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-9827

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

<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. 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

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

The staff of the Committee on Open 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 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
Fax (518) 474-1927
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

Robert J. Freeman
Executive Director

RJF:jm

cc: John Plume, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2705
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-AO-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
Fax (518) 474-1927

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

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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

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
Fax (518) 474-1927

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 986

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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-9969

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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
(518) 474-2518
Fax (518) 474-1927

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

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

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
Fax (518) 474-1927

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9874

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Ralph Cessario
First Deputy Town Attorney
Town of Amherst
5583 Main Street
Williamsville, NY 14221

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

Dear Mr. Cessario:

I have received your letter of January 6. You asked whether the Erie County Water Authority sent a copy of an appeal by the Town of Amherst of October 30 to this office as required by §89(4)(a) of the Freedom of Information Law, and if it did not do so, you asked that I offer my "position" concerning the "validity" of your request.

The substance of the matter involves a request by the Town for the water readings pertaining to the Authority's customers residing in the Town, and for "all Geographic Information System (GIS) data contained within the municipal boundary of the Town of Amherst." In a letter of October 10, the Authority denied the request without stating any reason or informing the Town of the right to appeal the denial. You contended in your appeal that the "digital information" sought "is not a copyright product" and must be disclosed.

From my perspective, there is likely no basis for withholding the information sought. In this regard, I offer the following comments.

First, based on a search of our files, the Authority did not transmit a copy of your appeal to this office. As you are aware, §89(4)(a) of the Freedom of Information Law states in relevant part that:

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

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 letter of denial attached to your letter did not refer to the right to appeal, and 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.

Second, the Freedom of Information Law 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 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, 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 medium, such as a computer tape or disk.

In a decision that may be 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.

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 I believe that one of the grounds for denial is pertinent to an analysis of rights of access, due to its structure, that provision frequently requires disclosure, and I believe that to be so in this instance.

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].

By their nature, water readings and spatial data contained in a GIS consist of factual information. Therefore, I believe that information sought must be disclosed pursuant to §87(2)(g)(i).

Lastly, I know of no judicial decision that deals with the relationship between the Freedom of Information Law, or an access law from another jurisdiction, and a work produced by a governmental entity for which there is a copyright claim. In my opinion, particularly in view of the expansive interpretations of the Freedom of Information Law by the Court of Appeals, a claim of copyright regarding a government produced record would be superseded by the Freedom of Information Law. In general, the recipient may do with a record disclosed under the Freedom of Information Law as he or she sees fit [see M. Farbman & Sons v. NYC Health and Hosps. Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Further, the fees for copies of records made available under the Freedom of Information Law must be based on the standards appearing in §87(1)(b)(iii), unless a different statute authorizes a higher fee, and there would be none in this instance.

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 Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, ___ AD 2d ___ (1996); 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 or disk) to which data is transferred.

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

Even if a claim based on a copyright, it is possible that your request would constitute a "fair use", for under the "fair use" factors, the "purpose and character" of your request would not involve commercial or profit making activity.

For the reasons described in the preceding commentary, I believe that the information sought 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: Director, Erie County Water Authority
Mark Fuzak, Deputy Associate Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9875

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Michael Steedly
91-A-5677 D-2-012
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. Steedly:

I have received your letter of January 6. You referred to a failure to respond to your requests for records by the New York City Police Department and the Office of the Kings County District Attorney. You asked that I "inform" those agencies that they are required to respond to requests.

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)].

As you requested, copies of this opinion will be forwarded to officials of the agencies in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Virginia Modest

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:pb

Enc.

cc: Board of Trustees
Leo Iavarone
Marion J. Zetterberg

NO FOIL AO
9876

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9877

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Ms. L.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 your note, which reached this office on January 8. You asked "[h]ow is a person to 'appeal' something if the request is not fulfilled nor denied".

In this regard, if an agency fails to respond to a request by neither granting nor denying access to records within the time periods prescribed by law [see Freedom of Information Law, §89(3)], the applicant may consider the request to have been constructively denied access and appeal in accordance with §89(4)(a) of the Freedom ofInformation Law. That provision states that:

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Marie A. Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9878

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Jalah Sealey
95-R-6374
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

Dear Mr. Sealey:

Your letter of January 28 addressed to James Aube, Director of the Division of Corporations and State Records, has been forwarded to the Committee on Open Government. The Committee, which is also a unit of the Department of State, is authorized to offer advice concerning the Freedom of Information Law. In your letter, you requested copies of records "pertaining to any policies and/or procedures and training concerning N.Y.C. police officers and how they are suppose to deal with people on parole that they come into contact with."

In this regard, I offer the following comments and suggestions.

First, one of the statutes to which you referred is the federal Freedom of Information Act. That statute pertains only to records maintained by federal agencies; it is inapplicable to units of state and local government. While the federal Act includes provisions dealing with fee waivers, the New York Freedom of Information Law does not contain analogous provisions. I note that it has been held that an agency may charge its established fee for copying even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, the Department of State does not maintain the kinds of records in which you are interested. As a general matter, a request for records should be directed to the agency that maintains them. In this instance, since your inquiry involves policy, procedures and training relative to New York City police officers, it is suggested that records falling within the scope of your request should be directed to the New York City Police Department.

Third, 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 the agency's response to requests, and requests should be directed to that person. The records access officer for the New York City Police Department is Sgt. Louis Lombardi, FOIL Unit, Room 110C, One Police Plaza, New York, NY 10038.

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-9879

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Vincent Malerba
82-A-2059
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. Malerba:

I have received your letter of January 4 in which you sought assistance in obtaining DD5's and other records relating to your arrest and indictment in 1981. Despite the holding in Gould et al. v. New York City Police Department (___NY2d___, NYLJ, November 27, 1996), you wrote that the Office of the Kings County District Attorney engaged in a "blanket" denial of your request on the basis of §87(2)(e) 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.

The provision at issue in Gould, §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 the provision to which you referred, §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). While it appears that

disclosure sixteen years after the events to which the records relate occurred would not interfere with an investigation or deprive a person of a fair trial in accordance with subparagraphs (i) and (ii) of §§87(2)(e), it is possible that the remaining aspects of that provision would remain pertinent to an analysis of rights of access. Since I have no knowledge of the contents of the records at issue or the effects of their disclosure, I cannot conjecture as to the extent to which §87(2)(e) might properly be asserted.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9880

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. Tyrone Peterson
94-A-1528
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. Peterson:

I have received your letter of January 5. You have sought guidance concerning rights of access to records relating to your case, such as "DD-5's autopsy reports etc."

In this regard, 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.

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." If the autopsy was performed outside of New York County, §677 of the County Law would be pertinent. In brief, under that statute, autopsy reports and related records are available as of right only to the next of kin and a district attorney; others could only obtain such records by means of a court order. If the autopsy report was performed in New York City by the Office of the Chief Medical Examiner, 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 autopsy reports and related 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.

With regard to DD5's and other records that may be maintained by a police department, 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 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. Axelrod, 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:
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> i. interfere with law enforcement investigations or judicial proceedings;
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> ii. deprive a person of a right to a fair trial or impartial adjudication;
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> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
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> 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9881

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Colleen M. Fennell, Ed.D.
Superintendent
Wynantskill Union Free School District
P.O. Box 345
Wynantskill, NY 12198-0345

The staff of the Committee on 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. Fennell:

I have received your letter of January 3 in which you requested an advisory opinion concerning the following issue:

> "Is the Management Letter of the annual School District Audit Report a public document and required to be given to the public or may it be viewed as a confidential document separate from the Audit Report."

In this regard, as you are likely aware, §30 of the General Municipal Law requires that every municipal corporation and school district is required to make an annual report of its financial condition to the State Comptroller. Section 35 of the General Municipal Law states in subdivision (1) that:

> "A report of such examination shall be made and shall be filed in the office of the state comptroller...An additional copy thereof shall be filed with the chief fiscal officer, except that in the case of a school district, such additional copy shall be filed in the office of the chairman of the board of trustees, the president of the board of education or the sole trustee, as the case may be. When so filed, each such report and copy thereof shall be a public record open to inspection by any interested person."

Subdivision (2)(a) of §35 makes specific reference to management letters and states in relevant part that:

> "Within ten days after the filing of a report of examination performed by the office of the state comptroller, a report of an external audit performed by an independent public accountant or any management letter prepared in conjunction with such an external audit with the clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk, he shall give public notice thereof...and that the (report of examination performed by the office of the state comptroller or report of, or management letter prepared in conjunction with, the external audit by the independent public accountant) has been filed in my office [sic] where it is available as a public record for inspection by all interested persons."

Based on the foregoing, it is clear that a management letter must be made available 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 9877

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Ms. L.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 your note, which reached this office on January 8. You asked "[h]ow is a person to 'appeal' something if the request is not fulfilled nor denied".

In this regard, if an agency fails to respond to a request by neither granting nor denying access to records within the time periods prescribed by law [see Freedom of Information Law, §89(3)], the applicant may consider the request to have been constructively denied access and appeal in accordance with §89(4)(a) of the Freedom ofInformation Law. That provision states that:

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Marie A. Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9878

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Jalah Sealey
95-R-6374
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

Dear Mr. Sealey:

Your letter of January 28 addressed to James Aube, Director of the Division of Corporations and State Records, has been forwarded to the Committee on Open Government. The Committee, which is also a unit of the Department of State, is authorized to offer advice concerning the Freedom of Information Law. In your letter, you requested copies of records "pertaining to any policies and/or procedures and training concerning N.Y.C. police officers and how they are suppose to deal with people on parole that they come into contact with."

In this regard, I offer the following comments and suggestions.

First, one of the statutes to which you referred is the federal Freedom of Information Act. That statute pertains only to records maintained by federal agencies; it is inapplicable to units of state and local government. While the federal Act includes provisions dealing with fee waivers, the New York Freedom of Information Law does not contain analogous provisions. I note that it has been held that an agency may charge its established fee for copying even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Second, the Department of State does not maintain the kinds of records in which you are interested. As a general matter, a request for records should be directed to the agency that maintains them. In this instance, since your inquiry involves policy, procedures and training relative to New York City police officers, it is suggested that records falling within the scope of your request should be directed to the New York City Police Department.

Third, 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 the agency's response to requests, and requests should be directed to that person. The records access officer for the New York City Police Department is Sgt. Louis Lombardi, FOIL Unit, Room 110C, One Police Plaza, New York, NY 10038.

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-9879

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 3, 1997

Mr. Vincent Malerba
82-A-2059
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. Malerba:

I have received your letter of January 4 in which you sought assistance in obtaining DD5's and other records relating to your arrest and indictment in 1981. Despite the holding in Gould et al. v. New York City Police Department (___NY2d___, NYLJ, November 27, 1996), you wrote that the Office of the Kings County District Attorney engaged in a "blanket" denial of your request on the basis of §87(2)(e) 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.

The provision at issue in Gould, §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)...
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> "...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 the provision to which you referred, §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
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> i. interfere with law enforcement investigations or judicial proceedings;
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> ii. deprive a person of a right to a fair trial or impartial adjudication;
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> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
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> 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). While it appears that

disclosure sixteen years after the events to which the records relate occurred would not interfere with an investigation or deprive a person of a fair trial in accordance with subparagraphs (i) and (ii) of §§87(2)(e), it is possible that the remaining aspects of that provision would remain pertinent to an analysis of rights of access. Since I have no knowledge of the contents of the records at issue or the effects of their disclosure, I cannot conjecture as to the extent to which §87(2)(e) might properly be asserted.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9880

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. Tyrone Peterson
94-A-1528
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. Peterson:

I have received your letter of January 5. You have sought guidance concerning rights of access to records relating to your case, such as "DD-5's autopsy reports etc."

In this regard, 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.

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." If the autopsy was performed outside of New York County, §677 of the County Law would be pertinent. In brief, under that statute, autopsy reports and related records are available as of right only to the next of kin and a district attorney; others could only obtain such records by means of a court order. If the autopsy report was performed in New York City by the Office of the Chief Medical Examiner, 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 autopsy reports and related 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.

With regard to DD5's and other records that may be maintained by a police department, 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 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. Axelrod, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9881

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Colleen M. Fennell, Ed.D.
Superintendent
Wynantskill Union Free School District
P.O. Box 345
Wynantskill, NY 12198-0345

The staff of the Committee on 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. Fennell:

I have received your letter of January 3 in which you requested an advisory opinion concerning the following issue:

> "Is the Management Letter of the annual School District Audit Report a public document and required to be given to the public or may it be viewed as a confidential document separate from the Audit Report."

In this regard, as you are likely aware, §30 of the General Municipal Law requires that every municipal corporation and school district is required to make an annual report of its financial condition to the State Comptroller. Section 35 of the General Municipal Law states in subdivision (1) that:

> "A report of such examination shall be made and shall be filed in the office of the state comptroller...An additional copy thereof shall be filed with the chief fiscal officer, except that in the case of a school district, such additional copy shall be filed in the office of the chairman of the board of trustees, the president of the board of education or the sole trustee, as the case may be. When so filed, each such report and copy thereof shall be a public record open to inspection by any interested person."

Subdivision (2)(a) of §35 makes specific reference to management letters and states in relevant part that:

> "Within ten days after the filing of a report of examination performed by the office of the state comptroller, a report of an external audit performed by an independent public accountant or any management letter prepared in conjunction with such an external audit with the clerk of the municipal corporation, industrial development agency, district, agency or activity, or with the secretary if there is no clerk, he shall give public notice thereof...and that the (report of examination performed by the office of the state comptroller or report of, or management letter prepared in conjunction with, the external audit by the independent public accountant) has been filed in my office [sic] where it is available as a public record for inspection by all interested persons."

Based on the foregoing, it is clear that a management letter must be made available 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

OML-AO- 2711
FOIL-AO- 9882

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Ms. Gail Caraccilo
[redacted]

The staff of the Committee on 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. Caraccilo:

I have received your letter of January 10 and the materials attached to it. You have requested an advisory opinion concerning a series of issues relating to the implementation of the Open Meetings Law by the Village of Seneca Falls.

The first pertains to the status of "two-member committees" designated by the Village Board of Trustees. In this regard, 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.

However, when a committee consists solely of members of a public body, such as a village board of trustees, 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 village 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)].

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice, the preparation of minutes, 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)].

Next, you wrote that "Board members have also occasionally rendered decisions by using telephone polls to discuss issues and record individual votes, and appear to also regularly conduct one-on-one meetings outside the committee and open meeting structure to discuss issues and render decisions."

As you may be aware, the Open Meetings Law pertains to meetings of public bodies, and 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 public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Further, 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 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.

With respect to conducting public business by phone, I point out that there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a decision or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

The definition of "public body" 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 reasonable 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 during duly convened meetings that are preceded by reasonable notice given to all members.

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". In my opinion, the term "convening" means a physical coming together. Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" requires the assembly of a group in order to constitute a quorum of a public body.

I also direct your attention to the legislative declaration of the Open Meetings Law, §100, which states in part that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy."

In short, while I believe that members of public bodies may consult with one another individually or by phone, I do not believe that they may validly conduct meetings by means of telephone conferences, vote or make collective determinations by means of telephonic communications.

With regard to the status of any decision made by phone poll, it is my opinion that those decisions, if reviewed by a court, could be deemed null and void. Again, if action can be taken by a public body only at a meeting during a majority of its membership is present, purported action taken outside the context of a meeting could be considered a nullity.

When action is taken by a public body, including a committee falling within the coverage of the Open Meetings Law, the action must be memorialized in minutes, for §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 include reference to action taken by a public

body. If no motions, proposals, resolutions or other votes are made or taken at a meeting, technically, there is no requirement that minutes be prepared.

If a public body reaches a consensus upon which it relies, I believe that minutes reflective of the decision reached must be prepared and made available. 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).

Therefore, if the Board reaches a "consensus" that is reflective of its action on or final determination of an issue, I believe that minutes must be prepared that indicate its action, as well as the manner in which each member voted [see Freedom of Information Law, §87(3)(a)].

Lastly, 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 and requiring

the preparation of a voting record sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues.

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)].

As you requested and in an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Village officials to whom you referred at the end of your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Bradford Jones
Ann Cramer
Thomas Sandroni
Louis Lorenzetti
Francis Brady
Joseph Bilancini
Marianne Piscitelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9883

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. David Majette
94-R-6596
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

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

Dear Mr. Majette:

I have received your letter of January 9. You have sought assistance in obtaining dental x-rays from your facility. You added that the facility, as of the date of your letter, has disregarded the request.

In conjunction with your comments, I offer the following remarks.

First, 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 by the Department of Correctional Services to determine appeals is Counsel to the Department.

It is also noted that the regulations promulgated by the Department of Correctional Services, §5.24(b), state that "A request for medical records may be submitted to the Assistant Commissioner of Health Services, Department of Correctional Services, Building 2, State Campus, Albany, NY 12226." It is suggested that you contact your inmate records coordinator to ascertain whether your request should be directed to a person at the facility or to the Assistant Commissioner as indicated in the regulations.

Lastly, with regard to access 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.

However, more relevant than the Freedom of Information Law is §18 of the Public Health Law. In brief, that statute provides patients with rights of access to medical records pertaining to them. Consequently, it is suggested that any requests for medical records refer to §18 of the Public Health Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9884

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. Juan C. Pichardo
94-A-8548
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. Pichardo:

I have received your letter of January 5, which reached this office on January 13. You have sought assistance in relation to a request for records relating to your arrest maintained by the New York City Police Department. You contend that the records should be made available under the Freedom of Information Law because you are entitled to them under the Criminal Procedure Law (CPL) and the Federal Rules of Criminal Procedure.

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 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.

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 the decision by the Court of Appeals cited earlier, which dealt with 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 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. Axelrod, 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-9885

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. Larry Vincent
[redacted]

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

Dear Mr. Vincent:

I have received your letter of January 8 in which you requested "intervention" by this office.

By way of background, you referred to requests made under the Freedom of Information Law in 1992 to Onondaga County. At that time, you were informed that the records sought did not exist. However, in conjunction with a hearing in which you were involved in 1996, you wrote that attorneys for the County produced several of the records that you had requested in 1992 for which there were claims that they did not exist.

In this regard, I offer the following comments.

First, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has no authority to enforce that statute or compel an agency to grant or deny access to records. Similarly, the Committee is not empowered to "intervene" in a legal sense. Consequently, the contents of this response should be considered advisory in nature.

Second, it is unknown whether you sought certification in 1992 in conjunction with the County's response. 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)].

While I am not suggesting that it is applicable, §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."

The language quoted above in my view pertains to a situation in which an agency official is aware that a record requested exists, but denies access by denying its existence, or in which an agency official destroys a record that has been requested in order to prevent its disclosure. When the kinds of actions described in §89(8) have occurred, they may result in a charge of a violation under §240.65 of the Penal 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-9886

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

Mr. Anthony Anzalone
89-A-7888
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. Anzalone:

I have received your letter of January 7 and the correspondence attached to it. You have sought assistance in obtaining laboratory reports from the New York City Police Department pertaining to your case. The reports involve controlled substances, and your arrest occurred in December of 1987.

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. Since the information in which you are interested relates to events that occurred nearly ten years ago, it is possible that some records might have been disposed of in accordance with provisions dealing with the retention of records. Insofar as the records that you are seeking no longer exist, the Freedom of Information would not apply.

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

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. The kind of information that you are seeking would appear to be factual in nature. If that is so, it would be available under §87(2)(g)(i), unless a different ground for denial applies.

Perhaps most significant 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 to the matter. In a recent decision, it was held that the purpose of §87(2)((e()(iv):

> "is to prevent violators of the law from being apprised of nonroutine procedures by which law 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Wilk, Ph.D.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2712
FOIL-AO-9887

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 4, 1997

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

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

Dear Ms. Maxam:

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

According to your letter:

> "On Dec. 30, 1996, [you] requested to inspect the 1996 general fund and highway fund abstracts of the Town of Chester. These are written records which are compiled monthly and approved for payment by the town board at their monthly meeting and then filed in a folder in a file cabinet in the town clerk's office. No search is required, no compilation. It is simply a matter of public inspection of a record.
>
> "On 1/8/97, the town clerk responded that [you] could inspect the records request[ed] only on February 12, 1997 between the hours of 10 a.m. and 1 p.m. She has been imposing this same type of restriction on [you], requiring a wait of a month or more, when [you] request to inspect the minute book of the town board. In other towns, upon making a request a[sic] the minute book or abstracts, the clerk simply hands over the book or folder and goes about her business while [you] inspect the records

> and then, if so requested, she makes a copy of record if [you] request."

You have asked whether the clerk can "restrict" access in the manner that you described. 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..."

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)].

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 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].

Lastly, since you referred to minutes of meetings, I point out that §106 of the Open Meetings Law pertains to minutes and provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

Moreover, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above. Again, I believe that the language of §106(3) is clear, for it states that minutes shall be available "within two weeks from the date of such meetings."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk, Town of Chester

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9888

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 6, 1997

Mr. Marc D. Zarowin
[redacted]

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

Dear Mr. Zarowin:

I have received your letter of January 13 and the correspondence attached to it.

You have sought an advisory opinion concerning a partial denial of access to a record by the Department of Transportation. By way of background, you indicated that you initiated a claim against "Well Done Moving", an "incompetent moving company which has already lost its DOT license." The item in which you are particularly interested that has been withheld involves "the name and number of Well Done Moving's bank account", for you wrote that without that information, you "may be unable to collect a significant and deserved judgment and the State will become complicit in [your] injury." The information in question was withheld pursuant to §87(2)(b) and (i) of the Freedom of Information Law.

In this regard, I offer the following comments.

First, the intended use of the information sought is irrelevant to rights of access conferred by the Freedom of Information Law. It has been held when records are accessible under that statute, they must be made equally available to any person, notwithstanding one's status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); M. Farbman & Sons v. NYC Health and Hosps. Corp., 62 NY 2d 75 (1984)]. Conversely, when a record may properly be withheld under the Freedom of Information Law, your need for a record in

litigation would not enhance your right to obtain it under that statute.

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

Section 87(2)(b) provides that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which involves "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Therefore, in many instances, lists of names and addresses, or records containing equivalent information, may be withheld when they are requested for a commercial purpose. Nevertheless, in my opinion, the privacy provisions do not apply when records identify commercial entities or persons acting in business capacities. From my perspective and based upon judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the 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 another decision, 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, assuming that the items in question relate to a business entity, it does not appear that §87(2)(b) would serve as a valid basis for denial.

The other provision cited in the denial of your request, §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 with 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 bank account number 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, §87(2)(i) would not likely be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lisa Reid, Assistant Commissioner for Governmental Relations
John B. Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9889

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 6, 1997

Mr. Howard Bean
93-A-7002
Midstate Corr. Facility
PO Box 2500
Marcy, NY 13403

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

Dear Mr. Bean:

I have received your letter of January 13 in which you sought assistance in obtaining records from the New York City Police Department.

Specifically, you requested records of civilian complaints against the police officers who arrested you, as well as the "sign out log for unmarked police cars". The request was denied on the basis of §87(2)(a) of the Freedom of Information Law, and you expressed the belief that you "have a right to any and all information that may help prove [your] innocence".

In the regard, I offer the following comments.

First, while you may have a right to obtain exculpatory information and records as a defendant in the context of a criminal proceeding, when seeking records under the Freedom of Information Law, you have the same rights as the public generally. 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, 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.

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 provision referenced in the Police Department's denial of your request, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". I assume that the statute to which the Department alluded is §50-a of the Civil Practice Law. That statute pertains to personnel records of police and correction officers and provides that personnel records concerning those officers that are used to evaluate performance toward continued employment or promotion are confidential. In a case dealing with unsubstantiated complaints against correction officers, the Court of Appeals found that §50-a exempted such records from disclosure [Prisoners' Legal Services of New York v. NYS Dept. of Correctional Services, 73 NY 2d 26 (1988)]. If you are seeking similar records, it appears that §50-a would be applicable and that it would serve as a proper basis for a denial of access.

A "sign out log for unmarked police cars" could not in my opinion be characterized as a personnel record. If such a log exists, I believe that it would be available under §87(2)(g)(i) of the Freedom of Information Law. Under that provision, statistical or factual information contained within intra-agency materials must be disclosed, unless a different ground for denial may appropriately be asserted.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Karen Pakstis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9890

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 6, 1997

Ms. Deborah Schleede
Atlantic Granite and Marble
450 Lee Road
Rochester, NY 14606

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

Dear Ms. Schleede:

I have received your letter of January 14 in which you requested an advisory opinion concerning rights of access to certain records.

You wrote that you are interested in obtaining "commercial building permit files or copies of the permit applications that may go to the town assessor", as well as "commercial building project addresses, type of jobs, the names, addresses and phone numbers of the contractors doing the work."

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 states in part that an agency is not required to create or prepare a record in response to a request. Therefore, insofar as the information sought is not maintained in the form of a record or records, the Freedom of Information Law would not apply.

Second, however, insofar as the information sought is maintained in an agency's records and can be found based on an agency's filing or record-keeping systems, I believe that it would be available.

As the Freedom of Information Law pertains to existing records, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the

extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, although one of the grounds for denial is pertinent to an analysis of rights of access, it could not be appropriately asserted in the context of your inquiry.

Section 87(2)(b) provides that an agency may withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which involves "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." Therefore, in many instances, lists of names and addresses, or records containing equivalent information, may be withheld when they are requested for a commercial purpose. Nevertheless, in my opinion, the privacy provisions do not apply when records identify commercial entities or persons acting in business capacities. From my perspective and based upon judicial interpretations, §87(2)(b) is intended to pertain to natural persons, not entities or persons acting in business capacities. In a decision rendered by the 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 another decision, 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, 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 records in question or that disclosure of the information would result in an unwarranted invasion of personal privacy. Further, none of the remaining grounds for denial could appropriately be applicable.

