of the Freedom of Information Law and the assertion of the attorney-client privilege pursuant to §4503 of the Civil Practice Law and Rules (CPLR). The court found that the mere communication between the law firm and the County as its client does not necessarily involve a privileged communication; rather, the court stressed that it is the content of the communications that determine the extent to which the privilege applies. Further, the court distinguished between actual communications between attorney and client and descriptions of the legal services provided, stating that:

> "Only if such descriptions can be demonstrated to rise to the level of protected communications, can respondent's position be sustained.
>
> "In this regard, the Court must make its determination based upon the established principal that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, as the Court determined in Matter of Priest v. Hennessy, supra,
>
> > [a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given. It is a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment is not privileged.
>
> Id. at 69.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 135 Misc.2d 126, 127-128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De Law Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..."

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material

prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "...in order to uphold respondent's denial of the FOIL request, the Court would be compelled to conclude that the descriptive material, set forth in the law firm's monthly bills, is uniquely the product of the professional skills of respondent's outside counsel. The Court fails to see how the preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, can be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 [Sup. Ct. Kings Ct. 1984]). Therefore, the Court concludes that the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "However, the Court is aware that, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court).

Finally, it was contended that the records consisted of intra-agency materials that could be withheld under §87(2)(g) of the Freedom of Information Law.

The court found that much of the information would likely consist of factual information available under §87(2)(g)(i) and stated that:

> "...the Court concludes that respondent has failed to establish that petitioner should be denied access to the descriptive material as a whole. While it is possible that some of the descriptive material may fall within the exempted category of expressions of opinion, respondent has failed to identify with any particularity those portions which are not subject to disclosure under Public Officers Law §87(2)(g). See, Matter of Dunlea v. Goldmark, supra, 54 A.D.2d 449. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra."

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

There may be other grounds for denial that would apply with regard to attorneys' bills or similar records pertaining to legal work performed for a school district. For instance, insofar as those kinds of records identify or could identify particular students, I believe that they must be withheld. As indicated earlier, a statute that exempts records from disclosure is the Family Education Rights and Privacy Act. Consequently, 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.

At this juncture, I direct your attention to the Open Meetings Law. As you are aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public

body may enter into an executive session. Specifically, §105(1) states in relevant part that:

> "Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session. Therefore, a public body may not conduct an executive session to discuss the subject of its choice.

Perhaps the most frequently cited ground for entry into executive session is the basis that is the focus of your inquiry as it relates to the Open Meetings Law, the so-called "personnel" exception. Although it is used often, the word "personnel" appears nowhere in the Open Meetings Law. While one of the grounds for entry into executive session relates to personnel matters, the language of that provision is precise. In its original form, §105(1)(f) of the Open Meetings Law permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and now states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> 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 under that provision 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.

Although the language of §105(1)(f) is not restricted to issues involving employees, it does not permit a public body to discuss every subject that might arise in relation to a "particular person". Again, the language of that provision is precise and pertains only to certain enumerated subjects that relate to an individual. When an issue essentially involves issues of policy, such as budgetary matters, the means by which public monies may be allocated, or the powers and duties of school district officials, I do not believe that there would be any basis for entry into executive session.

It is clear that discussions focusing on the development of a budget, including the creation or elimination of positions or layoffs of public employees, must be considered in public (see Doolittle, Matter of v. Board of Education, Sup. Ct., Chemung Cty., July 21, 1981; Gordon v. Village of Monticello, 207 AD 2d 55). Even when an issue or action taken might relate currently only to one employee, that does not necessarily permit a public body to conduct an executive session. In a decision involving different facts but in my opinion the same principle, it was held that the "personnel" exception for entry into executive session was not validly asserted. The court stated that:

> "In relying on the exception contained in paragraph f, the town asserts that its decision 'applied to a particular person, the Appellant herein'. While the town board's decision certainly did affect petitioner, and indeed at the time the decision was made affected only him, the town board's decision was a policy decision to not extend insurance benefits to police officers on disability retirement. Presumably this policy decision will apply equally to all persons who enter into that class of retirees. Thus, it cannot be said that the purpose of the meeting was to discuss 'the medical, financial, credit or employment history of a particular person'" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Lastly, I point out that a motion to enter into executive session describing the issues to be considered as "personnel matters", without more, or in some similar manner, 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.

It is noted that the Appellate Division recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court found that the issue should have been discussed in public and stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1)(f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to

> enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" (Gordon, supra, 58).

Based on the foregoing, 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 Doolittle v. Board of Education, supra; also Becker v. Town of Roxbury, 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.

Similarly, with respect to "contract 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].

A proper motion might be: "I move to enter into executive session to discuss the collective bargaining negotiations involving the police union."

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this

opinion will be forwarded to the Board of Education and the Superintendent.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Alan R. Derry, Superintendent