As you requested, copies of this opinion will be forwarded to the officials identified in your letter.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James Breeze
Carol Pennington
Robert Hank
Dennis Essom

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9891

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 6, 1997

Ms. Carol Ann Crill
[redacted]

The staff of the Committee on 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. Crill:

I have received your letter of January 12. In your capacities as a resident and member of the Board of Trustees of the Village of Prospect, you have sought my views concerning several issues.

As I understand the matter, on January 1, you phoned the Village office for the purpose of requesting a tape recording of an open meeting. The Village clerk returned your call on January 5, and a lengthy discussion ensued, with the clerk indicating that she would contact the New York Conference of Mayors to obtain guidance on the subject. It appears that, as of the date of your letter, your request had neither been granted nor specifically denied.

After the series of conversations between yourself and the clerk, at a meeting of the Board of Trustees on January 10, the clerk indicated that she tape recorded all of her conversations with you. You asked whether it is "legal for one party of a two party conversation to record that conversation without the other party's knowledge", and whether the tapes are property of the Village.

In this regard, while those matters are not considered directly by the Freedom of Information Law, because they do relate to rights of access to records, I offer the following comments.

Pertinent to the first question is §250.00(2) of the Penal Law, which deals with "Offenses Against the Right to Privacy" and defines the phrase "Mechanical overhearing of a conversation" to mean:

> "the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a

> person not present thereat, by means of any instrument, device or equipment."

As I interpret the provision quoted above, so long as a person is a party to a conversation, he or she may record the conversation without the consent or knowledge of the other party or parties to the conversation.

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."

Since the tape recordings involved issues of Village business, i.e., whether a tape recording of a Board meeting must be disclosed, I believe that they were prepared "in connection with the transaction of public business" and would constitute "records" that are the property of the Village.

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.

With respect to rights of access to the tape recordings, the Freedom of Information Law would govern. That statute also 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, a tape recording of a meeting of a public body would clearly constitute a "record" that falls within the coverage of the Freedom of Information Law. Moreover, it was held nearly twenty years ago that a tape recording of an open meeting of a public body must be made available (see Zaleksi v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

Lastly, under the retention schedules developed pursuant to §57.25(2) of the Arts and Cultural Affairs Law, I believe that tape recordings of meetings of the Board of Trustee must be retained for a minimum of four months.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9892

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 6, 1997

Mr. Mark Leaver
85-A-4122
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

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

Dear Mr. Leaver:

I have received your letter of January 14 and the correspondence attached to it.

You have sought assistance in obtaining a copy of a transcript of a guilty plea hearing from the Office of the Nassau County District Attorney. The assistant district attorney who responded to your request indicated that the transcript is a court record that falls beyond the coverage of the Freedom of Information Law. Based on a judicial decision pertinent to the matter, I concur with the District Attorney's response.

In this regard, 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."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

I direct your attention to the decision cited in the response to your request, Moore v. Santucci [151 AD 2d 677 (1989)]. That 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).

The foregoing is not intended to suggest that the transcript cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the transcript from the clerk of the court in which the proceeding was conducted, 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

cc: Douglas Noel
Lawrence J. Schwarz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9893

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 7, 1997

Mr. Tim Sheridan
Orangetown Police 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 January 17 and the materials related to it. You have raised a series of issues pertaining to your requests made under the Freedom of Information Law to the Town of Orangetown. Having reviewed the materials, I offer the following comments.

First, you referred to appeals that have been "ignored" by the Town. 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)].

Second, you have asked whether an agency must certify that a record made available is a true copy. With respect to that 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 emphasized 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.

Third, several aspects of the correspondence pertain to leave and attendance records, as well as overtime. From my perspective, records reflective of payments made to 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 overtime compensation, must be disclosed.

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).

In a case dealing with attendance records indicating the dates and dates of sick leave claimed by a particular police officer 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.

Lastly, as indicated earlier, §89(3) of the Freedom of Information 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Supervisor Kleiner
John McAndrew

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9894

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 7, 1997

Mr. Ronald Perry
96-A-0908
Downstate Correctional Facility
P.O. 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. Perry:

I have received your letter of January 14. You have asked for the names of the agencies that might have copies of various records in order that you may request them under the Freedom of Information Law. The information in which you are interested includes a desk appearance ticket, the court in which it was filed, the docket number and the name of the judge before whom the initial arraignment occurred.

In this regard, without additional information, there is no means of providing you with specific guidance. As a general matter, a request for records made under the Freedom of Information Law should be directed to the records access officer at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. In this instance, it would appear that the first records that were prepared in relation to the event likely would be maintained by the New York City Police Department. The records access officer for the Department is Sgt. Louis Lombardi, FOIL Unit, Room 110C, One Police Plaza, New York, NY 10038.

It also appears that some of the information in which you are interested would be available only from a 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 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 and court records. This is not to suggest that court records may not be available, for other provisions of law frequently provide broad rights of access to court records (e.g., see Judiciary Law, §255). It is suggested that you seek information that would be maintained by a court from the clerk of the court in which a proceeding occurred.

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-9895

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 10, 1997

Mr. Tom Lisborg
Master of Science in Engineering
Drejogade 26 F, Apartment 13
DK-2100 Copenhagen O
DENMARK

Dear Mr. Lisborg:

I have received your letter of February 2, which reached this office today. You have requested from the Committee on Open Government a variety of records, particularly those pertaining to a Surrogate's Court proceeding.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain possession or control of records generally, and it has no power to compel an entity to grant or deny access to records. In short, this office does not maintain the records in which you are interested. Nevertheless, I offer the following comments and suggestions.

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 Freedom of Information Law does not pertain to the courts or court records. This is not to suggest that court records are confidential; on the contrary, court records in many instances must be made available by the court or court clerk. In the case of a Surrogate's Court, §2501 of the Surrogate's Court Procedure Act states in relevant part that:

> "1. The clerk of the court shall keep a record of and be responsible for the proper indexing, filing or recording, as the case may be, collating, arranging, restoring and preserving of all records, documents, books, maps, instruments and other matter specified in this article or by other requirement of law heretofore or hereafter deposited, filed or recorded, of all matters specified by this article or by other requirement of law...
>
> 8. All books and records other than those sealed are open to inspection of any person at reasonable times."

Therefore, insofar as records in which you are interested are maintained by a Surrogate's Court, I believe that they would be available, except to the extent that the records may be sealed. It is suggested that you direct a request to the clerk of the Surrogate's Court in New York County.

Second, insofar as records in which you are interested might be maintained by an "agency", the Freedom of Information Law would be applicable. It is emphasized, however, that there is no central source, database or agency that would maintain all records pertaining to an individual. As such, a request for records must be directed to the agency or agencies that maintain the 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 the records.

Pursuant to regulations promulgated by the Committee on Open Government, 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 the records access officer at the agency or agencies that you believe would maintain records sought.

I would conjecture that the records in which you are interested would be maintained primarily by the Surrogate's Court. However, in the event that records of interest might be maintained by one or more agencies, enclosed is a copy of a brochure that describes 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.

cc: Chief Clerk
Surrogate's Court
New York County
31 Chambers Street
New York, NY 10007

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9896

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Shawn Green
14196006485
1600 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. Green:

I have received your letter of January 16. You have complained that requests for records made to various officials of the New York City Department of Correction have not been answered.

In this regard, 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 ordinarily be made to that person. While I believe that the officials who received your requests should have responded in a manner consistent with the Freedom of Information Law or forwarded your requests to the records access officer, it is suggested that you submit a new request to the records access officer. The person so designated at the Department of Correction is Thomas Antenen, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

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

For your information, the person designated to determine appeals at the Department is Ernesto Marrero, General Counsel.

Since you referred to the submission of a "Vaughn motion", I note that I am unaware of any provision of the New York Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or that 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9897

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Daniel Ward
91-A-9680
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733-0116

Dear Mr. Ward:

I have received your letter of January 14 in which you referred to an advisory opinion addressed to you on December 27 that focused on access to criminal history records.

You have asked that I comment with respect to the privacy of deceased persons who are the subjects of criminal history records.

In this regard, it appears that you misunderstand the thrust of the decision rendered in Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989). Neither of the staff members at the Division of Criminal Justice Services (DCJS) referred to the issue of privacy in their denials of access, nor did my response, because the holding in Capital Newspapers was based upon a provision that does not refer to privacy. The decision, as well as my response to you, are based upon §87(2)(a) of the Freedom of Information Law. To reiterate, that provision pertains to records that "are specifically exempted from disclosure by state or federal statute." In Capital Newspapers, it was determined that criminal history records were exempted from disclosure by means of a statute, §837 of the Executive Law. That being so, the records are simply beyond the reach of the Freedom of Information Law, and there is no need to consider the privacy issue; it has been eliminated in terms of an analysis of rights of access.

You referred to a statement in the annual report of the Committee on Open Government in which the Committee expressed its belief that when records are available from one governmental entity, they should be available from another that maintains the same or analogous records. It was made as part of a proposal to amend the Executive Law. The Committee's statement reflects a principle that it believes should be applicable, but which does not

apply in the case of criminal history records due to the decision rendered in Capital Newspapers and the finding that those records are exempted from disclosure. The Court in that case specified that it did not deal with the issue of privacy, because the records were exempted from disclosure by statute. Therefore, there is no issue involving the privacy of the deceased.

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."

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-9898

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Travis Foy
92-R-4185
135 State Street
Auburn, NY 13021-0168

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

Dear Mr. Foy:

Your letter of February 2 addressed to John Hasper, Deputy 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 and opinions concerning the Freedom of Information Law.

As I understand your correspondence, you requested a criminal history record pertaining to a named individual from the Office of the New York County District Attorney on November 29. It appears, however, that as of the date of your letter to this office, you had not yet received a response.

In this regard, I offer the following comments.

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

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.

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:jm

cc: John Hasper, Deputy Secretary of State
Gary Galperin, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9899

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Donald DuBois
88-B-1922
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. DuBois:

I have received your letter of January 15. You indicated that you requested records from the New York City Police Department in July, that the receipt of your request was acknowledged, and that you were informed that a determination would be made within ninety days. Nevertheless, as of the date of your letter to this office, it appears that you have received no further response.

In this regard, as you may be aware, 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 currently designated by the Department to determine appeals is Karen A. Pakstis, Assistant Deputy Commissioner, Legal Matters.

As you requested, copies of your correspondence are being returned to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen A. Pakstis
Joseph Desiderio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9900

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 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 January 17. Once again, you have sought assistance in obtaining records from the Office of the Westchester County District Attorney. You indicated that the agency has informed you that it has already disclosed to you all of the items that you requested. You wrote, however, that you do not have copies of the records and that most "were withheld from trial."

In the decision cited by the Office of the District Attorney, 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. 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard E. Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9901

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Roy Tarbell
89-C-688
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. Tarbell:

I have received your letter of January 10, which reached this office on January 21. You have requested assistance in obtaining statements made by two witnesses.

In this regard, 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).

Lastly, a request for the records in question should be directed to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant for records "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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9902

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 11, 1997

Mr. Barry Vallen
KFPC
Wards Island 4E
600 East 125 Street
New York, NY 10035

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

Dear Mr. Vallen:

I have received your letter of January 14. As I understand your correspondence, you have sought assistance in obtaining certain mental health records pertaining to yourself.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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." Assuming that you are a "qualified person", 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 have not received 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9903

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 12, 1997

Mr. Anthony Carty
92-A-9491
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. Carty:

I have received your letter of January 21 in which you have complained regarding the failure of the New York City Police Department to respond to your requests and appeal made under the Freedom of Information Law.

In this regard, as you may be aware, 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 currently 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-9904

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 12, 1997

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:

I have received your letter of January 16, which reached this office on January 24. You have questioned the propriety of a denial of a request for records directed to the Office of the Chief Medical Examiner in New York City. You contend that its reliance upon a provision of the City Charter is misplaced and that the records should have been made available to you under §240.20 of the Criminal Procedure Law (CPL).

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 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." With respect to autopsies performed in New York City by the Office of the Chief Medical Examiner, 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, as well as related records maintained by the Medical Examiner, were not subject to the

Freedom of Information Law. 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 autopsy reports and related 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.

Second, 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, 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.

I hope that I have been of 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-9905

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 12, 1997

Ms. Beverly Hettig
[redacted]

Dear Ms. Hettig:

I have received a copy of your letter of January 22 addressed to the Chairman of the Chenango County Board of Supervisors. You requested from him "a copy of the current list by subject, of records pertaining to the Millbrook Project."

In an effort to enhance your understanding of the Freedom of Information Law, I offer the following comments.

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)]. Therefore, if there is no list, by subject, of records pertaining to the Millbrook Project, the County would not be obliged to prepare such a list on your behalf.

An exception to that rule relates to a more general list that 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. There is no requirement that a subject matter list be prepared in relation to a particular project or person, for example. 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 note that §87(3)(c) does not require that an agency ascertain which among its records must be made available or may be withheld.

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 clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert D. Briggs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2713
FOIL-AO-9906

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 12, 1997

Ms. Judy Ungar
[redacted]

The staff of the Committee on 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. Ungar:

I have received your letter of January 21. You have sought an opinion concerning the propriety of a "school board executive session that took place without a Board of Education Meeting." You added that the "result of this executive session was a vote to disband a principal selection committee that had met several times after being publicly formed this past October."

In this regard, I offer the following comments.

First, it is emphasized 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.

Second, the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session [see Open Meetings Law, §105(1)]. From my perspective, the issue considered at the executive session should have been discussed in public, for there would have likely been no basis for conducting an executive session.

The provision that relates most closely to the matter pertains to the discussion of certain issues as they relate to a "particular person." Specifically, §105(1)(f) of the Open Meetings Law permits a public body to enter into executive session to discuss:

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

Since the issue involved terminating an entity, a committee, it is assumed that the matter involved the existence of the committee and not any particular person. If that is so, there would have been no basis for conducting an executive session.

Lastly, 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)]. 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 the Board should have occurred during an open meeting.

In addition, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

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

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-9907

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 12, 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 January 20. You have sought assistance in obtaining a "mental status report" prepared by a psychologist at your facility.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9908

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 13, 1997

Mr. Lenny Hernandez
94-A-2817
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. Hernandez:

I have received your letter of January 19. You have raised a series of questions relating to a request made under the Freedom of Information Law.

Specifically, you requested from the Superintendent at your facility the names of certain individuals, including correction officers, who worked at a specific location on a certain date in 1995. While some of the information sought was disclosed, your request as it pertains to correction officers was denied for the following reason: "The log books are in storage. If this is a legal matter, we will respond to a court order." In conjunction with the foregoing, you raised the following questions:

> "1) Can an agency deny records solely because the records are in storage?
>
> 2) Does the fact that a legal proceeding may be pending allow an agency to deny records?
>
> 3) Does a requester have to obtain a court order for access?
>
> 4) Are the names, or log books with the names, of state employed correctional officers exempt under FOIL?"

In this regard, I offer the following comments.

First, the fact that records are in storage in my opinion is irrelevant. As you may be aware, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" broadly to include:

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

Since the log books are held by the Department of Correctional Services or one of its facilities, I believe that they clearly constitute "records" that fall within the coverage of the Freedom of Information Law.

I note that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Based upon a judicial decision rendered by the State's highest court, if an agency can locate the records based upon the terms of the request, the applicant has reasonably described the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. Assuming that the records can be located in conjunction with the terms of your request, your request would apparently be appropriate, even though the records may be in storage.

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

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental

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

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

Third, in my view, an applicant for records would not be required to obtain a court order to gain access to records if those records are accessible under the Freedom of Information Law. Further, it appears in this instance that 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. In my view, two of the grounds for denial are 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].

I note that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a case in which it was determined that the sick leave records pertaining to a police officer must be disclosed. On the basis of that decision, I believe that timesheets, attendance and similar records pertaining to public employees must be made available. In the context of your request, records indicating the assignment of particular correction officers on a certain date would in my view constitute a permissible rather than an unwarranted invasion of privacy if disclosed.

The other provision of potential significance, §87(2)(f), states that an agency may withhold records insofar as disclosure would "endanger the life or safety of any person." While it might be contended that records indicating prospective assignments might if disclosed jeopardize security, since the records in question involved assignments of more than a year ago, I do not believe that §87(2)(f) would serve as a basis for denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: R. Kuhlmann, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9909

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 13, 1997

Mr. Stephen J. 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 letter of January 19. You referred to an advisory opinion prepared in response to your earlier inquiry that was forwarded to the Suffolk County Police Department. Notwithstanding the issuance of the opinion, you indicated that you have received no further response from the Department. As such, you wrote that you are "giving...notice of appeal" and asked that this office "take what ever steps legally [we] can to force this agency to comply with F.O.I.L."

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 that statute or otherwise compel an agency to grant or deny access to records.

Similarly, the Committee does not determine appeals. Section 89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

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

denial, or provide access to the record sought."

If you consider it appropriate to do so, it is suggested that you appeal based on the provision quoted above. For your information, the County Attorney has been designated to determine appeals in Suffolk County.

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-9910

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 14, 1997

Ms. Carol Felicissimo
[redacted]

The staff of the Committee on 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. Felicissimo:

I have received your letters of January 9 and January 31, which reached this office, respectively, on January 27 and February 6. You have sought assistance in relation to a variety of requests for information directed to officials of the Yonkers Public Schools.

Having reviewed your letters and the correspondence relating to them, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, in a technical sense, District officials need not provide answers in response to questions. In the future, rather than attempting to elicit information by asking questions, it is suggested that you request records (i.e., records indicating certification of the District's 504 hearing officers).

Second, in a related vein, 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 on the foregoing, information maintained by or for the District in some physical form, including a tape recording, would constitute a "record" that falls within the coverage of the Freedom of Information Law. Further, if the District maintains copies of policies, procedures or regulations adopted by the State Education Department, for example, I believe that they, too, would constitute "records" subject to rights conferred by the Freedom of Information Law.

Third, insofar as your requests involve records pertaining to your child, most relevant is a provision of federal law, the Family Educational 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 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.

As I understand the correspondence, the records that you requested that are personally identifiable to your child are "education records" that must be made available to you.

To the extent that your requests involve other than education records, the Freedom of Information Law would be applicable. 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.

Policies, procedures, rules, regulations and similar materials would be accessible, in my view, because none of the grounds for denial of access could appropriately be asserted to withhold those kinds of 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)].

It is also noted that the federal regulations promulgated under FERPA, §99.10(b), state that:

> "The educational agency or institution shall comply with a request for access to records within a reasonable period of time, but in no case more than 45 days after it has received the request."

If you believe that the District has failed to comply with FERPA, a complaint may be made to the Family Policy and Regulations Office, U.S. Department of Education, Washington, DC 20202.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Lois A. Jamieson
Betsy Hardeman
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9911

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 19, 1997

Mr. Steven Blow
Records Access Officer
NYS Department of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

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

Dear Mr. Blow:

I have received your letter of January 24 in which you asked whether, in my view, certain "legal conclusions" that you reached concerning the status of certain records "are correct."

The records in question, which are or may become involved in litigation, have been sought by the Public Service Commission from the Niagara Mohawk Power Corporation (NMPC) pursuant to an order. You indicated that the NMPC considers the records to be "sensitive and confidential, at least while the investigation is still in progress", and that the staff of the Department of Public Service is reviewing records of the NMPC's retained counsel and is interviewing individuals who may be able to provide relevant information. You added that:

> "NMPC will comply with our requirement to provide both sensitive and privileged materials, based on the interpretation of law, below, without waiving any attorney/client or other privilege it may have with respect to the information we are reviewing. The Company is, however, reluctant to provide copies of these materials because of the belief that the Freedom of Information Law might supersede any privilege, and/or the explicit understanding between the Company and Staff, to keep these materials confidential. Similarly, Staff's notes with respect to these materials and

> interviews might become accessible to 'any person' under the Public Officers Law (POL) Article 6."

In conjunction with the foregoing, you reached the following conclusions:

> "1. Identifying details concerning employees and other individuals that are contained in records of interviews, or the like, may be deleted to protect against an unwarranted invasion of personal privacy, pursuant to POL §89(2).
>
> 2. The above-referenced inquiry, ordered by the PSC, involves the compilation of records for law enforcement purposes which, if disclosed, would interfere with law enforcement investigations, within the means of POL §87(2)(e)(i).
>
> 3. The attorney/client, attorney work product and materials prepared for litigation privileges are codified in New York in §3101(b)(d) of the Civil Practice Law and Rules. These subdivisions constitute exempting statutes within the meaning of POL §87(2)(a) and materials turned over to the Department by a regulated entity, reserving the privilege, if in fact privileged, are exempt from disclosure."

In this regard, it is emphasized that I know nothing of the specific nature of the investigation or the contents of the records at issue. Consequently, the following remarks should be considered as general in character.

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.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, as §89(2) permits agencies to delete identifying details from records to protect against such invasions of privacy and includes examples of unwarranted invasions 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 of Appeals that focuses upon the privacy provisions, the Court referred to the authority to withhold "certain personal information about private citizens" [see Matter

"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, to the extent that the records at issue relate to persons in professional or business capacities, it does not appear that the provisions pertaining to privacy would apply.

However, insofar as the records involve other aspects of records pertaining to natural persons, depending on their nature, it is possible that names or other details could properly be withheld. Since you referred to an investigation, if, for example, an individual is the subject of an investigation that has not been completed or allegations of misconduct that have not been substantiated, a denial of access to records pertaining to the individual in those contexts may be appropriate.

The second basis for denial, §87(2)(e)(i), authorizes an agency to withhold records compiled for law enforcement purposes to the extent that disclosure would interfere with an investigation or judicial proceedings. While the Public Service Commission is not a criminal law enforcement agency, it has been advised that agencies that are empowered to engage in law enforcement functions may in appropriate circumstances assert the cited provision as a basis for denial of access to records. I note that the language of §87(2)(e)(i) is limited, in that it enables an agency to withhold certain records when disclosure would result in identifiable harm or impairment of an agency's ability to carry out its duties effectively. Further, while records may be used in or relate to an investigation, if they were prepared in the ordinary course of business, §87(2)(e) would likely not serve as a basis for denial.

I point out that notes and other records that may be or have been prepared by the Commission or Department staff in relation to the investigation would fall within the scope of a potential basis for denial that was not cited in your letter. 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.

The remaining basis for denial is based on a claim of confidentiality or privilege. In this regard, I note that a promise or assertion 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)].

In this instance, however, the assertion of confidentiality is based on statutes and judicial interpretations. Relevant is 87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." Among those statutes that exempt records from disclosure are §§4503 and 3101(c) and (d) of the Civil Practice Law and Rules (CPLR), which deal, respectively, with the attorney-client privilege, materials prepared for litigation, and attorney work product. Assuming that the provisions of the CPLR cited earlier could properly be asserted by NMPC when the records in question are in its possession and control, I believe that those provisions would exempt the records from disclosure, in the circumstances that you described, if and

when they come into the possession of the Commission or the Department.

In general, when privileged material is disclosed to a third party, the privilege is waived. Nevertheless, there are several judicial decisions, both state and federal, in which it has been held that privileged materials remain confidential when an entity is compelled to disclose them to a governmental agency and the entity specifies its intent to preserve this privilege.

The only situation of which I am aware in which the Freedom of Information Law was directly pertinent involved a decision to which you referred concerning the Public Service Commission. In that case, North Star Contracting Corp. v. Department of Public Service (Supreme Court, Albany County, April 24, 1985), the petitioner requested records from the agency under the Freedom of Information Law that had been submitted to the agency by the Consolidated Edison Company "in response to an inquiry by the Department." Following an in camera review of the records and a finding that they consisted of material prepared for litigation and were, therefore, properly characterized as privileged, it was held that "the exemption accorded such privileged documents was not waived by Con Ed when it responded to the direction of the Public Service Commission that it should submit its comments and copies of any technical analysis...This is true particularly in light of the fact that Con Ed had specifically reserved its privilege when it submitted such documents pursuant to a directive of the Commission."

Critical in my view is NMPC's effort to preserve the privilege. In an Appellate Division decision, it was held that: "Defendant waived any privilege that may have attached to its file when it turned over to plaintiff's criminal defense attorney and to the Grand Jury without specifically reserving its right to claim the privilege in subsequent proceedings..." [Ferraraccio v. Hartford Insurance Company, 187 AD 2d 954, 955 (1992)]. In another New York State court decision, it was held that:

> "Several Federal courts have held that the involuntary disclosure of privileged documents to a government agency does not waive the privilege. (See. e.g., *Osterneck v Barwick Inds.*, 82 FRD 81.83 Chase's production and disclosure, however, was voluntary, that is, it did not seek to prevent the production by asserting the privilege. Moreover, documents protected by the attorney-client privilege have been voluntarily produced to a governmental agency on the condition that the privilege will be maintained in subsequent proceedings, and in those cases courts have held that, under the circumstances, the privilege was not waived. (See. e.g., *Teachers Ins. & Annuity Assn. v Shamrock*

> *Broadcasting Co.*, 521 F Supp 638; *Schnell v Schnall*. 550 F Supp 650, 653. However, unless the right to assert the attorney-client privilege in subsequent proceedings is specifically reserved at the time disclosure is made to a governmental agency, that disclosure is held to be complete waiver of that privilege. (See *Teachers Ins. & Annuity Assn. v Shamrock Broadcasting Co., supra,* at pp 644-645). Chase, by its own admission, made no reservation of the attorney-client privilege at the time it produced these documents, and thus it has waived that privilege with respect to the documents disclosed...a mere hope or expectation that the District Attorney was an ally and not an adversary does not convert the relationship into a 'community of interest'..." [People v. Calandra, 120 Misc. 2d 1059, 1060-1061 (1993).

Similarly, federal courts in the other contexts have found that "de facto compulsion" does not result in the waiver of a privilege that might otherwise be asserted [see e.g., Niagara Mohawk Power Corporation v. Stone & Webster Engineering Corporation, 125 F.R.D. 578 (1989); Transamerica Computer Company v. International Business Machines, 573 F.2d 646 (1978)].

In sum, insofar as NMPC could properly claim privileges under the CPLR concerning its records, I believe that they would continue to be privileged and, therefore, exempted from disclosure under the Freedom of Information Law due to the Commission's order and NMPC's attempt to preserve the privilege. With respect to the claims relative to §§87(2)(e) and 89(2)(b) of the Freedom of Information Law, their propriety would be dependent upon the specific contents of the records and the effects of their disclosure.

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 9912

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 19, 1997

Mr. James Buckley
76-A-4477
Marcy Corr. Facility
PO 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. Buckley:

I have received your letter of January 23 addressed to William Bookman, Chair of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on behalf of its members.

You have sought assistance "in finding out any known agencies that investigate alleged wrong doings, misuse of power, and/or allegations of the Sale of Parole, on Temporary Release Privilege..." At the end of your letter, you identified a variety of government offices that have been contacted in relation to your inquiry. However, you indicated that you have received no answers in some instances and vague answers in others, as well as claims that the records sought "are confidential and outside the scope of the Freedom of Information Law.

In this regard, while I have no knowledge of any particular agency involved, it appears that you contacted the entities of government that might be involved in the kind of investigation to which you referred. However, if any such investigation is ongoing, it would appear that a request for records pertaining to the investigation might 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. Several of the grounds for denial would be relevant to an analysis of the matter.

If allegations of misconduct have been made but no determination reflective of a finding of misconduct has yet been made, identifying details concerning the subjects of the investigations could in my view be withheld on the ground that disclosure would constitute "any unwarranted invasion of personal privacy" pursuant to §87(2)(a)(b) of the Freedom of Information Law.

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.

Another 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 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 9913

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 19, 1997

Mr. Robert Allaway
92-A-4597 B-3-1
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. Allaway:

I have received your letter of January 22. You have sought assistance in relation to requests for records from various government offices in Suffolk County concerning your arrest and indictment.

In this regard, I offer the following comments.

First, since you referred to a request to the County Clerk, if the request involves court records, the Freedom of Information Law would not apply. 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 on the foregoing, while a police department or the offices of a district attorney or county attorney would clearly constitute agencies that fall within the coverage of the Freedom of Information Law, the courts and court records are outside the requirements of that statute. I point out that court records are, however, frequently available under other provisions of law (see e.g., Judiciary Law, §255). As such, when a request involves court records, it is suggested that the request be directed to the clerk of the appropriate court, citing an applicable provision of law.

With respect to your requests for agency 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. 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" prepared by police officers 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 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, 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: Derrick Robinson, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9914

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 20, 1997

Mr. Manuel H. Vlieg
[redacted]

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

Dear Mr. Vlieg:

I have received your letter of January 20, which reached this office on January 28. You indicated that you requested certain records from the Town of Hempstead but that you have not yet received a response. If the failure to respond can be considered a denial, you asked that I accept your letter as an appeal.

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 determine appeals or compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, in your letter you indicated that you asked that the Town provide you with the following:

> "1. The original announcement of test for Radio & Telephone Dispatcher 65335.
>
> 2...a copy of attendance records for years 1992 - 1996 for Candidates Manuel H. Vlieg and Christine Coleman.
>
> 3...copy of the test results for Radio & Telephone Dispatcher #65335, showing list of those passing in numerical order.
>
> 4. The results of interviews for the eligible candidates interviewed including names, dates, time and name of person who conducted said interview."

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

An announcement of a test in my opinion would clearly be available, for none of the grounds for denial would be pertinent.

Although two of the grounds for denial relate to attendance records, 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).

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.

Next, it appears that an eligible list was prepared in relation to the exam. In this regard, §71.3 of the regulations promulgated by the State Department of Civil Service, which is entitled "Publication of eligible lists", states in relevant part that:

> "Eligible lists may be published with the standing of the persons named in them, but under no circumstances shall the names of persons who failed examinations be published nor shall their examination papers be exhibited or any information given about them..."

Based upon the foregoing, an eligible list in my view identifies those who passed an exam and, therefore, are "eligible" for placement in a position. Further, an eligible list, based on the regulations cited above, is clearly public. Insofar as a record or records might identify those who failed an exam, I believe that they may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Lastly, assuming that those interviewed are identified on an eligible list, if records exist that indicate their names, the dates of interviews and the identities of those who conducted the interviews, I believe that those items would be available in conjunction with the preceding commentary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Douglas Mac Leod

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 99/5

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 20, 1997

Mr. Steven Smith
94-A-7714
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. Smith:

I have received your letter of January 23 and the correspondence attached to it. Since you referred to a letter of January 12 addressed to me, I note that this office never received the letter.

The matter involves your request directed to Sullivan County concerning a denial of your request for records on the ground that you were represented by counsel during the proceeding to which the records relate. You contend, however, that you never received some of the documents sought.

In this regard, I offer the following comments.

First, 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.

Second, with regard to the substance of your request, as it pertains to records that have not been made available to you or

your 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. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot in most instances 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 one aspect of your request involves autopsy reports, the first ground for denial is pertinent. Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §677 of the County Law, which 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. Further, only a court appears to have the authority to grant such an application, in which case an order to disclose may be made.

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.

Lastly, since you referred to a "Vaughn index", I note that I am unaware of any provision of the New York Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or that 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9916

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 21, 1997

Hon. Shirley Murray
Town Clerk
Town of Wilton
20 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 January 29. In your capacity as Wilton Town Clerk, you have raised a variety of questions concerning the Freedom of Information Law.

First, you referred to a record created by the Town Attorney in the performance of his duties for the Town, and you asked whether it is a "Town record" or whether the Attorney "has sole jurisdiction over the record."

As you may be 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 dealing with a similar issue, 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, 87 NY 2d 410. 417 (1995).

In the next scenario, the Town Attorney receives a copy of a record generated by a town department head. After receiving a request from another attorney for a copy of the record, you asked "[w]ould it be improper to suggest to the Town Attorney that the request be referred to the Records Access Officer or should he provide the copy as a professional courtesy?" In my opinion, since the request involves a Town record, the Town Attorney, unless given authority to the contrary, should comply with the Town's procedures.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of Wilton, is the Town Board, and I believe that the Board is

required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law. The attachments to your letter indicate that the Board has done so.

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."

If you are the Town's designated records access officer, you have the duty of coordinating the Town's response to requests for records. Therefore, a request for a record maintained by the Town Attorney should be forwarded to you; alternatively, the Town Attorney could inform you that a request has been made for the purpose of seeking guidance.

Next, you referred to a project presented to the Building Inspector/Code Enforcer for approval. Following a rejection of the application, the applicant was referred to the Zoning Board of Appeals for an interpretation of the zoning ordinance. In relation to the foregoing, the Building Inspector/Code Enforcer prepares a memorandum for the Zoning Board Appeals "outlining his reasons for denying the project based on his interpretation of the Zoning Ordinance and citing those sections of the Zoning Ordinance that he feels are applicable in this case." The memorandum is prepared in draft and revised several times. Further, the Zoning Board of Appeals would not be bound to accept the Building Inspector's recommendation. You asked whether the memorandum is exempt from disclosure.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 you referred, §87(2)(g), would determine rights of access. That provision permits an agency to withhold records that:

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

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

It would appear that the memorandum consists largely of the Building Inspector's opinion. If that is so, those aspects of the memorandum could justifiably be withheld.

Since you alluded to a record existing in "draft form", I note that the characterization of a record as a "draft" may be of little significance. As suggested earlier, a draft would constitute a "record" subject to whatever rights of access might exist. If, for instance, the Building Inspector's drafts include statistical or factual information, those elements of the drafts, as well as the final memorandum, would be available.

The next scenario involves a situation in which a project has received approval. In the request for a variance, the cover page states:

> "THE INFORMATION THAT IS CONTAINED WITHIN THIS BOOKLET IS COMPANY PROPRIETARY INFORMATION. THIS INFORMATION IS CONFIDENTIAL AND ALL INFORMATION SHALL BE DISSEMINATED ON A NEED-TO-KNOW BASIS. NO PHOTOCOPIES AND/OR REPRODUCTIONS OF THE INFORMATION IS AUTHORIZED WITHOUT PRIOR APPROVAL FROM (Company Name)."

You asked whether the company can "constrain the Town from releasing the information."

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565). In short, when the documentation comes into the possession of the Town, I believe that it becomes an "agency record."

Further, in my opinion, an assertion or claim of confidentiality, unless it is based upon a statute, is likely meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, supra; Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to justify withholding a record. In this instance, I am unaware of any statute that would render the record in question 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)].

In sum, the kind of statement prepared by the company is in my opinion of no legal significance.

Next, if a governing body disagrees with "some or all" of the Freedom of Information Law:

> "...and decides to establish policies and guidelines of its own concerning access to certain records and fees charged:

(a) Is the Records Access Officer subject to these policies and guidelines?

(b) If the Records Access Officer is subject to these policies and guidelines, and records are released or withheld accordingly, and litigation results, is the Records Access Officer liable for whatever damages are alleged?"

In this regard, when the State Legislature has enacted a statute, a municipality, its officers and employees in my view are required to comply with that statute. Further, insofar as an agency's policies or rules are more restrictive than the Freedom of Information Law, it is reiterated that they would be invalid (see Morris and Zuckerman, supra). I note, too, that in cases in which agencies have established fees in excess of those permitted by the Freedom of Information Law, the courts found that the agencies' actions were invalid [see Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, ___ AD2d ___ (1996); Sheehan v. City of Binghamton, 521 NYS 2d 207 (1978)].

Next, when another agency requests copies of records, you asked whether it is appropriate or advisable to require the agency to "complete a Freedom of Information Law form and pay the appropriate charge per copy."

In my opinion, the Freedom of Information Law is generally 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, in the absence of a rule or policy to the contrary, I believe that an agency should attempt to cooperate with another agency to the extent possible. Whether the agency should assess fees would be its choice; however, unless a request is voluminous, it would seem that in the spirit of cooperation, fees ordinarily charged might be waived. Similarly, although many requests by other entities of government might be handled informally, an agency could choose to require that a request be made in writing.

Lastly, you asked whether the Committee has a "publication containing its opinions." While there is no such publication, enclosed is an appendix to its annual report which includes indices to opinions rendered under the Freedom of Information and Open Meetings Laws. If, after reviewing an index there are opinions of particular interest, they can be obtained from this office and from various law libraries throughout the state. In addition, opinions

rendered since 1993 will likely become available via the Internet within a year.

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-9917

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 21, 1997

Ms. Susan T. Kostolecki
[redacted]

The staff of the Committee on 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. Kostolecki:

I have received your letter of January 29 in which you sought assistance concerning a request for records made to the Utica City School District.

The request involves records pertaining to teacher certification. Although its receipt by the District was acknowledged on January 21, there was no indication of when you might obtain the records, and as of the date of your letter to this office, you had received no further response.

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, I believe that a record indicating a teacher's certification 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.

The only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, 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 conjunction with the principles described in the preceding paragraph, it would appear that the most important document regarding the qualifications of a teacher, administrator or supervisor, is a certification. As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by the State Education Department that a particular individual has met the qualifications to engage in a particular area or areas of teaching or education. As such, the certification is likely the best and most accurate source of determining a teacher's qualifications. Further, I believe that it is clearly relevant to the performance of the employee's official duties.

In short, it is my view that records indicating the certification or certification status of teachers are available under the Freedom of Information Law, for disclosure would constitute a permissible rather than an unwarranted invasion of personal privacy.

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 Clerk of the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Clerk, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9918

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 24, 1997

Ms. Kathryn G. Guadagnino
Records Access Officer
NYS Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233-1016

The staff of the Committee on 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. Guadagnino:

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

The issue involves access to the "NYSDEC Spill Report Form", and you enclosed several samples of completed forms. Also enclosed is copy of a memorandum transmitted between staff of the Department of Environmental Conservation in 1993 in which reference was made to an opinion that I provided suggesting that the "remarks" field in the form be redacted pursuant to §87(2)(g) of the Freedom of Information Law. I do not recall whether the form was seen at that time, or whether advice was offered based on a verbal description of its contents. Nevertheless, as you are aware, there are two sections containing remarks. The first, which appears on page one of the form, consists of "caller remarks"; the second, which appears on page two and is typically the only item on that page, is entitled "DEC Remarks." Based on my review of the forms and the direction provided in a recent decision rendered by the Court of Appeals, I believe that page one would be available in its entirety. Page two in some instances appears to include information that could be withheld in part; in others, the second page would appear to be available in its entirety.

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 provision that represents the focus of the matter, §87(2)(g), enables in agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 of Appeals' decision dealt with similar reports prepared in a different context. The decision pertained to so-called "complaint follow-up reports" prepared by New York City police officers. In the context of your inquiry, the spill reports are also prepared following a call made by a person outside of DEC. Further, the complaint follow-up reports are prepared by a police officer at the scene; spill reports are prepared by DEC staff who also go to the scene of a spill.

One of the contentions offered by New York City was that the reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." (Gould et al. v. New York City Police Department, ___ NY2d ___, November 26, 1996).

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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."

Like the spill report form that contains "caller remarks", the complaint follow-up reports include statements of witnesses and others. The Police Department contended that witness statements could not be characterized as factual. The Court found otherwise and dealt with the issue as follows:

> "...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."

Based on the foregoing, the Court concluded that the blanket exemption claimed by the Police Department could not be sustained. In this instance, virtually the entirety of page 1 of the spill

report consists of factual information which, in my view, must be disclosed.

With respect to page two of the form consisting of DEC remarks, again, in some cases the remarks are wholly factual and would be available. Some, however, raise questions or offer opinions. To that extent, the Department would have the ability to withhold those portions of page two.

In only one instance did I see information that could be withheld under §87(2)(b) on the ground that disclosure would result in "an unwarranted invasion of personal privacy." Specifically, one form referred to a resident as an 86 year old woman. Whether that fact was relevant to the matter is conjectural. Nevertheless, that reference was the only one that I located among dozens of forms in which there would be an issue relating to the protection of personal privacy.

Another arguable basis for withholding some elements of the DEC remarks might be §87(2)(e). That provision permits an agency to withhold records that:

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

From my perspective, a spill and the response to it are essentially public events. Further, the events would be known to the owners of property or those responsible for the spill. As such, it is difficult to envision how the harmful effects of disclosure described in §87(2)(e) would arise through release of the forms. Moreover, the DEC remarks are generally quite brief. In many cases, they consisted of a brief notation or a single paragraph. In unusual situations, the remarks may be of greater length. However, I saw none that consisted of more than a half page. That being so, again, it is unlikely that §87(2)(e) would serve as a basis for withholding.

Lastly, it is emphasized that the Freedom of Information Law is permissive. While the Department would have the ability to withhold those portions of the forms consisting of staff opinions,

for example, there would be no obligation to do so, and the Department could choose to disclose [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

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-9919

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 24, 1997

Mr. Gary L. Rhodes
[redacted]

Dear Mr. Rhodes:

I have received your letter of January 28 and related materials. You wrote that you have been attempting to obtain information from assessors for the Town of Henderson concerning commercial signs.

Because it was not clear on the basis of the materials what records might have been withheld, I contacted the Town to learn more of the matter. In this regard, having spoken to Beth Pierce, the Town Clerk, and Thelma Schneider, an assessor, I was informed that existing Town records pertaining to the matter have been made available to you and that they do not know what you want that you have not already obtained. In short, it appears that the Town has disclosed the records in which you are interested to the extent that such records exist.

Since you requested "breakdowns" in one of your requests, I note 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 there are no records containing or consisting of "breakdowns", the Town would not be obliged to prepare new records containing the information sought on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Beth Pierce
Thelma Schneider

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9920

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 24, 1997

Mr. Norman H. Weissman
[redacted]

Dear Mr. Weissman:

As you are aware, your letter of January 31 addressed to Attorney General Vacco has been forwarded to the Committee on Open Government. The Committee is authorized by the Freedom of Information Law to provide advice and opinions concerning that statute.

Based on your correspondence, you have attempted without success to obtain records concerning a particular realtor and whether that person was licensed in 1983. In response to a request that appears to have been made early in 1995, you were informed in a letter dated January 31, 1995 by the Division of Licensing Services of the Department of State that:

> "REAL ESTATE RECORDS PRIOR TO 11/1/87 HAVE BEEN DESTROYED ACCORDING TO OUR SCHEDULED RATE OF DESTRUCTION. THEREFORE, WE ARE UNABLE TO COMPLY WITH YOUR REQUEST FOR INFORMATION ON MARY ANN BARON REALTY IN THE YEAR 1983."

In your letter to the Attorney General, you wrote that "it was illegal to destroy records once they were requested."

In this regard, it is true that it may be "illegal" to destroy records sought under the Freedom of Information Law after the records have been requested. Section 89(8) of that statute 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." However, as I understand the matter, any records falling within the scope of your request that might have existed would have been legally destroyed before your request was made or received by the Department of State.

I note that agencies cannot merely destroy records when they have the desire to do so or when they run out of storage space. On the contrary, retention and disposal of records are governed by law. Specifically, §57.05 of the Arts and Cultural Affairs Law provides that the Commissioner of Education is empowered:

> "[t]o authorize the disposal or destruction of state records including books, papers, maps, photographs, microphotographs or other documentary materials made, acquired or received by any agency. At least forty days prior to the proposed disposal or destruction of such records, the commissioner of education shall deliver a list of the records to be disposed of or destroyed to the attorney general, the comptroller and the state agency that transferred such records. No state records listed therein shall be destroyed if within thirty days after receipt of such list the attorney general, comptroller, or the agency that transferred such records shall notify the commissioner that in his opinion such state records should not be destroyed."

In the context of your correspondence, it appears that the kinds of records in which you are interested would have been destroyed in accordance with a schedule established by the Commissioner of Education that permitted the disposal of those kinds of records after they existed for a particular period of time. If my assumptions are accurate, the destruction of any records would not have been illegal and would have been carried out in accordance with law.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency is not required to prepare a record that is not maintained by the agency in response to a request. In short, if the record in question does not exist, the Freedom of Information Law would not apply.

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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 207
FOIL-AO 9921

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 26, 1997

Mr. Joel B. Lieberman
[redacted]

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

Dear Mr. Lieberman:

I have received a copy of your letter of February 7 addressed to Manuel Menendez, Jr., Counsel to the New York State Housing Finance Agency, in which you requested copies of reports prepared by the Agency following its investigation of a complaint made against you by a named former temporary secretary. At the end of the letter, you wrote that a copy was being sent to this office for the purpose of seeking an advisory opinion.

In my view, it is likely that the records in question should be made available to you, except to the extent that disclosure would constitute an unwarranted invasion of the privacy of a person other than yourself or that the information is exempted from disclosure by statute. In this regard, I offer the following comments.

You referred to a claim by the agency that it promised confidentiality to the complainant. Based on several judicial decisions, an assertion or promise 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 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.

The primary source of your rights of access to the records in question is the Personal Privacy Protection Law. In general, that statute 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, a person such as yourself in the context of your request, 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 or §96, which would deal with the privacy of others.

Of potential relevance to the matter is subdivision (6)(d) of §95, which states that rights of access by a data subject to not extend to:

> "attorney's work product or material prepared for litigation before judicial, quasi-judicial or administrative tribunals, as described in subdivision (c) and (d) of section three thousand one hundred one of the civil practice law and rules, except pursuant to statute, subpoena, search warrant or other court ordered disclosure."

The references to the work product of an attorney and material prepared for litigation are based on subdivisions (c) and (d) §3101 of the Civil Practice Law and Rules.

While I am unaware of the specific nature of the records sought, as you know, §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. 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)]. On the basis of the information that you provided, it does not appear that the records would have been prepared solely for litigation.

As suggested earlier, as a "data subject", I believe that you generally enjoy rights of access to records about yourself. However, insofar as the records pertain to or identify others, there may be privacy considerations applicable to them. To the extent that the records identify others, §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 not 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).

It is clear that the identity of the complainant is known to you, for you referred to her by name in your letter to Mr. Menendez. Nevertheless, depending upon the contents of those portions of the records identifiable to her, disclosure might constitute an unwarranted invasion of her privacy. To that extent, I believe that the Agency would have the ability to make appropriate redactions.

In sum, I believe that the records sought must be disclosed to you pursuant to the Personal Privacy Protection Law, subject to the qualifications discussed in the preceding commentary pertaining to the possibility that §95(6)(d) might enable the Agency to withhold some elements of the documentation, as well as the ability to redact information identifiable to the complainant the disclosure of which would constitute an unwarranted invasion of privacy.

A copy of this opinion will be forwarded to Mr. Menendez.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Manuel Menendez, Jr.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4922

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 26, 1997

Mr. Felix Bruno
88-A-8365
Sullivan Correctional Facility
Box AG
Fallsburg, NY 12733-0116

Dear Mr. Bruno:

I have received your "Freedom of Information Appeal" dated February 11. Please note that it did not reach this office until February 25.

You did not identify the agency that denied access to the records sought, but you wrote that the "hearing officer" issued a blanket denial "based on confidentiality and an 'interagency exception'."

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 has no power to determine appeals or otherwise compel an agency to grant or deny access to records. The provision pertaining to the right to appeal, §89(4)(a) of the Freedom of Information Law, states that:

> "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 is suggested that you submit an appeal in accordance with the direction provided by the provision quoted above.

While I am unfamiliar with the records that have been 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.

The "interagency exception", due to its structure, may permit an agency to withhold some aspects of records but require the disclosure of others. 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.

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-9923

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 26, 1997

Mr. Tom Lisborg
Master of Science in Engineering
Drejogade 26 F, Apartment 103
DK-2100 Copenhagen East
DENMARK

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

Dear Mr. Lisborg:

I have received your letter of February 15. Please accept my apologies for our failure to include a copy of our brochure. A copy is now enclosed.

If I understand the matter correctly, the primary issue involves failures on the part of certain agencies to respond to your requests for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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)].

As indicated in my previous letter to you, the courts are not subject to the Freedom of Information Law. However, it is my view that the Office of the Public Administrator is not a court and that it is required to comply with the Freedom of Information Law. Enclosed is a copy of an advisory opinion rendered in 1993 that deals with the status of the New York County Public Administrator.

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-9924

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 27, 1997

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 letters of January 31 and February 5, and I appreciate your kind words.

The issue raised involves your inability to obtain information concerning not-for-profit corporations, particularly charitable organizations, those that solicit contributions. In this regard, those kinds of entities would likely not be required to disclose their records to the public. The New York State 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 records maintained by entities of state and local government. It would not apply to records maintained by a private or not-for-profit organization. Similarly, the federal Freedom of Information Act pertains to federal agencies; it would not extend to private organizations, even though those organizations might receive federal funding.

There are, however, sources of information about charitable corporations in government that might be of use to you. For instance, the Office of Charities at the New York State Department

of Law, which is also known as the Office of the Attorney General, maintains annual financial reports that must be submitted by charitable corporations that raise monies through contributions in excess of a certain threshold. It is suggested that you contact the Office of Charities, which is located at 120 Broadway in Manhattan. The attorney who works in that unit is Ms. Nancy White, who can be reached at 416-8406.

In addition, all not-for-profit corporations are required to file a Form 990 with the Internal Revenue Service. The Form 990, which is public, includes general financial information, and I believe that it provides the wages of the highest five earners employed by a not-for-profit corporation.

In short, while it does not appear that you have a right to gain access to records directly from a charitable corporation, you may be able to acquire information about such a corporation indirectly from the agencies identified above.

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 9925

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 27, 1997

Mr. Terry Kuehn
[redacted]

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

Dear Mr. Kuehn:

I have received your letter of January 29. You wrote that you have attempted without success to obtain copies of a variety of records from the Town of Wheatfield concerning its fiscal affairs. Attached to your letter is a request made on December 5 which had not been answered as of the date of your letter to this office.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Records of or pertaining to a municipality's receipts or disbursements are typically available, for none of the grounds for denial would be applicable.

I note, too, that provisions in the Town Law provide specific direction concerning access to the kinds of records in which you are interested. For example, §29(4) of the Town Law requires that a Town Supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open

> and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

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

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

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

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Timothy Demler
DeEtte Ferchen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9926

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

February 28, 1997

Adam M. Sacks, 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. Sacks:

I have received your letter of January 22, which reached this office on February 6.

You have complained with respect to a response to your request for records by the Division of Parole. As I understand the matter, you requested the entire file concerning an individual who had been paroled but who died of a drug overdose a month after his release. In response to the request, you were informed that "you may be entitled to the records", but that "a signed, notarized release from the subject or his estate representative (short form) is required."

In this regard, I offer the following comments.

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

Second, although several of the grounds for denial might be applicable, it would appear that the provision of primary consideration is §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(b) includes a series of exemptions of unwarranted invasions 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 and must be disclosed. Depending on their nature, however, disclosure of 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 addition, depending upon the nature of the records, there may be privacy considerations relating to the family of the deceased as well. I have no personal knowledge regarding the content of the records in question. Nevertheless, notwithstanding one's death, in conjunction with the preceding commentary, I believe that some aspects of the records pertaining to the deceased might justifiably be withheld.

Aside from issues relating to the deceased or his family, the Division of Parole might also maintain records identifying the victim or victims and their relations. In those instances, there would also be privacy considerations, and the Division could in my view withhold to the extent authorized by §87(2)(b).

Also pertinent may 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.

Within a parole file might be communications between staff of the Division consisting of evaluations or opinions, for example, that could be withheld. Similarly, frequently recommendations concerning granting parole are offered by prosecutors and others that also might fall within the scope of the exception.

In sum, while much of the material pertaining to the deceased parolee likely should be disclosed, for the reasons described in the preceding paragraphs, it is likely that other aspects of the records could justifiably be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9927

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Philip White
86-B-0583
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 Mr. White:

I have received your letter of February 1. You have sought assistance in obtaining the contract between the Department of Correctional Services and the company that provides telephone service at your facility, as well as a variety of information concerning MCI's phone rates, standards of service and customer rights.

In this regard, I offer the following comments.

First, I believe that a contract between an agency and a company providing telephone services would be available under the Freedom of Information Law. In the case of the Department of Correctional Services, that agency's regulations provide that request for records kept at a facility should be directed to the facility superintendent or his designee. To request records kept at the Department's Albany offices, a request may be made to the Deputy Commissioner for Administration.

Second, MCI is not subject to the Freedom of Information Law. That statute pertains 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 generally applies to entities of state and local government; it does not apply to a private company.

However, the telephone industry in New York is regulated by the Department of Public Service, and it might have some of the information of your interest. Consequently, it is suggested that you write to the Department of Public Service, Consumer Services Division, Empire State Plaza, Agency Building 3, Albany, NY 12223.

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 9928

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Harry R. Newman
94-B-2449
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. Newman:

I have received your undated letter, which reached this office on February 4. You have complained that a request for a copy of a letter pertaining to you sent to a Division of Parole employee by a district attorney was rejected. You added that the District Attorney was "strongly opposed" to granting you parole.

In my view, it is likely that a denial of access to record in question was proper.

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

Pertinent to an analysis of rights of access 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. Insofar as the District Attorney was offering an opinion or recommendation, I believe that the denial of your request by the Division of Parole was consistent with the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-9929

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Dominick Raimo
90-A-44388
Elmira Corr. Facility
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. Raimo:

I have received your letter of January 30 and the correspondence attached to it. You complained that the Department of Correctional Services has "ignored" both your initial request for certain records and the appeal that followed. Consequently, you have sought the "intercession" of this office. The records sought involve "transfer history" and "Program history data".

In this regard, the Committee on Open Government is authorized to provide information concerning the Freedom of Information Law. The Committee is not empowered to enforce the Freedom of Information Law or compel an agency to grant or deny access to records. Nevertheless, in an effort to provide guidance, I offer the following comments.

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

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

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

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 "program history data", it appears that the records sought, to the extent that they exist, should be made available. I note that §5.21(a) of the regulations promulgated by the Department of Correctional Services states that:

> "information from the personal history portion of an inmate record shall be made available to the inmate, a representative of his estate, his legal guardian or committee, or his attorney."

Further, §5.09(i) provides that:

> "Personal history means 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."

In an effort to enhance compliance, a copy of this response will be forwarded to Counsel to the Department.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9930

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Vincent Malerba
82-A-2059
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. Malerba:

I have received your letter of February 2 which pertains primarily to the destruction of records by the Nassau County Police Department.

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.

I am unaware of the minimum retention period applicable to the record at issue. As such, it is suggested that you might attempt to learn of the applicable period, either directly or through your facility librarian, from the State Archives and Records Administration. That agency, a unit of the State Education Department, is responsible for devising the retention schedules.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9931

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 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 February 4. As I understand the matter, you were informed by the Office of the District Attorney that the file pertaining to your case does not contain certain information in which you are interested. You have asked for my opinion as to whether records containing the information in question should exist.

In this regard, having reviewed the materials attached to your letter, since I am not employed by a law enforcement agency, I could not conjecture as to whether the information sought should be included in a file.

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: Gary J. Galperin
Carmen A. Morales

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9932

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Carlos Rivera
93-A-2365
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. Rivera:

I have received your letter of January 31. You have sought assistance in your efforts in obtaining records relating to your indictment from the Office of the New York County District Attorney.

In this regard, I offer the following comments.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 a 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: Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9933

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Ms. Linda M. LeMoyne
[redacted]

The staff of the Committee on 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. LeMoyne:

I have received your letter of January 30 concerning your attempts to view records of the Village of Livonia.

Most recently, the Village informed you that the records would be made available on certain dates, but in each instance, permission to inspect the records was for "a few hours in a specific day." You wrote that, in your opinion, "once the records have been located", you "should be able to view them at any time during regular business hours." As such, you have sought an opinion concerning whether the Village "is obligated to open these records to [you] at any time during regular business hours until [you] complete [your] inspection."

Based upon the regulations issued by the Committee on Open Government and an appellate court decision, you have the right to inspect the records during the entirety of the Village's regular business hours.

In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee 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."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. 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].

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
Debra K. Stewart, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9934

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Mr. Paul E. Blood
[redacted]

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

Dear Mr. Blood:

I have received your letter of January 31, as well as the materials attached to it.

You referred to a situation in which an attorney for the Town of New Hartford, John Longeretta, employs Ms. Ann Pickney "in his private law practice and he bills the Town of New Hartford for her salary and benefits on a one-half basis." Consequently, in April you requested:

> "1. Copies of any and all time sheets for 1995 submitted by Ann Pickney which serves as the basis for Mr Longeretta's voucher to the town for her services.
>
> "2. A brief description of her work duties and responsibilities. Mr Longeretta's statement that 'she prepares what I tell her to' is not informative or descriptive. It is only reasonable to expect that either a job description or other statement of duties and responsibilities must be on file for Ann Pickney's position. I am requesting a copy of her job description and if a copy does not exist, I would ask that the Town Attorney provide any record which indicates the nature of her work."

Ms. Young, the Town clerk, informed you that the attorney would answer "in four weeks." No answer was given, and you appealed to the Town Board. You wrote, however, that the Board "ignored" the

appeal, and you asked if "there [is] any way that [this] office can help."

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 the Freedom of Information Law or to grant or deny access to records, it is my hope that the opinions rendered by this office are educational and persuasive. With those goals, 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. While the Clerk, presumably acting in her capacity as records access officer, acknowledged the receipt of the request and offered an approximate date on which the records would be made available or withheld, that date has apparently passed.

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)].

Second, 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 records in response to a request. However, insofar as the records sought exist, I believe that they must be disclosed.

As you may be 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 dealing with a similar issue, 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's 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, 87 NY 2d 410. 417 (1995).

In short, insofar as the attorney maintains or prepares records in his capacity as attorney for the Town, I believe that they are Town records subject to the Freedom of Information Law, even though they may not be in the physical possession of the Town.

Lastly, I believe that the kinds of records that you requested would be available under the Freedom of Information Law. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to the records in question, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

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). A job description or similar record would also consist of factual information accessible under the same provision.

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 officers and 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 duties.

While Ms. Pickney may not be a public employee and the records are not reflective of attendance per se, time sheets used as a basis for payment by the Town are, in my view, sufficiently similar to conclude that any such records must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Town Clerk, Gail Wolanin Young
John Longeretta, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9935

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 3, 1997

Ms. Gay H. Williams
City Attorney
City of Oswego
Oswego City Hall
23 West Oneida Street
Oswego, NY 13126

Dear Ms. Williams:

I have received your letter of January 31 and appreciate receipt of your determination of an appeal rendered under the Freedom of Information Law.

The appeal involved a request for "records, dictaphone, dispatch or radio transmissions" relating to a traffic stop of a particular individual. In upholding the initial denial of the request, you wrote that:

> "...the Freedom of Information Law does not require a municipality to create documents for response to FOIL requests. Dictaphone, dispatch and radio transmissions are not 'documents' which can be photocopied and turned over to you in response to your request. Rather they are tapes which would have to be transcribed in order to respond. The City is not required to transcribe every tape that is requested under the Freedom of Information Law."

I agree that the City is not obliged to create a record in response to a request and that it is not required to transcribe a tape recording. However, I believe that a tape recording is clearly a "record" that falls within the coverage of the Freedom of Information Law. While there may be no obligation to transcribe a tape recording, I believe that the public has the right to listen to or have a copy of a tape recording, unless there is a basis for denial appearing in §87(2) of the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, a tape recording maintained by or produced for an agency would, in my opinion, clearly constitute a "record."

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

I am unaware of the content of records that fall within the scope of the request. However, several of the grounds for denial might be relevant. For instance, §87(2)(e) permits an agency to withhold "records compiled for law enforcement purposes" under certain circumstances. The records might identify an individual or individuals, in which case §87(2)(b) could be relevant. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Internal communications might, depending upon their contents, be withheld pursuant to §87(2)(g).

This is not to suggest that the aforementioned grounds for denial would justify a denial in this instance; rather, my intent is to suggest that there may be a basis for withholding. I point out, too, that there is a judicial decision in which the court, based upon the facts in that case, found that tape recordings of certain communications broadcast over police radio were available [Buffalo Broadcasting, Inc. v. City of Buffalo, 126 AD 2d 983 (1987)].

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
cc: William G. Dunsmoor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9936

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 4, 1997

Mr. Eugene Hauver
84-A-2500
Wallkill Corr. Facility
PO 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. Hauver:

I have received your letter of February 2. In brief, you complained that the Division of Parole has "ignored" both your request for records under the Freedom of Information Law and the appeal that followed.

In this regard, 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:pb

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9937

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 4, 1997

Mr. Richard E. Dunavin
90-A-8241
C.C.F. 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. Dunavin:

I have received your letter of February 1. You wrote that you requested and paid twenty dollars for a copy of the "Classification and Guidelines Manual", but that the document sent to you expired more than nine years ago. You have asked whether there may be opinions rendered by this office "concerning the fact that the information supplied is to be current and accurate", and whether you are "to take a beating on the $20.00... and go for another manual, this time requesting a current and accurate manual."

In this regard, if the manual that you received has been updated and replaced with a newer version of same document, it is suggested that you attempt to return it and obtain the newer version at no additional charge. In my opinion, if an old record has become obsolete and replaced with a newer version, unless informed to the contrary, it should be implicit that a request involves the current record. On the other hand, if the document made available to you is the latest of its kind and has not been updated, while the agency in receipt of your request could have informed you that its contents are out of date, I know of no requirement that it so inform you.

As a general matter, the Freedom of Information Law merely requires the disclosure of existing records, unless there is a basis for a denial of access. That statute does not deal directly with the accuracy of the contents of records or their currency. In brief, an applicant for a record can obtain what the agency maintains, irrespective of whether the record is accurate or up to date.

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

FPM-AO 208
FoIL-AO 9938

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 5, 1997

Ms. Karen Cozzy
[redacted]

Dear Ms. Cozzy:

As you are aware, your letter of February 3 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 and opinions concerning public access to government records, primarily under the Freedom of Information and Personal Privacy Protection Laws.

You referred to the fact that motor vehicle license records can be "sold" to anyone and that you know of people who have been harassed or stalked and who "live in fear" that stalkers will find them.

In this regard, there are numerous State statutes that deal with public access to or the confidentiality of government records. The Freedom of Information Law pertains to records of state and local government. 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. I note that one of the grounds for denial provides that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Also relevant 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 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". Another, §96(1)(f), involves disclosure that is "specifically authorized by statute or federal rule or regulation".

It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

While the Freedom of Information and Personal Privacy Protections are applicable to many records, other statutes may deal with particular records. In those instances, the statute pertaining to specific records overrides those dealing with records more generally. In the context of your commentary, §202 has long provided that motor vehicle license records are public. That, however, is likely to change. As part of the federal crime legislation enacted, I believe, approximately two years ago, state departments of motor vehicles will soon have the ability to disclose personally identifiable license records only under prescribed circumstances, i.e., to insurance companies, law enforcement agencies, etc. Unless a state legislature takes action requiring disclosure by the end of this year, or unless that portion of the legislation is found to be unconstitutional, the general public will no longer have the right to obtain motor vehicle license records pertaining to individual licensees.

Enclosed for your review are two publications: "Your Right to Know", which deals with the Freedom of Information and Open Meetings Laws, and "You Should Know", which deals with the Personal Privacy Protection Law. The latter includes a list of some of the kinds of records that are confidential by statute.

I hope that I have been of assistance. If you have additional questions, please free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9939

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 1997

Mr. Louis Velez
95-A-3682
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. Velez:

I have received your letter of February 10. You have asked whether you have the right to obtain laboratory reports and analyses of drugs that were prepared in conjunction with your case. In addition, you questioned whether you might obtain records indicating the "chain of custody."

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, assuming that any investigation of the matter has been completed and that you were convicted, it is unlikely that any ground for denial of access could properly be asserted with respect to the records in question, insofar as they exist. Perhaps most relevant to the matter 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."

Based on the foregoing, records compiled for law enforcement purposes may be withheld only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise. Again, assuming that the matter is closed, it would be doubtful, in my view, that there would be a basis for withholding the records.

I note that 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. 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 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-9940

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 1997

Sandra Boss, R.N.
[redacted]

The staff of the Committee on 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. Boss:

I have received your letter of February 1, which reached this office on February 10. You have sought assistance in obtaining information from the Oneida County Cooperative Extension. The correspondence indicates that you have faced a series of delays in your efforts to acquire the information, and you asked how you can "lodge a complaint."

In this regard, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. In an effort to assist you, your letter will be treated as a complaint and a request for guidance.

First, I note 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."

According to §224(8)(b) of the County Law, a county extension service association is a "subordinate governmental agency" whose organization and administration are "approved by Cornell University as agent for the state." As such, I believe that the Cooperative Extension is an "agency" required to comply with the Freedom of

Information Law, for it performs a governmental function for the State and, in this instance, Oneida County.

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, since you did not describe the kind of information in which you are interested, I point out that the Freedom of Information Law pertains to existing records and states in §89(3) that an agency is not required to create a record in response to a request for records. Therefore, to the extent that the information sought does not exist in the form of a record or records, the Cooperative Extension would not be obliged to create a new record on your behalf. Insofar as the Cooperative Extension maintains the records of your interest, the Freedom of Information Law is based

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

Lastly, the case to which you referred involving Monticello related to an award of attorneys' fees in a case arising under the Open Meetings Law. Although attorneys' fees may be awarded under the Freedom of Information Law [see §89(4)(c)], the standards under which a court may award attorneys' fees differ from those applicable under the Open Meetings 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 Oneida County Cooperative Extension.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Oneida Cooperative Extension

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9941

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 1997

Ms. Terri Misiewicz
[redacted]

The staff of the Committee on 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. Misiewicz:

I have received your letter of February 5 and the materials attached to it. You complained that the Village of Port Chester has failed to comply with the Freedom of Information Law. You wrote that you "either do not get the information [you] requested because [your] request has been ignored or [you] have to ask for it seven times and then it is never given within the 10 days as specified by law."

In this regard, having reviewed the materials attached to your letter, I offer the following comments.

First, since some of your requests involve court records, 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. This is not to suggest that court records are beyond the scope of public rights of access. On the contrary, other statutes frequently provide broad rights of access. In the case of town and village justice courts, §2019-a of the Uniform Justice Court Act provides, in essence, that records of justice courts are public, unless some other provision of law confers confidentiality.

Second, with the Freedom of Information Law is applicable, that statute 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 for information. Similarly, that law does not require that an agency prepare new records in order to respond to questions. For instance, in one of your requests, you sought a list of building code violations, with certain details, found in Port Chester in 1993 and 1994. In short, if no list exists containing the information sought, the Village would not be obliged to create such a list on your behalf.

Third, I note that §89(3) also requires that an applicant "reasonably describe" the records sought. The Court of Appeals, the State's highest court, 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 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 Village's recordkeeping systems, to extent that the records sought can be located with reasonable effort, I believe that the requests 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 hundreds or thousands of records individually in an effort to locate those falling within the scope of the requests, to that extent, the requests would not in my opinion meet the standard of reasonably describing the records.

Fourth, insofar as a request for existing records reasonably describes the 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.

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 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: Richard Falanka, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-994

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 1997

Mr. Anthony Anzalone
89-A-7888
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. Anzalone:

I have received your letter of February 5, as well as the correspondence attached to it. You have sought guidance in relation to several requests made under the Freedom of Information Law.

According to your letter, you have encountered a series of delays in your attempts to gain access to records from the Office of the Bronx County District Attorney. In short, you were informed that staff at that agency had been unable, as of the date of your letter to this office, to locate the records. In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an

agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, 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, pertinent to the issues raised in the correspondence is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held that records maintained by an agency, including the office of a district attorney, that would ordinarily be deniable under the Freedom of Information Law become available to the public if they have been disclosed by means of a public judicial proceeding. As stated in that decision: "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. at 679). However, 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).

In addition, 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 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: Pat Bonanno, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9943

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 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 January 29, which reached this office on February 13. In brief, you complained that your request for trial transcripts directed to the Office of the New York County District Attorney was rejected, even though the materials were "read into the trial record."

In this regard, the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)] is most pertinent. In my view, Moore generally stands for the principle that records maintained by an agency, including the office of a district attorney, that would ordinarily be deniable under the Freedom of Information Law become available to the public if they have been disclosed by means of a public judicial proceeding. As stated in that decision: "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. at 679). However, 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).

In view of the holding in Moore, it is suggested that you seek the records in question from the clerk of the court in which the proceeding was conducted. While the courts are not subject to the Freedom of Information Law, court records are generally available under different statutes (see e.g., Judiciary Law, §255).

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: Carmen A. Morales
Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9944

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 10, 1997

Mr. Raymond R. Swanno
[redacted]

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

Dear Mr. Swanno:

I have received your letter of February 10 and the materials attached to it. You have sought an advisory opinion concerning a request directed to the Village of Millbrook. The request involves "all applications for employment, resumes, letters of reference, and any and all other documents reviewed for all applicants for position of police officer...during the period Jan. 1 thru Sept. 30, 1996."

In this regard, as indicated in previous correspondence, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Of primary significance are the provisions of §§87(2)(b) and 89(2)(b), which provide guidance concerning the ability to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy."

While some aspects of the matter at issue were discussed in an opinion addressed to you in June of 1996, I believe that the advice rendered then focused on procedures, criteria for holding a position, and the applicants who were hired. From my perspective, however, there is a distinction between the extent to which records must be disclosed pertaining to applicants who were hired, as opposed to those who were not. In the case of those who were not hired, I believe that names and other identifying details pertaining to them may be justifiably be withheld. I point out that §89(7) specifies that the names and addresses of applicants for appointment to public employment need not be disclosed. After an applicant is hired, his her name is clearly public; if an

applicant is never hired, there is no requirement that his or her name be disclosed.

It is noted that §89(2)(c) of the Freedom of Information Law states that disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted." In a decision in which a court ordered that certain deletions be made [Harris v. City University of New York [114 AD 2d 805 (1985)], a professor wanted to compare his qualifications with those of other faculty members who had been promoted to full professor during the preceding five years by reviewing their curricula vitae. In determining the issue, it was held that:

> "the deletion of such identifying information as names, addresses and Social Security numbers will not impede petitioner's ability to compare his credentials to those of other professional employees, yet will protect the individuals involved from an unwarranted invasion of their privacy" (id., 805-806).

As such, the court ordered the disclosure of resumés, following the deletion of the kinds of identifying details described in the passage quoted above.

In some instances, the deletion of identifying details may not be adequate to protect privacy. When that is so, an agency could likely withhold a record in its entirety to ensure against an unwarranted invasion of personal privacy.

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: Board of Trustees
Karen P. McLaughlin, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9945

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 11, 1997

Mr. C. Fisher
92-A-6723
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Fisher:

I have received your undated letter in which you requested the address of a certain retired judge.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law. The Committee does not maintain records generally, and this office maintains no information regarding retired judges.

I note further that §89(7) of the Freedom of Information Law specifies that nothing in that statute requires the disclosure of the home address of a present or former public officer or employee. As such, you would have no right to the home address of a retired judge under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9946

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 11, 1997

Mr. David P. Ward
[redacted]

The staff of the Committee on Open 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 February 9 in which you requested an opinion concerning a partial denial of a request for records by the Village of Westfield.

By way of background, you requested "total expenses incurred" by the Village for legal services rendered by the Village Attorney during a particular time period, as well as copies of "all billings" from the attorney "with an explanation for legal services provided for each service performed" during that period. You were informed that records reflective of payments made to the Village Attorney are public, but that "explanations for legal services provided for each service performed is Attorney-Client privileged information."

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 states in part that an agency is not required to create or prepare a record in response to a request. Therefore, if there is no "total", the Village would not be required to review its records for the purposes of preparing a new record on your behalf. Similarly, if there are no "explanations", new records would not have to be created to include that kind of description.

Second, however, 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.

With respect to payments to a law firm, the judicial interpretation of the Freedom of Information Law indicates that the information sought, if it exists, must be disclosed in great measure or perhaps in its entirety. 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Vincent E. Luce, Village Clerk
John W. Beckman, Village Attorney
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9947

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 12, 1997

Ms. Linda McParland
[redacted]

The staff of the Committee on 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. McParland:

I have received your letter of February 13 and the materials attached to it. You have sought an advisory opinion concerning the application of the Freedom of Information Law to volunteer fire companies that were created as private corporations. You also referred to a fire and rescue corporation and questioned its status under the Freedom of Information Law.

In this regard, I offer the following comments.

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

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

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

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law. In so holding, the Court stated that:

> "We begin by rejecting respondent's contention that, in applying the Freedom of Information Law, a distinction is to be made between a volunteer organization on which a local government relies for performance of an essential public service, as is true of the fire department here, and on the other hand, an organic arm of government, when that is the channel through which such services are delivered. Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §84).
>
> "True, the Legislature, in separately delineating the powers and duties of volunteer fire departments, for example, has nowhere included an obligation comparable to that spelled out in the Freedom of Information statute (see Village Law, art 10; see, also, 39 NY Jur, Municipal Corporations, §§560-588). But, absent a provision exempting volunteer fire departments from the reach of article 6-and there is none-we attach no significance to the fact that these or other particular agencies, regular or volunteer, are not expressly included. For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objections cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" (id. at 579].

Moreover, although it was contended that documents concerning the lottery were not subject to the Freedom of Information Law because they did not pertain to the performance of the company's fire fighting duties, the Court held that the documents constituted "records" subject to the Freedom of Information Law [see §86(4)].

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

> "Section 1402 of the Not-for-Profit Corporation Law is directly applicable to the plaintiffs and pertains to how volunteer fire companies are organized. Section 1402(e) provides:
>
> > '...a fire corporation, hereafter incorporated under this section shall be under the control of the city, village, fire district or town authorities having by law, control over the prevention or extinguishment of fires therein. Such authorities may adopt rules and regulations for the government and control of such corporations.'
>
> "These fire companies are formed by consent of the Colonie Town Board. The Town has control over the membership of the companies, as well as many other aspects of their structure, organization and operation (section 1402). The plaintiffs' contention that their relationship with the Town of Colonie is solely contractual is a mischaracterization. The municipality clearly has, by law, control over these volunteer organizations which reprovide a public function.
>
> "It should be further noted that the Legislature, in enacting FOIL, intended that it apply in the broadest possible terms. '...[I]t is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (Public Officers Law, section 84).
>
> "This court recognizes the long, distinguished history of volunteer fire companies in New York State, and the vital services they provide to many municipalities. But not to be ignored is that their existence is inextricably linked to, dependent on, and under the control of the municipalities for which they provide an essential public service."

Based upon the foregoing, it is clear that volunteer fire companies are subject to the Freedom of Information Law.

It is also noted that the Appellate Division, Second Department, which includes Suffolk County within its jurisdiction, has held that a volunteer ambulance corporation is subject to the Freedom of Information Law. In so holding, the decision states that:

> "The Court of Appeals has rejected any distinction between a volunteer organization on which a local government relies for the performance of an essential public service and an organic arm of government (*see, Matter of Westchester Rockland Newspapers v. Kimball,* 50 N.Y.2d 575, 579, 430 N.Y.S.2d 574, 408 N.E.2d 904).
>
> "The appellant performs a governmental function, and it performs that function solely for the Mastic Ambulance District, a municipal entity and a municipal subdivision of the Town of Brookhaven (hereinafter the Town). The appellant submits a budget to and receives all of its funding from the Town, and the allocation of its funds is scrutinized by the Town. Thus, the appellant clearly falls within the definition of an agency and is subject to the requirements of FOIL" [Ryan v. Mastic Ambulance Company, 212 AD 2d 716, 622 NYS 2d 795, 796 (1995)].

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, the kinds of records in which you are interested would be available. Relevant is §87(2)(g). While that provision serves as a potential basis for denial, due to its structure, it often requires disclosure. Specifically, that provision states that an agency may withhold records that:

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

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial 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 State's highest court has recently construed the term "factual data" expansively, stating that:

> "...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 et al. v. New York City Police Department, ___ NY 2d ___, NYLJ, November 27, 1996).

Based upon the foregoing, financial records, as well as those reflective of response times, would generally consist of factual data that must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Roy Fries
Lurene Burns

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9948

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 12, 1997

Mr. Edward Nelson
[redacted]

The staff of the Committee on Open 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 February 13, as well as the correspondence attached to it. You have raised a series of issues concerning requests for records directed to the Village of Port Chester.

First, you were informed in response to your initial request that you must supply your social security number and date of birth, that your signature be notarized and that you must provide "specific dates of the records sought."

In this regard, since you requested records pertaining to yourself and because records about you might justifiably be withheld if requested by others, it was reasonable in my view for the Village to require that you provide reasonable proof of identity.

However, the Freedom of Information Law does not require 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.

I am unfamiliar with the Village's recordkeeping systems. When records can be located with reasonable effort, I believe that a request would meet the requirement that the records be "reasonably described." On the other hand, if records are filed in chronological order, for example, rather than by name, it might be necessary to seek them by means of a date or a particular range of dates in order to reasonably describe the records.

Second, you requested a subject matter list of records maintained by the Village Police Department, "including the names of forms submitted to outside agencies in the course of working with them...in those drug operations." As you may be aware, §87(3)(c) of the Freedom of Information Law is pertinent to the matter, for it 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.

Third, the remainder of your request includes all records pertaining to 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. 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph M. Krzeminski, Chief of Police
Anthony M. Cerreto, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9949

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 12, 1997

Mr. Wallace S. Nolen
94-A-6723
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. Nolen:

I have received your letter of March 12 in which you raised a series of issues concerning the implementation of the Freedom of Information Law at your facility.

The first issue involves the contention that once a request is made under the Freedom of Information Law and records are inspected by an inmate, a request by the inmate for copies would involve a new request requiring "a totally new determination" concerning access to copies. From my perspective, a request for copies of records already made available for inspection would not represent a second request. On the contrary, in many instances agencies encourage inspection of records prior to a request for copies in order to reduce the necessity or burden of photocopying. Frequently, a review of lengthy documents will reveal that only a few pages within the document are needed for duplication.

Second, the facility, according to your letter, permits inmates to review records "for perhaps 45 to 60 minutes once a week." While I am unaware of the amount of time that an inmate may be free to inspect records, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) include provisions dealing with the time during which agencies must make records available. Specifically, §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 rendered by the Appellate Division. 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].

Third, you wrote that Department officials stated that they can make "generalized" statements to the effect that records are "exempt without reference to specifics." In addition, you indicated that if any portions of a page can justifiably be withheld, facility officials withhold the entire page.

In my view, while the Freedom of Information Law and the regulations require that an initial denial of access be given in writing, the reasons for such denial need not be detailed. In contrast, under §89(4)(a) of the Freedom of Information Law, if an appeal is denied, the person denying the appeal must "fully explain" in writing the reasons for further denial.

When some elements of records are public and others can properly be withheld, I believe that an agency is required to disclose the available portions of the records. Section 87(2) states that all records are available, except "records or portions thereof" that fall within the grounds for denial that follow. The phase quoted in the preceding sentence clearly indicates that there may be situations in which a single record includes both available and deniable information, and that an agency is obliged to disclose those portions of the record that do not fall within any of the grounds for denial. I note that if a record includes deniable information, an applicant would not have the right to inspect it. In such a circumstance, an agency could photocopy the record, from which appropriate deletions could be made. In that circumstance, I believe that the agency could charge a fee for photocopying.

Lastly, you wrote that facility officials doe not "state in any kind of response the approximate date in which a request for records will be honored and/or denied." 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 point out 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent L. Portuondo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9950

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 12, 1997

Mr. Philip King
91-A-5926
Pouch Number 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 10 and the materials attached to it. You asked for my views concerning a response to a request for records issued by the office of the Queens County District Attorney.

In brief, Assistant District Attorney Lee denied the request on the ground that the District Attorney had "already disclosed all available records" in response to previous requests made under the Freedom of Information Law. Nevertheless, you wrote that you had not previously sought the records that were the subject of the response, that "[t]o receive a document under FOIL, it must be requested specificy" [sic], and that you had never requested all of the records that could have been disclosed. Further, in your request, you focused on records pertaining to interviews of witnesses.

In this regard, I offer the following comments.

First, the Freedom of Information Law does not require that specific records be requested. By way of background, when the Freedom of Information Law was initially enacted in 1974, it required that an applicant seek "identifiable" records. That standard often resulted in difficulties, for applicants for records were often unaware of the particular records sought and therefore could not identify them. Nonetheless, 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 "reasonably describe" the records sought. I point out that it has been held that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a

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

Second, I am unfamiliar with your previous requests or which records might have been disclosed or withheld. Of potential relevance to the matter is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held 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, however, 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 maintain 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).

Third, assuming that the records sought involving interviews of witnesses have not been previously disclosed, I believe that the Freedom of Information Law would determine rights of access. 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. In my view, several of the grounds for denial could 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". 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 be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

Lastly, §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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Young C. Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9951

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 13, 1997

Mr. Candido Rodriguez
91-A-4028
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. Rodriguez:

I have received your letter of February 19 in which you inquired with respect to the fees that may be charged for copies of records.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy up to nine by fourteen inches. As such, the maximum cost of sixty photocopies would be fifteen dollars. I note that there is nothing in the Freedom of Information Law that would require you to request all of the photocopies at one time. You could request a certain number of copies now and the remainder thereafter.

You also referred to your unsuccessful efforts in obtaining a copy of your "Anti-Violence Certificate", which you claim to have been lost by correction officers. I know nothing about the issuance of such a certificate. If your counselor cannot or will not assist you, it is suggested that you describe the matter to the superintendent or other appropriate official at your facility.

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-2720
FOIL-AO-9952

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 13, 1997

Mr. John A. Berlingieri
[redacted]

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

Dear Mr. Berlingieri:

I have received your letter of February 20 in which you complained that the Village of Wappingers Falls has failed to respond to your requests for records.

As I understand the matter, you are or had been employed by the Village, and you requested minutes of meetings held by the Board of Trustees during a certain period, "police department time sheets as well as payroll records and time cards" pertaining to you covering the period of May through December of 1994.

From my perspective, the records sought must be made available to you, and in fact, to the public generally. 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. Although two of the grounds for denial relate to attendance records or time sheets, as well as payroll records, based upon the language of the Law and its judicial interpretation, I believe that such records are generally available.

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

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

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

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

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

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

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

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries, as well as attendance records, must be disclosed.

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." While you could not invade your own privacy, I note that even the attendance or salary records of other public employees would be accessible. Payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

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

In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights

> of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

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

In affirming the Appellate Division decision in Capital Newspapers, the Court of Appeals found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed

> choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (Capital Newspapers v. Burns, supra, 565-566).

Based on the preceding analysis, it is clear in my view that payroll and attendance records must be disclosed under the Freedom of Information Law.

Second, minutes of meetings of the Board of Trustees are also accessible. Section 106 of the Open Meetings Law pertains specifically 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."

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 Village officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon Edward Hinzman, Mayor
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9953

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 13, 1997

Mr. Eugene S. Kobylinski
[redacted]

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

Dear Mr. Kobylinski:

I have received your letter of February 11, which reached this office on February 19.

You wrote that, "as a taxpayer", you "would like to know the answer to the following question": "For the position titled 'Attendance' in the middle, school, what additional duties are assigned to the post?" Your attempts to obtain an answer have been unsuccessful.

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 is not required to create or prepare a new record in response to a request for information. Similarly, as you inferred, the Freedom of Information Law does not require that agencies answer questions; again, that law deals with records. In the future, rather than attempting to elicit information by asking questions, it is suggested that you request records.

Second, when a request is made for 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, records that describe the duties required to be performed by a person or persons holding a certain position, they must be disclosed, for none of the grounds for denial would be applicable.

As you may be aware, §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].

In my view, a job description or similar record indicating an employee's functions or assignments would clearly be relevant to the performance of his or her official duties. Therefore, even if such a record pertains to a single employee, I believe that it must be disclosed.

Also relevant 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. A job description or similar record would constitute "intra-agency material"; however, it would consist of factual information accessible under §87(2)(g)(i) or an agency's policy that would be available under §87(2)(g)(iii).

In short, insofar as a record exists containing the information that would answer your question, I believe that it 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-9954

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 13, 1997

Mr. Stephen Roberts
93-A-7854
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Roberts:

I have received your letter of February 10, which reached this office on February 18. You have sought assistance in obtaining your plea and sentencing minutes relating to your proceeding.

In this regard, the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, §86(1) defines 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 excludes the courts and court records from its coverage. Therefore, the matter is beyond the Committee's authority.

It is suggested that you confer with your attorney or perhaps a representative of Prisoners' Legal Services.

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-9955

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 13, 1997

Mr. Dale L. Wheelock
89-C-1224 B-3-57
Collins Correctional Facility
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. Wheelock:

I have received your letter of February 15. You wrote that you want to appeal "the judges decision in a Corrections Law 169-e matter concerning [your]self." You added that you intend to write to the court to request transcripts of the hearing and documents pertinent to the determination, and you have sought assistance in obtaining those records.

Having reviewed the Correction Law, I was unable to find any §169-e. Nevertheless, assuming that you were referring to a judicial proceeding, I point out that the Freedom of Information Law does not apply to the courts or court records. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

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

In turn, §86(1) defines 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 would not serve as a means of obtaining court records.

This is not to suggest that court records may not be available. Often other provisions of law require the disclosure of those records (see e.g., Judiciary Law, §255). It is suggested that any requests for court records be directed 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 '9956

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 14, 1997

Mr. Len McRae
83-A-5207
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. McRae:

I have received your letter of February 18 in which you sought assistance in obtaining trial transcripts and other court records.

In this regard, I offer the following comments.

It is noted at the outset that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

In turn, §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 that court records are not available, for other statutes frequently provide broad rights of access to those records (see e.g., Judiciary Law, §255).

It is suggested that your request for court records be directed 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-1957

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 14, 1997

Mr. William McKethan
93-A-6107
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. McKethan:

I have received your letter of February 17 in which you sought assistance in obtaining certain records from the Port Authority of New York and New Jersey. You wrote that the Port Authority "seems to be of the opinion" that it is not subject to the Freedom of Information Law.

From my perspective, that opinion would be accurate. In this regard, I offer the following comments.

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."

In a case involving the application of the New York Freedom of Information Law to the Waterfront Commission of New York Harbor, which is a bi-state agency, it was held in Metro-ILA Pension Fund v. Waterfront Commission of New York Harbor (Supreme Court, New York County, NYLJ, December 16, 1986) that "[a]n interstate agency is created by interstate compact, and New York may not impose its preferences with respect to freedom of information on the other

party to the compact." Therefore, it was held that "the Waterfront Commission is not an 'agency' subject to New York's Freedom of Information Law." In short, the State of New York cannot extend or impose its laws beyond its borders. Since the Port Authority is a bi-state agency, neither the New York nor the New Jersey freedom of information statutes would apply.

I note that the Port Authority has adopted a policy which is based largely on New York's Freedom of Information Law. For purposes of guidance, when that statute applies, it provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

As you requested, enclosed is a copy of the advisory opinion to which you referred.

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-9958

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 14, 1997

Mr. Edward Russo
97-R-0415
Ulster Correctional Facility
P.O. Box 800
Napanoch, NY 12458-0800

The staff of the Committee on Open 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:

I have received your letter of February 20. You have asked how you may obtain your pre-sentence report, as well as your case file maintained by your facility.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Department of Correctional Services, a request for records kept at a facility may be directed to the facility superintendent or his designee. When making a request, §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. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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-9959

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 14, 1997

Mr. George Chavis
91-A-3261
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. Chavis:

I have received your letter of February 19. As I understand the matter, you have sought assistance in obtaining medical records pertaining to yourself from your correctional facility.

In this regard, I offer the following comments.

First, by way of background, the Freedom of Information Law pertains to agency records, including those maintained by 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, 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 Program
New York State Department of Health
Hedley Park Plaza
Suite 303
Troy, NY 12180

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-9960

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Jose Rodriguez
349-96-04808
09-09 Hazen Street
East Elmhurst, NY 11370

Dear Mr. Rodriguez:

I have received your letter of March 12 in which you requested various materials from this office pertaining to your case.

In this regard, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. This office does not have the requested records. Nevertheless, in an effort to assist you, I offer the following comments.

First, since you made reference to 5 U.S.C. §§552 and 552a, I note that they are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes apply only to records maintained by federal agencies. The statute of general application concerning access to records in New York is the New York Freedom of Information Law.

Second, in general, to seek records under the Freedom of Information Law, a request should be directed to the records access officer at the agency that maintains the records. The records access officer has the duty of coordinating an agency's response to requests. Further, §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.

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.

Without knowledge of the contents of the records in which you are interested, I cannot offer specific guidance. However, I point

out that the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9961

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. James Lewis Jr.
96-R-1927
Wyoming Corr. Facility
PO Box 501, Dunbar Road
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. Lewis:

I have received your letter of February 23. You have asked what steps may be taken if an agency fails to answer or ignores a 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)].

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-9962

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Alcimus Cargill
94-R-8114
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. Cargill:

I have received your letter of February 25 in which you requested an advisory opinion concerning the Freedom of Information Law. Specifically, you questioned the propriety of a response by the Department of Correctional Services relating to your request for its employee manual. In short, the request was granted and denied in part.

From my perspective, while I am not familiar with the specific contents of the manual, it is likely that portions of that document could justifiably be withheld, while the remainder 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 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. In my view, 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 record sought 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, 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 record 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 record 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-9963

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Charles Williams
95-A-6564
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open 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 19 in which you questioned the propriety of a response to a request for certain records rendered by the Department of Correctional Services.

According to your letter, you requested the Department's "Employee Manual" and the "Employee Rule Book." In response, the Department indicated that portions of the documentation would be disclosed upon payment of a fee of ten dollars, but that other aspects would be withheld on the ground that disclosure could, in your words, "endanger the safety and security of the facility." You wrote that you believe that the records are public, that you cannot understand why portions of a record may be withheld, and that the fee of ten dollars is "unfair."

From my perspective, while I am not familiar with the specific contents of the records in question, it is likely that the Department's response was consistent with 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 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. In my view, 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:
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> i. statistical or factual tabulations or data;
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> ii. instructions to staff that affect the public;
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> iii. final agency policy or determinations; or
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> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or 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...
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> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a 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 might be deniable, others must in my opinion be disclosed in conjunction with the preceding commentary.

Lastly, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy when making records available. I note that there is nothing in the Freedom of Information Law pertaining to the waiver of fees, and that it has been held that an agency may charge its established fee, even when the applicant for the records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9964

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Hon. Larry G. Mack
Cattaraugus County Legislator
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 letter of February 15, which reached this office on February 27. You have sought an advisory opinion concerning the propriety of a partial denial of access rendered under the Freedom of Information Law by Cattaraugus County. The information withheld involve a certain public employee and the "certificates of his associates, bachelor and master degrees..."

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, the information sought should be disclosed. 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].

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)]. Based on that decision, insofar as records maintained by an agency include information reflective of the educational degrees awarded to a public employee, they must be made available.

I hope 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-9965

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Terrence A. Robinson
91-B-1231
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. Robinson:

I have received your letter of February 21, as well as the correspondence attached to it. In short, having been denied access to records by the Office of the Erie County District Attorney, you questioned whether an office of a district attorney is subject to the Freedom of Information Law. The records sought include transcripts of grand jury proceedings, autopsy reports and related records, and other records relating to your case.

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."

In view of the foregoing, an office of a district attorney is clearly an agency 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. Since I am unaware of the contents of all of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to various grand jury related records, it is my view that those records could be withheld if requested under the Freedom of Information Law. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the CPL, states in relevant part that:

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

Further, "subdivision three" of §190.25 includes specific reference to the district attorney. As such, grand jury minutes would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Another statute that exempts records from disclosure is §677 of the County Law, which refers to autopsy reports and related records. Subdivision (3), paragraph (b) of that provision states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report, for the ability to obtain such a report is based solely on §677(3)(b) of the County Law. While you 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.

In considering the other records falling within the scope of your request, 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Frank J. Clark, III
Steven Meyer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9966

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Ms. Ann S. Daughton
Administrative Assistant
Niagara County Industrial Development Agency
2055 Niagara Boulevard - Suite One
Niagara Falls, NY 14304-1617

The staff of the Committee on 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. Daughton:

I have received your letter of February 21 in which you sought advice concerning the fees that may be charged by the Niagara County Industrial Development Agency under the Freedom of Information Law. You indicated that the Board of the Agency expressed an interest in "charging for time spent on obtaining documents for Freedom of Information requests."

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, 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. In this instance, I know of no statute that would authorize the Agency to do so.

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 personnel time, for inspection of or search for records, except as otherwise prescribed by statute.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9967

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Rafael Robles
88-A-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 February 24. You asked whether you may have the right to know whether certain experts who testified at your trial are certified in their fields and whether you may obtain records concerning their education. You also inquired with respect to an office in Virginia that traces weapons and the location of a firearms manufacturer.

In this regard, I have no knowledge concerning the Virginia entity or the firearms manufacturer to which you referred. Both of those areas of inquiry involve matters that appear to be beyond the scope of the New York Freedom of Information Law.

With respect to certifications and educational backgrounds of experts, I believe that records containing those kinds of information must be disclosed in conjunction with 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.

The only ground for denial significant to an analysis of rights of access is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public

employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, 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].

As I understand it, the issuance of a certification, which I believe is the equivalent of a license, is based upon findings by a certifying or licensing entity that a particular individual has met the qualifications to engage in a particular area or areas of endeavor. As such, I believe that it is clearly relevant to the performance of an individual's duties.

Lastly, 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)].

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-9968

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 17, 1997

Mr. Matthew 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:

As you are aware, your letter of February 8 addressed to the Commissioner of Education 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 public access to government records.

According to your letter, in an effort to ascertain whether two individuals were graduates of a certain high school, you asked for photocopies of the pages of a yearbook in which those individuals' pictures appear. The principal of the school indicated that you could look at yearbooks, but that copies could not be provided without the written consent of either the students or the parents.

In my opinion, you have the right to inspect the yearbooks and to have copies upon payment of the appropriate fee. 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, yearbooks maintained by a school district would constitute a "record" that falls 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 has acquired 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 and could be made known to any purchaser of a yearbook and any others with whom the contents of the yearbook have been 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.

Lastly, when records are accessible under the Freedom of Information Law, §89(3) of that statute requires that they be made available for inspection and copying upon payment of the requisite fee. I note that under §87(1)(b)(iii) of the Law, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches.

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-9969

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 18, 1997

Mr. Isaiah Brown
349-97-00441
15-15 Hazen Street
East Elmhurst, NY 11370

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

Dear Mr. Brown:

I have received your letter of February 24 concerning a request for records directed to the Office of the New York County District Attorney. You have asked whether Article 240 of the Criminal Procedure Law (CPL) "specifically exempt[s] any of the requested materials from disclosure under FOIL."

Secondly, you wrote that the Office of the District Attorney does not honor a request for records when it is made concerning "a pending criminal matter." You questioned the propriety of that stance.

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 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.

Second, with respect to records relating to a pending criminal matter, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9970

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 19, 1997

Mr. Joseph Sorce, Jr.
93-A-8163
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. Sorce:

I have received your letter of February 26 and the materials attached to it.

As I understand the matter, having requested a certain record from the Nassau County Police Department, you were informed that the record had been microfilmed and that the original record had been destroyed. You have questioned the legality of the destruction of the original record.

In this regard, I direct your attention to §57.29 of the Arts and Cultural Affairs Law, which states that:

> "Any local officer may reproduce any record in his custody by microphotography or other means that accurately and completely reproduces all the information in the record. Such official may then dispose of the original record even though it has not met the prescribed minimum legal retention period, provided that the process for reproduction and the provisions made for preserving and examining the copy meet requirements established by the commissioner of education. Such copy shall be deemed to be an original record for all purposes, including introduction as evidence in proceedings before all courts and administrative agencies."

Based on the foregoing, it appears that the disposal of the original record after it was microfilmed was consistent with law.

If you remain interested in obtaining a copy of a retention schedule, you may write to the State Archives and Records Administration, Cultural Education Center, Empire State Plaza, Albany, NY 12230.

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: Richard Baribault
Thomas J. King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 9971

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 19, 1997

Mr. Steven Smith
94-A-7714
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. Smith:

I have received your letter of February 24, as well as the materials attached to it. You have sought my opinion concerning rights of access to records that have been requested from the Division of State Police. In brief, the records relate to your arrest.

In this regard, I offer the following comments.

First, 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, there is no decision of which I am aware 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, in a related vein, 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, if, for example, there is no "itemized index" of evidence, reports, test results and the like, the agency would not be required to prepare an index on your behalf.

Third, as it pertains to existing records maintained by an agency, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of all 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 one aspect of your request involves autopsy reports and related records, it is my view that those records could be withheld when 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 is §677 of the County Law, which refers to autopsy reports and related records. Subdivision (3), paragraph (b) of that provision states that:

> "Such records shall be open to inspection by the district attorney of the county. Upon application of the personal representative, spouse or next of kin of the deceased to the coroner or the medical examiner, a copy of the autopsy report, as described in subdivision two of this section shall be furnished to such applicant. Upon proper application of any person who is or may be affected in a civil or criminal action by the contents of the record

> of any investigation, or upon application of any person having a substantial interest therein, an order may be made by a court of record, or by a justice of the supreme court, that the record of that investigation be made available for his inspection, or that a transcript thereof be furnished to him, or both."

Based upon the foregoing, the Freedom of Information Law in my opinion is inapplicable as a basis for seeking or obtaining an autopsy report, for the ability to obtain such a report is based solely on §677(3)(b) of the County Law. While you 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.

In considering the other records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Col. James A. Fitzgerald, Chief Inspector
Timothy B. Howard, Staff Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9972

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 19, 1997

Mr. John M. Crotty
Deputy Chairman & Counsel
NYS Public Employment Relations Board
80 Wolf Road
Albany, NY 12205

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

Dear Mr. Crotty:

As you are aware, I have received your letter of March 3 in which you requested an advisory opinion concerning the Freedom of Information Law on behalf of the Public Employment Relations Board (PERB). You have asked whether a proposed "arbitrator appraisal form", if completed and returned to PERB by a party to a grievance arbitration, would be accessible in whole or in part under the Freedom of Information Law. You also asked whether PERB's "written analyses, compilations or summaries of the forms and responses for its internal uses...would be exempt from compulsory disclosure."

By way of background, you wrote that PERB has established a voluntary grievance arbitration program under which the parties select an arbitrator from PERB's panel of grievance arbitrators. The form in question would be sent to the parties following the award, and PERB would consider the forms, which are in the nature of evaluations, to be "confidential" and for its internal use. The appraisal forms would be used by PERB in its periodic evaluations of arbitrators to determine whether they should remain members of its grievance arbitration panel.

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, two of the grounds for denial are relevant to an

analysis of public rights of access and, conversely, PERB's authority to withhold the records at issue.

It is my understanding that the forms would be completed by two categories of persons: representatives of employee unions, and employees or agents of employers. Especially relevant in the case of the former group is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) provides examples of unwarranted invasions of personal privacy. While I know of no judicial decision that deals with records analogous to the form, I believe that names or other identifying details pertaining to union representatives or union employees who complete the forms could be withheld based on the provisions cited above.

It is noted that the introductory language of §89(2)(b) indicates that an unwarranted invasion of personal privacy "includes, but shall not be limited to" the examples that follow. From my perspective, two of the examples offer guidance.

Section 89(2)(b)(i) refers to the disclosure of "personal references of applicants for employment" as an unwarranted invasion of personal privacy. While the evaluation form is not an employment reference, it serves a similar purpose. The person who completes the form, like a person preparing an employment reference, is asked to offer a candid appraisal of an individual, particularly in terms of how well or poorly that person carries out his or her work related duties. Because it is clear that the identity of a person who prepared an employment reference may be withheld, due to the similarity of the function in this instance, I believe that the same conclusion could be reached with respect to a representative or employee of a union who completes the form.

Additionally, §89(2)(b)(v) states that an unwarranted invasion of personal privacy includes: "disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency." The contents of the form would not reveal personal details relevant to the life of the person completing the form; however, it would include a representation of that person's feelings and opinions concerning an arbitrator. In my view, those kinds of expressions of opinions might be considered "personal" if they are to be honest. Further, I would contend that the names and other identifying details pertaining to those in the first category who completed the forms are not relevant to PERB. What is relevant is their opinion of the arbitrator.

For the foregoing reasons, I believe that PERB would have the authority to withhold identifying details concerning the union representatives or employees who complete the forms.

With respect to agency employees completing the forms, the issue as it relates to the protection of privacy, in my view, is

more difficult. 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].

In the context of your inquiry, forms completed by public employees would not involve or relate to their accountability. Rather, completion of the forms would be ancillary to the performance of their routine duties. Consequently, identifying details regarding public employees who complete the forms arguably might be withheld as an unwarranted invasion of personal privacy.

Also of potential significance 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.

Notwithstanding the foregoing as it relates to public employees completing the forms, all such forms when transmitted to PERB would constitute inter-agency materials that fall within the scope of §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. The "ratings" circled would constitute opinions. Therefore, I believe that the substance of the forms when they are prepared by public employees could be withheld under §87(2)(g).

With regard to PERB's analyses, compilations or summaries of the forms and responses, all such records would constitute intra-agency materials. It is likely, however, that portions of those materials would constitute "statistical or factual tabulations or data" available under §87(2)(g)(i). In a situation unlike yours but pertinent nonetheless, an agency "gave a score" to firms

submitting proposals in response to RFP's. Although the scores were derived from a compilation of opinions prepared in numerical form, the Court held that the scores, the figures based upon the opinions, were accessible under §87(2)(g)(i). In addition, in its discussion of what constitutes "factual data" in a recent decision, the Court of Appeals held that:

> "...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).

Based on the foregoing, the kinds of records prepared following the receipt and analysis of the forms would be accessible or deniable, in whole or in part, depending on their specific contents. Again, insofar as those records consist of opinions, recommendations, conjecture and the like, I believe that they may be withheld.

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-9973

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 19, 1997

Dr. John R. Riley
[redacted]

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

Dear Mr. Riley:

I have received your letter of February 24 in which you complained that the Jamestown School District "does not answer" your requests and asked for assistance.

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.*"

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Education
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2725
FOIL-AO-9974

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 20, 1997

Ms. Dorothy Harris
[redacted]

Ms. Barbara Weinschenk
[redacted]

The staff of the Committee on 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. Harris and Ms. Weinschenk:

I have received your letter of February 27, as well as the materials attached to it.

You have requested an opinion concerning the Open Meetings Law as it pertains to a variety of issues relating to meetings of the Lake George School District Board of Education. As I understand the matter, a complaint was filed with the Board in September in which numerous issues were raised focusing upon the ability of school administrators to perform consultant services and running "a private business venture, directly associated with school activities", and permitting teachers to take paid leave days while pursuing private employment in conjunction with the consultant services and the private venture. An issue raised later involves the use of District telephone lines in carrying out those private business activities. You were informed in December that a committee had been designated to address the issues. However, you wrote that you "do not know when this committee was appointed, nor do [you] know which Board members were on said committee as this was never done at an open meeting." At an ensuing meeting of the Board, it conducted an executive session to consider the committee's recommendations and to take action. Prior to the Board's February meeting, you received a letter from the Board President stating that there had been no violation. Again, you wrote that you were unaware of when the Board reached that decision or how the Board members voted, for the action was not accomplished during an open meeting.

In this regard, I offer the following comments.

First, many elements of the issues raised relate to the general accountability of the Board and its administrators. Those issues may be separate from the requirements of the Freedom of Information Law and the Open Meetings Law. While those statutes might serve as a vehicle for learning of the District's policies, procedures and actions, they do not deal directly with the propriety of those policies, procedures and actions.

Second, at this juncture, the focus will involve several issues relating to the Open Meetings Law.

Assuming that the committee designated by the Board consisted for two or more of its members, I believe that the committee would have been required to comply with the Open Meetings Law. When a committee consists solely of members of a public body, such as a county board of supervisors, 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 a committee of a county board of supervisors, 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 members of a body (see e.g., General Construction Law, §41). As such, in the case of a committee consisting of three, for example, a quorum would be two.

Further, 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)].

Next, from my perspective, the Board could not have validly taken action outside of a "meeting" held in accordance with the Open Meetings Law, during which a quorum was present and by means of an affirmative vote of a majority of its total membership. In this regard, I offer the following comments.

Relevant in my view is §41 of the General Construction Law which provides guidance concerning quorum and voting requirements. Specifically, the cited provision states that:

> "Whenever three of more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, at a meeting duly held at a time fixed by law, or by any by-law duly adopted by such board of body, or at any duly adjourned meeting of such meeting, or at any meeting duly held upon reasonable notice to all of them, shall constitute a quorum and not less than a

> majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words 'whole number' shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting."

Based upon the language quoted above, a 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.

Further, §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 assembly syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of the ordinary definition of "convene", I believe that a "convening" of a quorum requires the physical coming together of at least a majority of the total membership of a public body, that a majority of a public body would constitute a quorum, and that an affirmative majority of votes would be needed for a public body to take action or to carry out its duties.

I note too, that the Open Meetings Law has been broadly interpreted by the courts. In a landmark decision rendered in 1978, the Court of Appeals found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, aff'd 45 NY 2d 947 (1978)].

If action could validly be taken outside the context of a meeting held in accordance with the Open Meetings Law, the intent of that statute would be circumvented. In my view, any action taken to designate a committee, to determine the scope of its inquiry, or to make or change policy should have occurred during an open meeting.

It is 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 also judicial direction 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 situations that you described, when the Board reached a "consensus" reflective of any final determination, I believe that minutes reflective of the action taken and 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.

With respect to executive sessions, 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.

I note that although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. It is true that one of the grounds for entry into executive session often relates to personnel matters. From my perspective, however, 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.

When a discussion concerns matters of policy, i.e., the policy applicable to all administrators or teachers relative to the ability to provide consulting services, outside employment, or the use of phones, for example, I do not believe that §105(1)(f) could be asserted, even though the discussion may relate to "personnel". In none of the instances described would the focus involve a "particular person" or whether or how well or poorly an individual has performed his or her duties. To reiterate, in order to enter into an executive session pursuant to §105(1)(f), I believe that the discussion must focus on a particular person (or persons) in relation to a topic listed in that provision. As stated judicially, "it would seem that under the statute matters related to personnel generally or to personnel policy should be discussed in public for such matters do not deal with any particular person" (Doolittle v. Board of Education, Supreme Court, Chemumg County, October 20, 1981).

Even though any action taken might relate currently only to one employee, presumably that action would affect or serve as precedent in cases arising in the future pertaining to other non-union employees. 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)].

Therefore, insofar as discussions by the Board or its committee, assuming that the committee is a "public body", involved policy that would be applicable to employees or administrators generally, such discussions in my view should have been conducted in public. Only to the extent that an issue focused on a particular person in conjunction with one or more of the topics appearing in §105(1)(f) would executive sessions have been proper.

Lastly, 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 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)].

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-9975

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 20, 1997

Hon. Caroline M. Ferretti
Member, Zoning Board of Appeals
Town of Knox
1567 Bozenkill Road
Delanson, NY 12053

The staff of the Committee on 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. Ferretti:

I have received your letter of February 28. In your capacity as a member of the Town of Knox Zoning Board of Appeals, you have requested an advisory opinion concerning the Freedom of Information Law. In brief, over a period of months, you have unsuccessfully attempted to acquire or view a "building permit and ancillary paperwork" maintained by the Town's Building Inspector/Zoning Administrator relating to a new structure.

In this regard, I offer the following comments.

First, as a general matter, 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 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 zoning board of appeals 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.

Second, the records sought, although in the physical custody of the Building Inspector, are not in his legal custody. The town clerk, pursuant to §30 of the Town Law, is the legal custodian of all Town records. Therefore, even though the clerk may not have physical possession of the records sought, I believe that she has legal custody of the records.

Third, in terms of the responsibilities imposed by the Freedom of Information Law, §89(1)(b)(iii) of that statute requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of Knox, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law. The attachments to your letter indicate that the Board has done so.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The

> designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
>
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
>
> (4) Upon request for copies of records:
>
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
>
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:
>
> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

If the town clerk or other person is the Town's designated records access officer, that person has the duty of coordinating the Town's response to requests for records. Therefore, at the records access officer's direction, I believe that the Building Inspector must either turn the records over to the records access officer or disclose the records to the extent ordered by the records access officer.

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

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

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

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

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

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

As I understand the nature of the records sought, it does not appear that there would be any basis for a denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Robert Delaney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9976

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 21, 1997

Mr. Zachary L. Karmen
Acting Appeals Officer
Onondaga County Dept. of Social Services
Legal Division
421 Montgomery Street
Syracuse, NY 13202

Dear Mr. Karmen:

I appreciate receipt of your determination of an appeal by Mr. Clyde Ohl rendered on February 24 pursuant to §89(4)(a) of the Freedom of Information Law. While I am in general agreement with your rationale and the outcome, there is one area in which I believe your reliance as a basis for a denial of access is misplaced.

Specifically, at the end of the determination, reference was made to "executive privilege" and the decision rendered in Cirale v. 80 Pine St. Corp. [35 NY2d 113 (1974)]. As you may be aware, Cirale was decided after the enactment but before the effective date of the Freedom of Information Law in 1974. In 1977, the original enactment was repealed and replaced with the current version of that statute, which became effective in 1978. Soon after the change in the law, the Court of Appeals appears to have abolished the governmental privilege in the context of requests made 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" [Doolan v. BOCES, 48 NY2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) or they do not; if they do not, there would be no basis for denial, notwithstanding a claim based on an assertion of executive or governmental privilege.

I do not believe that the foregoing would in any way require a change in the result of your determination, and 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-9977

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Robert Smith
80-A-0827
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

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

Dear Mr. Smith:

I have received your letter of March 1.

According to the correspondence, prior to your parole hearing, you requested your case record in accordance with the Freedom of Information Law regulations promulgated by the Division of Parole, which state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. In response to the request, you were given some records, but you were informed that other materials would be withheld. You appealed the denial and sought assistance in the matter.

In this regard, it is unclear whether you have a right to records other than those disclosed. As suggested above, the regulations appear to recognize due process, for you should have the ability to gain access to records "to be considered" at a hearing. Further, the exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, if the Division has disclosed the records to be considered at the hearing that are not exempt form disclosure, I believe that the response was consistent with law. Otherwise, however, in response to your appeal, the Division, in my opinion, would be required to disclose all other records to considered at the hearing that are not deniable under the regulations or the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David Molik
Parole Officer Payne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2727
FOIL-AO-9978

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Arthur Springer
[redacted]

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

Dear Mr. Springer:

As you are aware, I have received your letter of March 5. In addition to the materials previously forwarded to you, you requested references to "state public health laws authorizing executive sessions for so-called 'quality assurance' matters, and the extent of post-session disclosure required in minutes or later documentation."

In this regard, I point out that there are two methods 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.

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.

Relevant to your inquiry is §108(3), which exempts from the Open Meetings Law:

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

By way of background, §2805-j of the Public Health Law states in part that:

> "1. Every hospital shall maintain a coordinated program for the identification and prevention of medical, dental and podiatric malpractice. Such program shall include at least the following:
>
> (a) The establishment of a quality assurance committee with the responsibility to review the services rendered in the hospital in order to improve the quality of medical, dental and podiatric care of patients and to prevent medical, dental and podiatric malpractice. Such committee shall oversee and coordinate the medical, dental and podiatric malpractice prevention program and shall insure that information gathered pursuant to the program is utilized to review procedures. At least one member of the committee shall be a member of the governing board of the hospital who is not otherwise affiliated with the hospital in an employment or contractual capacity."

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

investigations be performed and reported to the Department concerning those incidents.

Perhaps most important in terms of your inquiry is §2805-m, which states in part that:

> "1. The information required to be collected and maintained pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, reports required to be submitted pursuant to section twenty-eight hundred five-l of this article and any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be kept confidential and shall not be released except to the department or pursuant to subdivision four of section twenty-eight hundred five-k of this article.
>
> 2. Notwithstanding any other provisions of law, none of the records, documentation or committee actions or records required pursuant to sections twenty-eight hundred five-j and twenty-eight hundred five-k of this article, the reports required pursuant to section twenty-eight hundred five-l of this article nor any incident reporting requirements imposed upon diagnostic and treatment centers pursuant to the provisions of this chapter shall be subject to disclosure under article six of the public officers law or article thirty-one of the civil practice law and rules, except as hereinafter provided or as provided by any other provision of law."

Article six of the Public Officers Law is the Freedom of Information Law. Therefore, when records involve quality assurance pursuant to §§2805-j, k or l of the Public Health Law, they must be kept confidential, notwithstanding the provisions of the Freedom of Information Law.

Since the records concerning a quality assurance function are made confidential under the Public Health Law, a discussion of information acquired in carrying out that function would be exempted from the Open Meetings Law.

It also appears that one of the grounds for entry into executive session would be pertinent. Specifically, §105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to discuss:

> "the medical, financial, credit or employment history of a particular person or corporation,

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

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 - 9979

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Reginald Hough
92-A-2997
Groveland Corr. Facility
PO 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. Hough:

I have received your letter of February 25, as well as the materials attached to it.

According to the correspondence, prior to your parole hearing, you requested your case record in accordance with the regulations promulgated by the Division of Parole, which state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. In response to the request, you were given the "parole board summary" and informed that other materials were exempt from disclosure under §8000.5(c)(2)(i)(a) and (b). You appealed the denial and sought assistance in the matter.

In this regard, it is unclear whether you have a right to records other than the parole summary. As suggested above, the regulations appear to recognize due process, for you should have the ability to gain access to records "to be considered" at a hearing. Further, the exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the

Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, if the Division has disclosed the records to be considered at the hearing that are not exempt form disclosure, I believe that the response was consistent with law. Otherwise, however, in response to your appeal, the Division, in my opinion, would be required to disclose all other records to considered at the hearing that are not deniable under the regulations or the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: David Molik
Parole Officer Williams

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 9980

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Joseph Plater
95-B-2336
354 Hunter Street
Ossining, NY 10562-5442

<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. Plater:

I have received your undated letter in which you sought assistance in obtaining hospital records pertaining to two individuals who were involved in a car accident and taken to Cortland Memorial Hospital. You wrote that the records are needed in connection with criminal charges against you.

From my perspective, you would not have rights of access to the records in question. 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."

If the hospital in question is a private facility, rather than a governmental entity, the Freedom of Information Law would not apply.

Second, even if the Freedom of Information Law is applicable, I believe that the records in question could be withheld. 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. In my view, two of the grounds for denial are pertinent.

Section 87(2)(a) concerns records that are "specifically exempted from disclosure by state or federal statute." Two such statutes involving medical records are §§18 and 2803-c of the Public Health Law. Both require the confidentiality of medical records.

In addition, §87(2)(b) of the Freedom of Information Law 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..."

In short, the kinds of records in which you are interested must generally be kept confidential.

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 9981

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Edwin Arthur
90-A-8635
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. Arthur:

I have received your letter of March 1. You have sought assistance in obtaining a subject matter list from the Division of Probation. According to your letter, you requested the record in question on January 10, but as of the date of your correspondence with this office, you had not received a response.

In this regard, first, by way of background, the Freedom of Information Law pertains to existing records and states that, in general, an agency is not required to create records. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

The record requested, however, is one of the records "specified in subdivision three of section eighty-seven". That provision states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)].

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

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

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

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

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

In an effort to enhance compliance, a copy of this response 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: Linda Valenti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9982

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Joel Chapman
94-A-8057
P.O. Box 2500
Marcy, NY 13403

<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. Chapman:

I have received your letter of March 2. You have sought advice concerning the method of "challenging the classification of a Department of Corrections Directive." You wrote that the document, "#4470 General Library Services" is "classified A" and is distributed only to certain staff.

In this regard, while I am unfamiliar with the Department of Correctional Services' classification system or procedure, it is possible that the record at issue may be available, perhaps in part, under 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 of the grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, 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 record sought 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, 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 record 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 record 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 9983

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mr. Bruce Cannon
[redacted]

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

Dear Mr. Cannon:

I have received your letter of February 26 in which you sought assistance concerning a request under the Freedom of Information Law.

According to your letter, on January 29, you sent a request to the Division of Parole. However, as of the date of your letter to this office, you had received no response. It is your belief that, absent a response, you cannot appeal.

In my view, under the circumstances that you described, you have the right to appeal on the ground that your appeal 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, I believe that the person designated by the Division of Parole to determine appeals is David Molik, Senior Attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9984

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Ms. Judy Manzer
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 Ms. Manzer:

I have received your letter of March 5, in which you asked that I forward an advisory opinion concerning access to certain records to Robert W. Ingalls, who directs Oneida County's "911" system.

Specifically, you wrote that you have had difficulty in obtaining 911 "dispatch times" for fires in the City of Utica, i.e., records indicating the time the 911 dispatchers received the calls and the time that they notified the police and/or fire departments. Mr. Ingalls denied the requests, citing §308(5) of the County Law.

From my perspective, the records sought do not fall within the coverage of the provision cited by Mr. Ingalls and must be disclosed. In this regard, I offer the following comments.

First, §308(5), which is now §308(4) 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 my view, "records...of calls" means either a recording or a transcript of the communication between a person making a 911 emergency call, and the employee who receives the call. I do not believe that §308(4) can validly be construed to mean records regarding or relating to a 911 call. If that were so, innumerable police and fire reports, including arrest reports and police blotter entries, would be exempt from disclosure. In short, §308(4) could not justifiably be construed to pertain to all such records. Rather, again, I believe that it pertains to the recording or transcript of a 911 call.

Second, assuming that to be so, the records in which you are interested would, in my opinion, be accessible under 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.

While one of the grounds for denial is pertinent, due to its structure, I believe that it would require disclosure in this instance. 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 point out that the Court of Appeals, the State's highest court, recently focused on what constitutes "factual data", stating that:

> "...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, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). 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, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

Based on the foregoing, insofar as records include reference to the times in question, I believe that they consist of "factual data" that must be disclosed under §87(2)(g)(i) of the Freedom of Information Law.

As you requested, a copy of this response will be forwarded to Mr. Ingalls.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert W. Ingalls

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2328
FOIL-AO 9985

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 24, 1997

Mrs. Shirleymarie Sullivan Sheldon
[redacted]

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

Dear Mrs. Sheldon:

I have received your letter of February 28 in which you sought assistance. You have asked whether it is "necessary for an appointed committee to keep minutes in the same manner as a Town Board."

From my perspective, the answer is dependent upon whether the "appointed committee" is a "public body". In this regard, I offer the following comments.

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 town board, or when persons are designated to serve on a statutory body, such as planning board or zoning board of appeals, 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 town 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, a quorum consists of a majority of the total

membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, a town board consists of five, its quorum would be three; in the case of a committee consisting of three, a quorum would be two.

As suggested earlier, if an entity is statutory in nature, i.e., a planning board or a zoning board of appeals, it, too, would constitute a public body subject to the Open Meetings Law.

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)].

If a committee is subject to the Open Meetings Law, it is required to prepare minutes in accordance with §106 of that statute. Section 106 states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Lastly, irrespective of whether the committee in question is required to comply with the Open Meetings Law, any records that it prepares or acquires would fall within the coverage of the Freedom of Information Law. 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, minutes, notes, memoranda, or any other materials containing information prepared or acquired by the committee designated by the Town Board or the Town Supervisor would be produced for the Town and, therefore, would constitute records that fall within the coverage of the Freedom of Information Law.

As you requested, a copy of this opinion will be sent to the Colden 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 9986

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 25, 1997

Mr. Isaiah Brown
#349-97-00441
15 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. Brown:

I have received your letter of February 28 in which you sought assistance in obtaining records from the New York City Police Department relating to your arrest, as well as the Department's subject matter list. At the end your request, you wrote that the information requested would not be "used for commercial benefit, so [you] do not expect to be charged fees..."

In this regard, I offer the following comments.

First, your reference to the absence of any use of the records for commercial benefit appears to relate to the federal Freedom of Information Act. That statute, which applies only to federal agencies, includes provisions concerning the waiver of fees. The New York Freedom of Information Law, the governing statute in this instance, contains no provision concerning the waiver of fees, and it has been held that an agency may charge its established fees, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Second, 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.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9987

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 25, 1997

Mr. Danny Marcus
#90-T-4135
Attica Corr. Facility
Box 149
Attica, NY 14011

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

Dear Mr. Marcus:

I have received your letter of March 3. You have requested an opinion concerning rights of access to a manual used by employees of the Department of Correctional Services.

From my perspective, while I am not familiar with the specific contents of the manual, it is likely that portions of that document could justifiably be withheld, while the remainder 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 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. In my view, 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 record sought 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, 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 record 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 record 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 9988

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 25, 1997

Mr. John Daniels
#86-C-0867
Elmira Correctional Facility
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. Daniels:

I have received your letter of March 3. You wrote that the records access officer at your facility failed to respond to your request for records in a timely manner, and that you appealed her constructive denial of access to Counsel to the Department of Correctional Services. You have asked that this office "intervene" on your behalf.

In this regard, the Committee is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense or compel an agency to comply with law. While it appears that your appeal was appropriate, in an effort to enhance compliance with the Freedom of Information Law, I offer the following comments, which will be sent to the records access officer.

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: Ms. McKibbon, Records Access Officer
Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-9989

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 26, 1997

Ms. Terry L. Wolfenden
Superintendent of Schools
Dunkirk Public Schools
City School District of Dunkirk
PO Box 1298 - 201 Lake Shore Drive East
Dunkirk, NY 14048-6298

The staff of the Committee on 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. Wolfenden:

I have received your letter of March 6 in which you sought guidance concerning the obligation of the City School District of Dunkirk to disclose certain records. Specifically, you wrote that:

> "The question is whether community residents who attend building-level Compact meetings or our District-Wide Compact Committee meetings are entitled to agendas, minutes of previous meetings, and internal communications from staff members to the leadership of a Compact committee. Some committees have written agendas; others do not. All have typed minutes. We have made those available upon request. What we have concerns about are memos between Committee members, letters of complaint or suggestions, etc."

From my perspective, the records at issue should be treated under the Freedom of Information Law in the same manner as if the committee members were officers or employees of the District. In this regard, I offer the following comments.

First, as you are aware, the committees that are the focus of your inquiry were created pursuant to regulations promulgated by the Commissioner of Education are required to comply with the Open Meetings Law.

By way of background, §100.11(b) of the regulations states in relevant part that:

> "By February 1, 1994, each public school district board of education and each board of cooperative educational services (BOCES) shall develop and adopt a district plan for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking. Such district plan shall be developed in collaboration with a committee composed of the superintendent of schools, administrators selected by the district's administrative bargaining organization(s), teachers selected by the teachers' collective bargaining organization(s), and parents (not employed by the district or a collective bargaining organization representing teachers or administrators in the district) selected by their peers in the manner prescribed by the board of education or BOCES, provided that those portions of the district plan that provide for participation of teachers or administrators in school-based planning and shared decisionmaking may be developed through collective negotiations between the board of education or BOCES and local collective bargaining organizations representing administrators and teachers."

Section 100.11(d) provides in part that:

> "The district's plan shall be adopted by the board of education or BOCES at a public meeting after consultation with and full participation by the designated representatives of the administrators, teachers, and parents, and after seeking endorsement of the plan by such designated representatives."
>
> "Each board of education or BOCES shall submit its district plan to the commissioner for approval within 30 days of adoption of the plan. The commissioner shall approve such district plan upon a finding that it complies with the requirements of this section..."

Additionally, §100.11(e)(1) states that:

> "In the event that the board of education or BOCES fails to provide for consultation with, and full participation of, all parties in the

> development of the plan as required by subdivisions (b) and (d) of this section, the aggrieved party or parties may commence an appeal to the commissioner pursuant to section 310 of the Education Law. Such an appeal may be instituted prior to final adoption of the district plan and shall be instituted no later that 30 days after final adoption of the district plan by the board of education or BOCES."

It has been advised that the committees created pursuant to the regulations are required to comply with the Open Meetings Law. That statute 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 judicial decisions indicate that advisory bodies having no power to take final action, other than committees consisting solely of members of public bodies, 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, however, although the committees in question may or may not have the ability to make determinations, according to the Commissioner's regulations, they perform a necessary and integral function in the development of shared decision making plans. As stated earlier, the regulations specify that a district plan "shall be developed in collaboration with a committee." As such, a committee must, by law, be involved in the development of a plan. The regulations also indicate that a plan may be adopted by a board of education or BOCES only "after consultation with and full participation by" a committee, and that the Commissioner may approve a plan only after having found that it "complies with the requirements of this section", i.e., when it is found that a committee was involved in the development of a plan. Further, an appeal may be made to the Commissioner if a board has failed to permit "full participation" of a committee.

In the decisions cited earlier, none of the entities were designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the status of shared decision-making committees in my view is the decision rendered in MFY Legal Services v. Toia [402 NYS 2d 510 (1977)]. That case involved an advisory body created by statute to advise the Commissioner of the State Department of Social Services. In MFY, it was found that "[a]lthough the duty of the committee is only to give advice which may be disregarded by the Commissioner, the Commissioner may, in some instances, be prohibited from acting before he receives that advice" (id. 511) and that, "[t]herefore, the giving of advice by the Committee either on their own volition or at the request of the Commissioner is a necessary governmental function for the proper actions of the Social Services Department" (id. 511-512).

Again, according to the Commissioner's regulations, which have the force and effect of law, a plan cannot be adopted absent "collaboration" and participation by the committees that are the subject of your inquiry. Since they carry out necessary functions in the development of shared decision making plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

In my opinion, the same conclusion can be reached by viewing the definition of "public body" in terms of its components. A committee is an entity consisting of more than two members; it is required in my view to conduct its business subject to quorum requirements (see General Construction Law, §41); and, based upon the preceding commentary, a committee conducts public business and performs a governmental function for a public corporation, such as a school district or a BOCES.

While the Commissioner's regulations make reference to "school-based" committees, there is no statement concerning their specific role, function or authority. It is my understanding, based upon a discussion with a representative of the State Education Department, that school-based committees carry out their duties in accordance with the plans adopted individually by boards of education in each school district, and that those plans are intended to provide the committees in question with a role in the decision making process. When, for example, a plan provides decision making authority to school-based committees within a district, those committees, in my opinion, would clearly constitute public bodies required to comply with the Open Meetings Law. Similarly, when a school-based committee performs a function analogous to that of the shared decision-making committee, i.e., where the school-based committee has the authority to recommend, and the decision maker or decision making body must consider its recommendations as a condition precedent to taking action, I believe that the committee would be a public body subject to the Open Meetings Law, even when the recommendations need not be followed.

In sum, due to the necessary functions that the committees in question perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that they constitute "public bodies" subject to the requirements of the Open Meetings Law.

Second, assuming that to be so, I believe that the committees are governmental entities or extensions of the District and, therefore, are part of an "agency" subject to the Freedom of Information. 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 a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 most relevant to the matter 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. Further, it was recently found by the State's highest court that the exception is intended to enable agencies to withhold "opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making" [Gould v. New York City Police Department, 89 NY2d 267, 277 (1997)].

Based on the foregoing, memoranda transmitted between or among committee members would, in my view, constitute intra-agency materials. Insofar as those materials consist of suggestions, advice, opinions and the like, I believe that they may be withheld.

You also referred to complaints, and it is assumed that you are referring to complaints by members of the public that might be submitted to the District or the committees. In this regard, §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", and it has generally been advised that identifying details pertaining to complainants may be withheld to protect their privacy. If deletion of those details would not enable a recipient of a copy of a complaint to identifying details, the remainder of a complaint, its substance, would likely be available.

It is also noted that if a complaint or similar record would, if disclosed, make a student's identity easily traceable, the Family Educational Rights and Privacy Act (20 USC §1232) would ordinarily prohibit disclosure, unless a parent of the student consents to disclosure.

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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2110
FOIL-AO-9990

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 26, 1997

Mr. Marcus Washington
80-A-0649
Southport Corr. 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 March 5. You have asked for clarification concerning the ability of agencies to charge fees for search. In addition, you sought an explanation of the relationship between the Freedom of Information Law and the Personal Privacy Protection Law.

In this regard, I offer the following comments.

First, agencies subject to the New York Freedom of Information Law ordinarily cannot charge fees for searching for records. While the federal Freedom of Information Act may permit the assessment of search fees, I note that that statute applies only to federal agencies; it does not apply to entities of state and local government.

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.

With respect to the relationship between the Freedom of Information Law and the Personal Privacy Protection Law, the former deals with rights of access to records conferred upon the general public. 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.

One element 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, however, 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. I point out that while an individual may not have rights of access under the former to public safety agency records under the Personal Privacy Protection Law, 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.

The Personal Privacy Protection Law also deals 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.

I hope that the foregoing serves to enhance your understanding of the issues raised 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-9991

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 28, 1997

Mr. Christopher Joseph LeGere
General Delivery
Jensen Beach Post Office
Jensen Beach, FL 34957

Dear Mr. LeGere:

I have received your letter of March 18, as well as a variety of materials attached to it.

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 does not maintain records generally, nor is it empowered to acquire records on behalf of an individual.

To seek records under the Freedom of Information Law, an applicant should ordinarily direct his or her request to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests.

With respect to requests for oaths of office, such records are filed with respect to some of the individuals to whom you referred but, in all likelihood, not all. Oaths are filed by governors, commissioners and other state employees. However, because they are filed chronologically, an applicant must include the year in which the oath was filed in order to locate and obtain copies of the records. Some of the individuals that you identified are not state employees, such as the employees of the State Medical Society and the Mental Hygiene Legal Services. Further, some of the individuals associated with the Capital District Psychiatric Center may not be employees, but rather persons who function on a contractual basis. The latter group would not have filed oaths of office.

I note that copies of oaths of office are available for a fee of 50 cents per photocopy pursuant to §96 of the Executive Law. If you choose to request copies of oaths of office, please make your check payable to the "NYS Department of State" and send it to the

Department of State, Bureau of Miscellaneous Records, 41 State Street, Albany, NY 12231.

One aspect of your request involves home addresses of certain public employees. Here I point out that §89(7) of the Freedom of Information Law specifies that home addresses of present or former public employees need not be disclosed.

Lastly, you are interested in obtaining a copy of a warrant pertaining to you from the Town of Glenville. Since I am unaware of the content of the warrant, 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.

Perhaps most relevant would be §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."

If §87(2)(e) could not justifiably be asserted as a means of withholding the warrant, it would appear that the Town must disclose it, whether or not you appear, so long as you pay the appropriate fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jack G. Purdy, Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9995

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Robert DeCostanzo
[redacted]

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

Dear Mr. DeCostanzo:

I have received your letter of March 10. You asked that I review your appeal to the Superintendent of the East Islip School District and the ensuring response.

Although you did not forward those documents, you wrote that the District, in response to a request for records, did not inform you that it had withheld certain "legal bills". Further, you questioned the propriety of a denial of access to the bills.

In this regard, I offer the following comments.

First, 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...
>
> 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..."

Based on the foregoing, if an agency grants access to some of the records sought, but denies access to others, it is required to indicate that the reasons and "explain in writing" that records have been withheld. Further, §1401.7 requires that a person denied access to records be informed of the right to appeal and the name and address of the person or body to whom an appeal may be directed.

If an appeal is denied, the applicant may seek judicial review of the agency's determination by initiating a proceeding in Supreme Court under Article 78 of the Civil Practice Law and Rules.

A person denied access may appeal pursuant to §89(4)(a) of the Freedom of Information Law, which provides that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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, with regard to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to payments to an attorney or 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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Michael Capozzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9993

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Larry Reandeau
[redacted]

Dear Mr. Reandeau:

I have received your letter of March 11 and the correspondence attached to it. The materials relate to the application of the Freedom of Information Law to the "AATV", the Adirondack Association of Towns and Villages.

From my perspective, the AATV likely is not subject to the Freedom of Information Law. That statute pertains 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, an agency, in general, is a state or local governmental entity.

The AATV appears to consist of representatives of numerous units of local government, but it is not itself a governmental entity. Other organizations, such as the Association of Towns, the New York Conference of Mayors and the New York State School Boards Association, consist of representatives of government. Nevertheless, because they are not government or governmental entities, like the AATV, they would not constitute "agencies" subject to the Freedom of Information 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:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9994

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

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 March 10 in which you requested "a decision...regarding a record keeping matter of the Ellenville School District". The matter involves the destruction of telephone logs.

It is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions concerning public access to government records. The Committee is not empowered to render a "decision" that is binding. That being said, I offer the following comments.

First, 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.

To regularize the process of retaining and disposing of records, the State Archives and Records Administration, a unit of the Education Department, has developed detailed schedules indicating minimum retention periods for various classes of records. It is suggested that you review the schedule, which is maintained by the District, or that you contact the State Archives and Records Administration at (518) 474-6771 or by writing to that agency at Room 9C71, Cultural Education Center, Albany, NY 12230.

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:pb

cc: Mr. Peter J. Ferrara, District Superintendent of Schools
Mrs. Marion Dumont, President, Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 995

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Frederick W. Turner
Town Attorney
Town of Greenburgh
P.O. Box 205
Elmsford, NY 10523-0205

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

Dear Mr. Turner:

I have received your letter of March 17 in which you sought advice concerning the Freedom of Information Law. Please note that I attempted to reach you by phone without success. In short, you have asked whether §87(4) of the Freedom of Information Law pertains exclusively to state agencies, and, if that is so, whether §87(2)(d) may be asserted by entities of local government.

In this regard, §87(4) in my view pertains only to state agencies. As you are aware, for purposes of that subdivision, the phrase "state agency" is defined to mean "only a state department, board, bureau, division, council or office and any public corporation the majority of whose members are appointed by the governor." I note that §87(4) relates to §89(5), which pertains to situations in which commercial enterprises submit records to state agencies pursuant to law or regulation and the records include information that might fall within the scope of §87(2)(d). I believe that §87(4) was enacted in conjunction with §89(5) in order to clearly limit the application of the latter provision to state agencies.

Notwithstanding the foregoing, §87(2) pertains to all agencies, including units of local government. Therefore, it is clear in my opinion that a unit of local government has the authority to withhold records, where appropriate, in accordance with §87(2)(d).

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 9996

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Anthony Vitiello
[redacted]

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

Dear Mr. Vitiello:

I have received your letter of March 5 in which you asked when §87(2)(e)(ii) of the Freedom of Information Law serves as a basis for withholding records. That provision permits an agency to withhold records compiled for law enforcement purposes insofar as disclosure would "deprive a person of a right to a fair trial or impartial adjudication.".

In this regard, I am unaware of any judicial decisions that focus on the language quoted above. It has been advised, however, that §87(2)(e)(ii) might justifiably be asserted to withhold records in the nature of evidentiary material when they are requested prior to a judicial or perhaps a quasi-judicial proceeding. For example, if laboratory tests or similar evidentiary material is disclosed to the public and the news media in advance of a trial, it is possible that disclosure would deprive a person of a right to a fair trial.

It has been contended that some records falling within §87(2)(e) may be withheld following a conviction but before an appeal is heard by the Appellate Division. I disagree with that contention. Arguments before appellate courts do not involve factual or evidentiary matters, but rather the application or interpretation of law. As such, disclosure at that juncture could not, in my opinion, deprive a person of the right to a fair trial or impartial adjudication.

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 9997

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. John Daniels
86-C-0867
Elmira Corr. Facility
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. Daniels:

I have received your letter of March 3, which reached this office on March 11. You have asked that this office "intervene" on your behalf in an effort to obtain the criminal history records of witnesses for the prosecution who testified at your trial. The Monroe County records access officer indicated that the Office of the District Attorney does not maintain the records in question.

You have contended that "We don't have them [records] is not an exemption as defined by FOIL §87(2), particularly in light of the fact that all this agency has to do is run a NYSIS check to produce the requested information".

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 "intervene" in the legal sense or to acquire records on behalf of an applicant.

Second, if the Office of the District Attorney does not possess the records, that agency would not be obliged by the Freedom of Information Law to obtain them or to "run a NYSIS check". Section 89(3) of that statute provides in part that an agency is not required to "prepare any record not possessed or maintained by such entity..." Therefore, again, if the office of the District Attorney does not possess the records of your interest, it is not required to prepare or obtain them on your behalf.

Lastly, I note that the general repository of criminal history records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney, if he or she maintains possession of the records, must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989)].

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

cc: John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 9998

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Charles Sisnett
Box 500
[redacted]

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

Dear Mr. Sisnett:

I have received your letter of March 10. You have asked how you might obtain the "name or record or the officer who testified at [your] grand jury". You indicated that the District Attorney denied your request pursuant to §190.25 of the Criminal Procedure Law (CPL), therefore, §87(2)(a) of the Freedom of Information Law.

In this regard, as you may be aware, 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 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."

Since the provision quoted above pertains not only to testimony, but "any matter attending a grand jury proceeding", I believe that the records in question would be exempted from 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. It is suggested that you discuss the matter with your attorney.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPL-AO 211
FOIL-AO 9999

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Stanley Joseph
[redacted]

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

Dear Mr. Joseph:

I have received your letter of March 10. You have sought an advisory opinion concerning rights of access to transcripts of Parole Board hearings involving Wyley Gates.

From my perspective, it is likely that the primary issue in terms of rights of access involves the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" with respect to both the inmate and perhaps others, such as those associated with the victims.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy. While that standard is not defined, §89(2)(b) provides a series of examples of such invasions of privacy.

Also relevant is the Personal Privacy Protection Law, which 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 involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Section 96(1) of the Personal Privacy Protection Law limits the circumstances under which state agency may disclose personally identifiable information. The only provision in my opinion that would permit the Division of Parole to disclose information identifiable to an inmate would involve §96(1)(c), which authorizes disclosure when personal information is available under the Freedom of Information Law, i.e., when disclosure would not constitute an unwarranted invasion of personal privacy.

While I am unfamiliar with the contents of the transcripts, information regarding the inmate's medical or mental condition would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details concerning the inmate that could be withheld in accordance with the privacy provisions.

Those provisions would also be applicable with respect to references to victims, their families and others affected by the crime. The extent to which they would apply would in my opinion be dependent on the specific nature of the information.

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

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

iii. final agency policy or determinations; or

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

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

If, for example, a district attorney offered an opinion or recommendation to the Parole Board concerning the possibility of parole, the portions of the transcript reflective of that kind of advice or opinion could in my view be withheld under §87(2)(g).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1000

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. John Fisher
The 305 West 45th Street
Tenants Association
305 W. 45th Street - 6D
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. Fisher:

I have received your letter of January 17, as well as the materials attached to it. You have sought an advisory opinion concerning what you characterize as an "actual and constructive denial" of your request made under the Freedom of Information Law to the Division of Housing and Community Renewal (DHCR).

In a request dated September 3, you wrote that "Every record requested herein is maintained by the agency in electronic form and I request copies in such electronic format", and you offered to pay up to $100 for reproduction of the records. The records sought included Petition for Administrative Review Decisions ("PARS"), which, according to your request, exist in "what is known as the 'Zyindex database'"; all "non-substantive PAR decisions" that were not contained on a CD-ROM previously produced; the DHCR "Decision Index" required to be maintained pursuant to the State Administrative Procedure Act; and a variety of other records. In response to the request, Marcia P. Hirsch, Acting General Counsel, indicated that some of the records would be available in hard copy at a cost of 25 cents per photocopy and that others would be made available free of charge. Ms. Hirsch denied access to the Zyindex database "because it is contained in a computer software program produced by a company that owns a copyright which prevents copying of the program without authorization from the company." She also indicated that the Office of Rent Administration (ORA) "has issued thousands of PAR orders that either dismissed, rejected or terminated PARs." As such, she wrote that that aspect of your request did not reasonably describe the records sought as required by §89(3) of the Freedom of Information Law. She also wrote that

your description of a record as a "subject matter list" was "insufficient for us to determine what record your are requesting to see."

In your letter addressed to me, you wrote that you recognize that your request is "sizable", but that you have "had conversations with DHCR's computer specialists who indicate the records do exist and that making them available in electronic media can be accomplished without difficulty."

To learn more of the matter, I have spoken with several officials of DHCR. In this regard, I offer the following comments.

Based on discussions with DHCR staff, the PARS currently exist in electronic form in three media. Some exist on CD-ROM, which apparently have been made available to you. However, the contents of the CD-ROM's have not been updated for some time. Consequently, the more recent PARS are not maintained in that medium. Many exist on the Zyindex database, which will be considered more fully later in this response. Finally, many exist on floppy disks. The disks have been prepared and are kept by clerical staff interspersed through the agency. They are not maintained or stored together, as a database, nor are they indexed or retrievable in any systematic way.

It is my understanding that some PARS are maintained on a mainframe computer, but not in any kind of systematic way. The PARS kept on CD-ROM's were located on the mainframe, but numerous PARS are not stored on the mainframe. Further, the mainframe might include not only PARS, but also drafts, notes and other data that may have little or nothing to do with PARS. In short, it is essentially by chance that PARS have been stored on the Division's mainframe computer. Apparently it took several staff members approximately four months to extract PARS from the mainframe in 1994 and to confirm that they did indeed represent final determinations. The confirmation was accomplished by cross-referencing with other records which indicate the date of issuance of the actual orders. Those final determinations comprise the contents of the CD-ROM's which you are familiar.

I was informed that the Zyindex software operates by extracting data based upon key words. With the use of a key word, a subset of data can be retrieved from the mainframe. That data must then be analyzed to determine the extent, if any, to which it includes PARS. Again, when what appears to be a PAR is found, it must be compared with an original paper document to determine whether it is indeed a final decision. In sum, it is my understanding that there is no existing electronic mechanism that enables the Division to locate or extract what clearly are PARS.

Insofar as your request involves the extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law, I note 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 DHCR'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. 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.

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 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marcia P. Hirsch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10,001

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Dan Giblin
Appraisal Service, Inc.
PO Box 132
Chenango Forks, NY 13746-0132

The staff of the Committee on Open 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 March 7 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, you recently wrote to the Broome County Director of Real Property Tax Services, Mr. Ivan C. Moscrip, to request the County's assessment file at the same cost as last year, $75. You were informed, however, that pursuant to "a new price structure", the fee would now be $1,800. The Director "also alluded to the possibility of blanking out property owners' names and addresses from the file, presumably in the interests of privacy, but were likely in an attempt to render the file's data useless".

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to agency records, and that §86(4) of that statute defines the term "record" expansively to include:

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

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. 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.

Second, with respect to 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 disk or tape) to which data is transferred. The fee of $1,800 would be inconsistent with the Freedom of Information

Laws, particularly since the equivalent data in the same file was made available previously for a fraction of that amount.

Lastly, with respect to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Moreover, long before the enactment of the Freedom of Information Law, it was established by the courts that records pertaining to the assessment of real property are generally available [see e.g., Sears Roebuck & Co. v. Hoyt, 107 NYS 2d 756 (1951); Sanchez v. Papontas, 32 AD 2d 948 (1969).

Index cards containing a variety of information concerning specific parcels of real property have long been accessible to the public. As early as 1951, it was held that the contents of a so-called "Kardex" system used by assessors were available. The records determined to be available were described as follows:

> "Each card, approximately nine by seven inches (comprising the Kardex System), contains many printed items for insertion of the name of the owner, selling price of the property, mortgage, if any, frontage, unit price, front foot value, details as to the main building, including type, construction, exterior, floors, heating, foundation, basement, roofing, interior finish, lighting, in all, some eighty subdivisions, date when built or remodeled, as well as details as to any minor buildings" [Sears Roebuck & Co. v. Hoyt, supra, 758; see also Property Valuation Analysts v. Williams, 164 AD 2d 131 (1990)].

Insofar as the records in which you are interested are essentially the equivalent of those described above, I believe that they must be disclosed.

Further, it is noted that assessment rolls and related documents have been found judicially to be available to the public, whether they are maintained in paper or computer tape format, and irrespective of the purpose for which a request is made. One of the grounds for denial in the Freedom of Information Law, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". Section 89(2)(b) describes a series of unwarranted invasions of personal privacy, including subparagraph (iii), which pertains to:

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

Therefore, if a list of names and addresses is requested for commercial or fund-raising purposes, an agency may, under most circumstances, withhold such a list. Nevertheless, in a decision rendered more than ten years ago, the issue was whether county assessment rolls were accessible under the Freedom of Information Law in computer tape format. In holding that they are, the court found that assessment rolls or equivalent records are public records and were public before the enactment of the Freedom of Information Law. Specifically, in Szikszay v. Buelow [436 NYS 2d 558 (1981)], it was found that:

> "An assessment roll is a public record (Real Property Tax Law [section] 516 subd. 2; General Municipal Law [section] 51; County Law [section] 208 subd. 4). It must contain the name and mailing or billing address of the owner of the parcel (Real Property Tax Law [sections] 502, 504, 9 NYCRR [section] 190-1(6)(1)). Such records are open to public inspection and copying except as otherwise provided by law (General Municipal Law [section] 51; County Law [section] 208 subd. 4). Even prior to the enactment of the Freedom of Information Law, and under its predecessor, Public Officers Law [section] 66, repealed L.1974, c. 578, assessment rolls and related records were treated as public records, open to public inspection and copying (Sanchez v. Papontas, 32 A.D.2d 948, 303 N.Y.S.2d 711, Sears Roebuck & Co. v. Hoyt, 202 Misc. 43, 107 N.Y.S.2d 756; Ops. State Comptroller 1967, p. 596)" (id. at 562, 563).

Further, in discussing the issue of privacy and citing the provision dealing with lists of names and addresses, it was held that:

> "The Freedom of Information Law limits access to records where disclosure would constitute 'an unwarranted invasion of personal privacy' (Public Officers Law [section] 87 subd. 2(b), [section] 89 subd. 2(b)iii). In view of the history of public access to assessment records, and the continued availability of such records to public inspection, whatever invasion of privacy may result by providing copies of A.R.L.M. computer tapes to petitioner would appear to be permissible rather than 'unwarranted' (cf. Advisory Opns. of Committee on Public Access to Records, June 12, 1979, FOIL-AO-1164). In addition, considering the legislative purpose behind the Freedom of Information Law, it would be anomalous to permit the statute to be used as a shield by government to prevent disclosure.

> In this regard, Public Officers Law [section] 89 subd. 5 specifically provides: 'Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records.'" [id. at 563; now section 89(6)].

The court stated further that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent should be disclosed. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Ivan C. Moscrip

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10,002

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 1997

Mr. Charles Semowich
[redacted]

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

Dear Mr. Semowich:

I have received your letter of March 11 in which you requested an advisory opinion concerning "secret votes".

According to your letter the Common Council of the City of Rensselaer consists of nine members. At a recent meeting, the President was absent, leaving four republicans and four democrats. You wrote that:

> "During the public portion of the meeting a vote was taken to elect a President Pro Tem. After two votes the vote was 4 to 4. Finally, the corporation lawyer suggested that a vote be taken by written ballot. This too ended in a tie. My question, is there an provision for secret votes by elected officials especially Rensselaer, City Council in voting for a President Pro Tem? Please note, the written ballot vote conducted on that evening was secret since the aldermen did not sign the ballots."

In this regard, since the Freedom of Information Law was enacted in 1974, it has imposed what some have characterized as an "open meetings" to requirement. Although the Freedom of Information Law pertains to existing records and generally does not require that a record be created or prepared [see Freedom of Information Law, §89(3)], an exception to that rule involves votes taken by public bodies. 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 an "agency" which is defined to include a municipal board [see §86(3)], such as a city council, a record must be prepared that indicates the manner in which each member who voted cast his or her vote.

Second, in the context of a votes taken by the Council to attempt to select a president pro tem as in the situation that you described, often a series of ballots may be taken until a particular member receives an affirmative vote of a majority of the membership of the body. If that is so, it does not appear that the preliminary votes, i.e., those votes that do not result in a majority, must be recorded, for they are not "final". However, any vote resulting in an affirmative total of a majority of the membership of the Council would, in my opinion, be required to be recorded and indicate how each member voted. Therefore, if the final vote was 5 to 3, for example, a record, presumably a portion of the minutes of a meeting, must identify how each member cast his or her vote.

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)].

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 1900

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

March 31, 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 March 13 in which you asked whether, in my view, Albany County has violated the Freedom of Information Law.

You referred to Resolution 58, which was adopted by the County Legislature in 1978 and states that:

> "All requests to inspect and/or copy public records must be submitted in writing to the County Clerk, Albany County Records Access Officer, on request forms provided by the County Clerk..."

In conjunction with the foregoing, you asked, first, whether you can request County government records only from the County Clerk, or whether you may request records from other county officials.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §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."

Based on the foregoing, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that requests may be made to County officials generally. In my opinion when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

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 (§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" [§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 processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that is unnecessarily serves to delay a response to or deny a request for records.

Third, you asked whether the notice referenced in §1401.9 of the regulations must be posted "in all sub-divisions of Albany County Government where the public does business with said sub-divisions of County Government". In short, I do not believe that the provision in question requires that notice be posted in all of the locations that you suggested. The cited provision 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."

Reference is made to "posting in a conspicuous location" (emphasis mine); posting in more than one location is not required.

Lastly, I would conjecture that Resolution 58 is or represents a portion of the regulations promulgated by the County to implement the Freedom of Information Law. I note that the current Freedom of Information Law became effective on January 1, 1978 and that agencies then were required to adopt the appropriate rules and regulations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Hon. Thomas Clingan, County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10005

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 1, 1997

Ms. Anne M. Miller, Vice President
Citizens for Accountability and
Reform in Education (CARE)
204 True Hickory Drive
Rochester, NY 14615

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

Dear Ms. Miller:

I have received your letter of March 17, as well as the materials attached to it. You have requested an advisory opinion on behalf of Citizens for Accountability and Reform in Education (CARE) concerning a request for records of the Greece Central School District.

By way of background, on February 18, the president of CARE applied to inspect "a copy of the tentative contract agreement between the GTA union and the district to include all related financial data and all info that has been or will be shared with GTA members..." In addition, he asked that "any reason for denial [be given] in writing." Soon after, the District Clerk indicated in writing that the tentative agreement "will be available following ratification by both parties." The president objected to the response because it neither included a reason for the denial nor reference to the right to appeal the denial. The clerk thereafter denied the request on the ground that disclosure would "impair present or imminent contract awards or collective bargaining negotiations" and informed CARE's representative of the right to appeal. Further, according to a news article, the Superintendent determined not to release the tentative agreement, stating that "[i]t is not a contract until it is ratified." Another article indicated that the tentative agreement had been distributed to hundreds of GTA members for their review.

In a letter of March 5 sent by CARE's attorney to the District's appeals officer, it was contended that the basis for denial offered by the District was unjustifiable, for the negotiations had ended. Moreover, he claimed, and his claim was

later confirmed by means of news articles, that the tentative agreement was disclosed to the news media.

The matter is apparently moot, for the record in question was eventually disclosed and ratified by the teachers' union. However, you sought an advisory opinion concerning rights of access to the tentative agreement at the time that it was requested, and in an effort to enhance compliance with and understanding of the Freedom of Information Law, 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, only one of the grounds for denial, §87(2)(c), is pertinent to an analysis of rights of access to a tentative agreement in the circumstances described in the materials. As you may be aware, that provision permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." The key word in that provision in my opinion is "impair", and the question in the context of the award of contracts or, as in this situation, collective bargaining negotiations, involves whether or the extent to which disclosure would "impair" the process by diminishing the ability of the government to reach an optimal agreement on behalf of the taxpayers. That a contract has not been signed or ratified, in my view, is not determinative of rights of access or, conversely, an agency's ability to deny access to records. Rather, I believe that consideration of the effects of disclosure is the primary factor in determining the extent to which §87(2)(c) may justifiably be asserted.

As I understand its application, §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 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, because the record at issue was known to both parties to the negotiations and in fact had been distributed to widely to members of the GTA, the rationale described above and the judicial decisions rendered to date suggest that §87(2)(c) could not justifiably have been asserted to withhold the record.

If indeed the document had been disseminated to hundreds of union members, very simply, I do not believe that it could have been characterized as secret or deniable. Further, irrespective of how the news media might have obtained a copy of the tentative agreement, once that occurred and the news media reported its contents, I believe that the District would have lost its ability to assert §87(2)(c). In short, the record would have effectively been disclosed to the public. And finally, as I understand the matter, collective bargaining negotiations had ended. I recognize that if either side rejected the tentative agreement, the parties might have been forced to reopen the negotiations. Nevertheless, in view of the factors described above, even if that occurred, it does not appear that either party to the negotiations would have been disadvantaged by such a disclosure vis a vis the other. Again, both parties would have been fully aware of the contents of the documentation; there would have been no inequality of knowledge.

A copy of this opinion will be forwarded to District Officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Raymond Page
Donald Nadolinski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1006

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

Mr. John Whitfield
88-A-5197
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. Whitfield:

I have received your letter of March 11. You wrote that the Office of the Kings County District Attorney has ignored your request under the Freedom of Information Law, and you asked what the Committee can do.

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 Freedom of Information Law or compel an agency to grant or deny access to records.

As you may be aware, the provision pertaining to appeals states in relevant part that:

> "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 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: Mary Faldich

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1006a

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

Mr. Shawn Green
97-A-0801
P.O. Box F
Fishkill, NY 12524-0445

Dear Mr. Green:

I have received your letter of March 11. You have asked for a "specific Article 78 form."

In this regard, "Article 78" pertains to Article 78 of the Civil Practice Law and Rules, which begins at §7801. This office does not maintain form books. However, your facility librarian should be able to acquire copies of models or forms through the New York State Library.

The second issue involves your efforts in obtaining copies of a judicial determination. Here I point out that the Freedom of Information Law pertains to agency records and §86(3) of that statute defines the term "agency" to include:

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

This is not to suggest that court records may not be public. On the contrary, other statute frequently require the disclosure of

those records (see Judiciary Law, §255). It is suggested that you submit a request to the court in which the proceeding was conducted, 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-10007

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

Mr. Chris Payton
96-A-0796
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. Payton:

I have received your letter of March 12 in which you asked how to acquire grand jury minutes.

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.

Here I point out that the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1008

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

Mr. Larry 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 recent letter, which reached this office on March 17.

According to your letter, you requested records on February 27, 1996, from the Lynbrook School District. The receipt of the request was acknowledged, and you were informed that the materials would be available in sixty working days. On July 24, you were informed that the records were ready for you to pick up and that the fee for copies would be $73. You have since been informed that you cannot obtain or request additional materials until you pick up the records requested last February and pay the fee.

You have sought an advisory opinion concerning the issues described above. In this regard, I offer the following comments.

First, in my view, the delay in disclosure by the District constituted a denial of access to the records. However, it is unclear whether there were any communications between you and the District relative to the request. It is unknown, for example, whether, due to the passage of time, you contacted the District for the purpose of withdrawing your request, or whether the District contacted you to indicate that disclosure would be delayed beyond the sixty business day period. From my perspective, the reasonableness of the District's action would be dependent upon the facts relating to the matter.

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..."

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)].

With respect to the matter of the fee, it has been 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, 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.

Again, I am unaware of the facts in relation to the situation. In my opinion, the propriety of the District's response is dependent on its reasonableness in conjunction with the attendant facts.

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-10009

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

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 a copy of your letter of March 13 addressed to Dr. Richard Grant, Assistant Principal of a public school in New York City. In the letter, you requested "graduation rosters" or class lists for the years 1945 to 1955 and indicated that you would forward a copy of the letter to me "for [my] interpretation of the statutes."

In this regard, as you are aware, the statute that generally pertains to access to records maintained by governmental entities in New York is the State's 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.

It is possible, however, that the governing statute in the context of your request is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g). 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.

While the records in question relate to students who attended the school prior to the enactment of FERPA and may have primarily historical value at this juncture, I have discussed the issue in the past with officials of the United States Department of Education, which oversees and promulgates regulations concerning FERPA. In short, I was advised that FERPA essentially prohibits disclosure of the kinds of records at issue without the prior consent of the persons to whom the records pertain, unless it can be shown that the subject of a record is deceased.

I note that although the federal regulations define the phrase "education records" broadly, the definition excludes "Records that only contain information about an individual after or she is no longer a student at that agency or institution." Therefore, if, for example, a list or similar document has been prepared concerning alumni and their activities, that kind of material would not be subject to FERPA, and there would be no prohibition concerning disclosure. In that event, the Freedom of Information Law would apply.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dr. Richard Grant

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1010

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 2, 1997

Mr. Wayne Jackson

<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 March 14. You have questioned the propriety of an agency's restriction in the amount of time that you may listen to certain tape recordings.

From my perspective, the issue involves the reasonableness of the agency's response. If, for example, the equipment necessarily used to enable you to listen to a tape recording must also be used by the agency's staff each day in order to carry out its duties, I would suggest that the kind of restriction described in your letter would be reasonable. On the other hand, if the agency has many items of the same equipment and any one is not in use during the course of business hours, and if its use by you would not interfere with the agency's obligation to perform its duties, the restriction would, in my view, likely be unreasonable.

At the end of your letter, you referred to the agency's offer to provide you with copies of the tapes in which you are interested. It is your opinion, however, that disclosure of copies would be inadequate. You also wrote that the agency "does not concede that original tapes are records as defined by FOIL."

In this regard, I believe that original tape recordings would clearly constitute records that fall within the coverage of the Freedom of Information Law. 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."

It is suggested, too, that the agency's offer of duplicate copies of the tape recordings be accepted and that you request that the agency certify that the copies made available to you are true copies pursuant to §89(3) of the Freedom of Information Law. That provision states in part that an agency, when it makes a copy of a record available, must "certify to the correctness of such copy if so requested..." The certification would serve as an assurance that the copy of the record made available to you is a true copy of the agency's 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-10011

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 3, 1997

Ms. Shirin Parsavand
The Gazette Newspapers
P.O. Box 1090
Schenectady, NY 12301-1090

The staff of the Committee on 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. Parsavand:

I have received your letter of March 20 in which you sought an advisory opinion concerning a denial of access to a record by the City of Schenectady School District.

The record sought is "a list of proposed budget reductions, consisting mainly of job eliminations and the savings that would result." You indicated that a revised version of the list in question was distributed to the public. In its denial of access to the original list, the District referred to the exception pertaining to "inter-agency or intra-agency materials" and the ability to deny access when disclosure "would impair present or imminent contract awards or collective bargaining negotiations." You pointed out that the Superintendent informed you that "little difference exists" between the first list and the second.

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.

As suggested in the denial, one of the grounds for withholding records clearly relates to the kind of document that is at issue. 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.

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.

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.

More recently, a decision involved ratings relating to requests for proposals (RFP's). The ratings were prepared by staff for the purpose of evaluating criteria used in analyzing the RFP's. Even though the ratings consisted essentially of numerical figures assigned to opinions, it was held that they must be disclosed. The Court was careful to point out, however, that "the subjective comments, opinions and recommendations" prepared by staff need not be disclosed [Professional Standards Review Council of America, Inc. v. NYS Department of Health, 193 AD 2d 937, 930-940 (1993)].

I am unaware of the contents or structure of the record in question. Insofar as it consists of narrative expressions of opinions or recommendations, I believe that it could be withheld. On the other hand, insofar as it consists of statistical or factual information, i.e., numbers and the like, judicial decisions indicate that those portions of the record must be disclosed.

The other provision to which the District alluded is §87(2)(c), which permits an agency to withhold records to the

extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." I am unaware of whether the District is involved in collective bargaining negotiations. If such negotiations are ongoing, it is possible that some aspects of the record, but in all likelihood not all aspects, could be withheld under §87(2)(c). If negotiations are ongoing and the document disclosed after the preparation of the record at issue includes substantially the same information as the former, and if the impact upon negotiations would be the same, there would appear to be no justification for an assertion of §87(2)(c) with respect to the former document. If collective negotiations are not ongoing, it does not appear that §87(2)(c) would be pertinent or applicable as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent Raymond Colucciello
Sherry Greenleaf

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO 2/3
FOIL-AO-10012

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 3, 1997

Mr. Edward McKenna
90-A-2392
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. McKenna:

As you are aware, I have received your letter of March 17, as well as the correspondence attached to it. You have asked that I review your request for records made under the Freedom of Information Law and the "Privacy Act" to the New York City Coalition for Fairness to Veterans.

In my opinion, neither the Freedom of Information Law nor the State's version of a "privacy act", the Personal Privacy Protection Law, would be applicable.

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 includes entities of state and local government within its coverage. Similarly, the Personal Privacy Protection Law defines "agency" [see §92(1)] to include only state agencies; that statute excludes local governments from its coverage.

The organization maintaining the records that you requested does not appear to be a governmental entity. If that is so, again, neither of the statutes upon which your request is based would be applicable.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Willie Burks

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2734
FOIL-AO-10013

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 3, 1997

Ms. Mary Beth Kearns
[redacted]

The staff of the Committee on 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. Kearns:

I have received your letter of March 18. You wrote that the Village of Rockville Centre "apparently has denied" your request for minutes of a recent meeting of the Zoning Board of Appeals. You were informed that "the ZBA minutes have not been transcribed...[but] can be ordered directly from the stenographer." Further, it appears that the fee for the transcript if acquired from the stenographer would be $4.50 per page.

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

First, it is noted that the Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

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

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, it is clear that minutes need not consist of a verbatim account of every comment made at a meeting. It is also clear that minutes must be prepared and made available within two weeks.

While there may be a need on the part of the Zoning Board of Appeals to have a transcript, I do not believe that such a need in any way diminishes its responsibility under the Open Meetings Law to prepare minutes and disclose them within two weeks.

Second, the Village, in my opinion, cannot charge more than twenty-five cents per photocopy for the contents of the transcript.

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."

Due to the breadth of the definition, a record produced "for" an agency, such as a transcript of a meeting produced by a stenographer for the Village, would in my view constitute an agency record that falls within the coverage of the Freedom of Information Law.

Section 87(1)(b)(iii) of the Freedom of Information Law provides that an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches, unless a different fee is prescribed by statute. I know of no statute that would authorize the Village to assess a fee higher than twenty-five cents per photocopy. Therefore, irrespective of the rate paid by the Village to the stenographer for the preparation of a transcript, I believe that, once prepared, the transcript would constitute a Village record and that the fee for photocopies could not exceed twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Zoning Board of Appeals
Martha Krisell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1001

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 3, 1997

Mr. Roy Clendinen
95-R-2720
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. Clendinen:

I have received your letter of March 13. As in previous correspondence, you referred to a request made to the office of the Bronx County District Attorney in August. You have been informed that the agency is searching for the record, but that the record could not be found. The record in question was allegedly written by a former employee of the agency, who indicated that he did not recall having written it, a letter to the Parole Board.

Since you suggested in your earlier letter to this office that you had initiated an Article 78 proceeding, I wrote that this office could not advise. In your latest letter, however, you wrote that the proceeding has not been commenced. Based on that representation, 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, 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, it is possible, depending on its contents, that the record at issue, if found, could properly 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.

Pertinent to the matter 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: Peter D. Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10015

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 4, 1997

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 March 16, as well as the materials attached to it.

The correspondence pertains to your request for a copy of a request by the City of Buffalo Department of Public Works transmitted to the City's Civil Service Commission in which the status of a position was asked to be changed, apparently from provisional to temporary. The City denied access on the ground that the document is "interdepartmental." You have contended that the document must be disclosed because it consists of an instruction to staff that affects the public.

In short, if I understand the nature of the record accurately, I disagree with your contention.

As you are aware, one of the grounds for withholding records under the Freedom of Information Law, §87(2)(g), pertains to "inter-agency or intra-agency materials." The record in question, which was prepared by one entity of City government and transmitted to another, clearly falls within the scope of that provision. However, subparagraphs (1) through (iv) of §87(2)(g) specify that certain kinds of information contained within inter-agency or intra-agency materials must be disclosed, one of which pertains to "instructions to staff that affect the public."

In my view, the record in question would not constitute an "instruction"; on the contrary, it appears to be a request that may be accepted, rejected or perhaps modified. If that is so, I believe that the City's denial of your request would have been consistent with the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Bonnie Lockwood
Corporation Council
Gladys G. Herndon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10016

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 7, 1997

Mr. Frank D. Struchen
[redacted]

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

Dear Mr. Struchen:

I have received your letter of March 19, as well as the materials attached to it.

As I understand your correspondence, you have asked whether an agency, specifically, the Village of Portville, may deny access to records because they are maintained by the Village Attorney, and whether the Village may deny a request and "refuse to provide identity of an appeals person or body."

In this regard, I offer the following comments.

First, insofar as a person, such as an attorney retained or employed by the Village, maintains records for the Village, 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)].

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..."

In short, although records may be maintained separate from Village premises by its attorney, I believe that they would fall within the coverage of the Freedom of Information Law. Whether such records would be available to the public would be dependent on

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

Second, when a person is denied access to records, that person has the right to appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the 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 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-10017

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Mr. Darrell Brand
96-B-1408
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. Brand:

I have received your letter of March 20 and the materials attached to it. You have sought assistance in obtaining records pertaining to your proceeding from the Clinton County District Attorney, as well as a "master index" pertaining to the case.

In the context of the issues raised in the correspondence, it appears that the holding in Moore v. Santucci [151 AD2d 677 (1989)] is most pertinent. The holding in Moore expresses three principles relevant to the matter. First, if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. Second, 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. And third, 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 requested from the District Attorney would likely constitute court records that the agency is not required to provide.

With respect to the "master index", reference to that phrase appears in a section of the regulations promulgated by the

Department of Correctional Services. It is 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 need not be prepared with respect to records pertaining to a single individual or a particular case.

Lastly, you referred in your request to a waiver of fees. In this regard, it has been held that an agency is not required to waive fees for copies requested under the Freedom of Information Law, even if the request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Penelope D. Clute, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10018

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

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 March 24 in which you sought assistance in obtaining records from Bell Atlantic NYNEX Mobile Telephone Company. You wrote that the Ravena Coeymans Selkirk School District has leased cellular phones from Bell Atlantic, and that you are interested in viewing bills and records of calls involving the use of those phones. You indicated that "Bell Atlantic wishes verification that [you are] entitled to this information under law so they can release the requested information to [you]."

In this regard, I offer the following comments.

First, the statute over which the Committee on Open Government has advisory jurisdiction, the Freedom of Information Law, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to records of entities state and local government in New York; it does not apply to a private company. Therefore, while the Freedom of Information Law clearly would apply to the District, it does not apply to Bell Atlantic.

Since I am not an expert with respect to issues regarding records maintained by private entities, I am unaware of any obligation on the part of Bell Atlantic to disclose records concerning telephone usage to you. Similarly, I am unfamiliar with any legal prohibition that might preclude Bell Atlantic from disclosing. In short, I cannot offer guidance with respect to Bell Atlantic's obligations regarding the disclosure of its records.

Second, however, as indicated above, the District's records are subject to rights conferred by the Freedom of Information Law. 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."

It is noted that the Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests [see e.g., Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980) and Washington Post v. Insurance Department, 61 NY 2d 557 (1984)]. Therefore, insofar as the materials in which you are interested are maintained by the District, they would constitute "records" subject to the Freedom of Information Law.

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

Third, 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 AD2d 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.

A problem involves the ability of District officials to know which numbers on a bill involve calls made to parents, especially when the calls are local, and there may be no way of knowing, based upon a review of numbers called, which pertain to contact with parents, as opposed to others.

In order to comply with the Buckley Amendment, for those records reflective of calls made by staff who routinely and who, as part of their duties, contact parents of students, it is suggested that the last four digits appearing in a local phone number might be deleted, unless it is known that certain phone numbers do not involve contact with parents. In the case of reference to long distance calls, as well as 800 and 900 numbers, I believe that reference to those calls should be disclosed in their entirety, unless it could clearly be asserted that a particular long distance call or calls involved contact with the parent of a student. Similarly, those records of calls made by staff who do not telephone parents of students routinely and as part of their official duties in my view must be disclosed. In those instances, I do not believe that any basis for denial could justifiably be asserted.

I 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- 2738
FOIL-AO- 10019

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

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 letter of March 19 in which you raised issues concerning the implementation of the Open Meetings Law by the Town of Southold.

You indicated that the Town "has not introduced the Open Meetings Law into its Town Code making information on it less widely available than FOIL or local laws". In this regard, the Freedom of Information Law requires agencies to adopt procedural rules and regulations; there is no such requirement imposed by the Open Meetings Law. In my view, there is no need for a town or other agency to adopt or enact special provisions relating to the Open Meetings Law. The statute itself (see attached) provides the necessary guidance.

A second issue involves minutes of executive sessions. 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 minutes or notes of executive session might be available or deniable.

Lastly, you asked whether the process leading to a vote to exclude you from an executive session could properly have been considered in executive session. It appears that the discussion could validly have occurred in executive session pursuant to

§105(1)(f) of the Open Meetings Law. 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."

As I understand the situation, it involved a matter "leading to...the removal of a particular person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb
Enc.
cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2739
FOIL-AO-10020

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Ms. Tinker Twine
Woodstock Journal
PO Box 477
Woodstock, NY 12498

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

Dear Ms. Twine:

I have received your letter of March 21 in which you sought and advisory opinion.

Attached to your letter is a copy of an appeal addressed to the Supervisor of the Town of Saugerties, James Griffis, who also serves as chairman of the Saugerties Festival Development Corporation (FDC). You wrote that the Board of Trustees of the FDC consists of the same persons as the members of the Town Board, and that it is your understanding that the FDC was formed by the Town Board and Woodstock Ventures, Inc. in 1994 "to handle the town's portion of the proceeds from the Woodstock '94 music festival that was held in Saugerties in August, 1994".

Your letter was apparently precipitated by the following series of facts;

> "Around Christmas 1996, Griffis announced at a town board meeting that the FDC was in receipt of $900,000-plus from Woodstock Ventures and Polygram, the festival producers. Supposedly, that money could be used for any purpose the town chose. Unfortunately, all deliberations about how the money will be used have been carried on behind closed doors, with the public and a least one FDC (town board) member left out of the loop entirely.
>
> "Now the town attorney says the town is negotiating to buy property for a new town

> hall. It appears that by the authority of some members of the FDC, the FDC intends to go ahead and build a town hall without any public input and present it to the town like a present. It seems to some town residents that the FDC is a thinly disguised shadow government designed to conduct town business while totally circumventing the Open Meetings Law."

From my perspective, the records of the FDC are subject to the Freedom of Information Law, and its meetings must be conducted in accordance with the Open Meetings Law. In this regard, I offer the following comments.

First, 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, an "agency" generally is an entity of state or local government. Typically, a private entity or a not-for-profit corporation would not constitute an agency, for it would not be a governmental entity.

However, there is precedent indicating that in some instances a not-for-profit corporation may indeed 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].

In the same decision, the Court noted that:

> "...not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id., 581).

The point made in the final sentence of the passage quoted above appears to be especially relevant, for, as I will suggest later, there may be "considerable crossover" in the activities certain persons in the performance of their duties for the Town government and the FDC.

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found again that a not-for-profit corporation, based on its relationship to an agency, was itself an agency subject to the Freedom of Information Law. The decision indicates 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 (see, e.g., Irwin Mem. Blood Bank of San Francisco Med. Socy. v American Natl. Red Cross, 640 F2d 1051; Rocap v Indiek,

> 519 F2d 174). 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...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 FDC and the Town of Saugerties is similar to that of the BEDC and the City of Buffalo, the FDC would constitute an "agency" required to comply with the Freedom of Information Law.

Because the Supervisor serves as the Chairman of the FDC and the members of the Town Board and the FDC Board are one and the same, it is clear that the Town of Saugerties exercises substantial control over the FDC. If that is so, I believe that the FDC 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 FDC 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 FDC 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. In view of its membership the degree of governmental control exercised by the Town, I believe

that it conducts public business and performs a governmental function for a public corporation, in this instance, the Town of Saugerties.

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.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Mr. Griffis and the Town Board.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: James Griffis
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10021

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

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 March 18, as well as the correspondence attached to it. In brief, you have sought assistance in obtaining records relating to your arrest from the Village of Depew Police Department. You complained that each response from the Department has indicated that you requests were forwarded to the Office of the Erie County District Attorney.

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to 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 86(4) defines the term "record" to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals,

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

Based on the foregoing, both the Village of Depew and the Office of the District Attorney constitute "agencies" subject to the requirements of the Freedom of Information Law. Further, each in my view has an independent obligation to respond to requests for records in its possession, irrespective of the source of the records or the outcome of a proceeding. Therefore, insofar as the Village maintains records that are the subjects of your requests, I believe that it is required to grant or deny access to those records, in whole or in part, in accordance with the provisions of the Freedom of Information Law.

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. While I am unfamiliar with the records sought and some aspects of the records sought might properly be withheld, relevant is a recent decision by the Court of Appeals, the State's highest court, concerning complaint follow up reports 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, neither a police department nor an office of a district attorney can claim that complaint follow up

reports or similar records 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: James A. Brennan, Chief of Police
John DeFranks, Chief of Appeals

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2741
FOIL-AO-10022

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Ms. Barbara Weinschenk
[redacted]

The staff of the Committee on 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. Weinschenk:

I have received your letter of March 24. You have asked for an advisory opinion concerning the following issues:

> "1. Can a School Board of Education be polled over the telephone for a decision regarding any school issue?
>
> 2. Are tape recordings of a Board of Education meeting made by an administrator of the school subject to FOIL?"

In this regard, I offer the following comments.

First, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually or by telephone. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, or a meeting held by means of a telephone conference, would in my opinion be inconsistent with law.

As you may be aware, §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.

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 sum, 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.

Second, with regard to the tape recordings, 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, if an administrator records a meeting in furtherance of the performance of his or her duties, I believe that the tape recording 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. 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]. Since a 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 a tape recording of an open meeting.

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-10023

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Ms. Trina Blomquist-Martinez
[redacted]

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

Dear Ms. Blomquist-Martinez:

I have received your letter of March 12. You referred to delays in response to requests for records of the Village of Ossining and complained that records have been inappropriately discarded.

Since you did not provide information concerning particular requests or the specific records at issue, I offer the following general comments.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, the Commissioner of Education has the function of administering and regulating with respect to local government records management. 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.

To carry out the provisions quoted above, the State Archives and Records Administration, a unit of the Department of Education, has developed detailed schedules indicating minimum retention periods for particular classes of records. The retention schedule applicable to a village would be maintained by the village clerk as "records management officer", or a copy can be obtained from the State Archives and Records Administration, Cultural Education Center, Empire State Plaza, Albany, NY 12230.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access/Management Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10024

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Mr. Wallace Nolen
#94-A-6723
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. Nolen:

I have received your letter of March 18 in which you referred to my response to you of March 12 and raised other issues relating to the treatment of requests for records by the Department of Correctional Services.

One of the decisions referenced in the earlier opinion, Murtha v. Leonard, held in part that an agency was required to permit members of the public to inspect records during regular business hours. While I believe that inmates must be treated as members of the public when determining which records or portions of records must be disclosed, it is questionable in my view whether an inmate could validly assert that he or she has the right to inspect records during regular business hours. In short, that person's freedom to be in a certain place for an extensive period of time may be limited.

You referred to the absence of any estimates or approximate dates given by Department personnel to indicate when records would be made available. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written

> acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

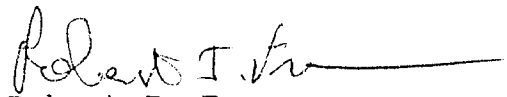
> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial,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

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

Lastly, you asked that I locate your appeals to the Department made in the past two or three years to determine whether it forwards the appeals to the Committee on Open Government as required by §89(4)(a) of the Freedom of Information Law. The Committee does not file copies of the appeals or determinations of the appeals by name or by agency; rather they are filed in chronological order. Since we receive thousands of appeals each year, without the dates or approximate dates of appeals, we cannot locate the records in question except by reviewing each of thousands of documents.

I hope that I have been of some assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:pb

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Evah Foster, Councilwoman
Town of Russell
Rt. 1
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 Councilwoman Foster:

I have received your letter of March 9 in which you sought an advisory opinion.

According to your letter, your initial attempt to gain access to the Town of Russell's 1996 payroll records was refused by the Town Supervisor, Mr. Robert Best. Although he has since permitted you to inspect the records, you wrote that "now he refuses to turn the original payrolls over to the Town Clerk." You added that it is your understanding "that the town clerk is supposed to have custody of all town records."

In this regard, I offer the following comments.

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 his 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 his capacity as a government official acting in the performance of his 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 "records".

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 he 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, he is but one among five members of the Town Board. In my view, he 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 he has the legal authority to exercise control over the records in the manner described in your letter.

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.

I note that the Freedom of Information Law makes specific reference to payroll records. Section 87(3)(b) states that each agency shall maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

I hope that I have been of assistance. A copy of this opinion will be forwarded to the Supervisor.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert Best, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10026

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Mr. Wallace Nolen
94-A-6723
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. Nolen:

I have received your letter of March 17 in which you questioned the accuracy of various opinions rendered by this office concerning "commercial purposes" and the use of "mailing lists", for example. You also requested an opinion concerning what constitutes a "name" for the purpose of the payroll record required to be maintained for purposes of complying with §87(3)(b) of the Freedom of Information Law.

In this regard, first, the only opinion prepared by this office dealing with the issue of the name on the payroll record was prepared at your request in 1992, and a copy is enclosed.

Second, I am not an expert in constitutional law, "commercial speech" principles, or the federal cases that you cited. My opinions have been prepared based on the language of the Freedom of Information Law and its judicial interpretation.

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 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)].

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.

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.

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

OML-AO-2743
FOIL-AO-10027

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 8, 1997

Ms. Dione Goldin
[redacted]

The staff of the Committee on 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. Goldin:

I have received your letter of March 23 in which you raised issues relating to executive sessions and minutes of meetings.

The initial area of inquiry concerns the ability of a board of education to take action during an executive session. In this regard, minutes reflective of action taken by a public body 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 is 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 addition, I direct your attention to the Freedom of Information Law. Section 87(3)(a) provides that:

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

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

The second issue involves the adequacy of minutes that merely indicate "that a grievance brought by a teacher had been settled without stating what the grievance was and what the settlement terms were." 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.

Lastly, you referred to a note pertaining to §1708 of the Education Law that states that:

> "An executive session to which the public is denied admission cannot, by resolution, be converted into a public meeting within the purview of this section unless and until members of the public have been informed that the meeting is again public."

In my view, the foregoing appears to be based on the definition of the phrase "executive session." "Executive session" is defined in §102(3) of the Open Meetings Law to mean a portion of an opinion meeting during which the public may be excluded. Therefore, when an executive session has ended, a public body must return to an open meeting and/or inform the public that the open portion of the meeting will continue.

I hope that the foregoing serves to clarify 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

OML-AO-3744
FOIL-AO-10028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 10, 1997

Ms. Suzanne Carello
[redacted]

The staff of the Committee on 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. Carello:

I have received your letter of March 23, as well as a copy of a request that you intend to direct to the Village of Seneca Falls. You have asked whether "all the records" that you might request must be disclosed and whether the request should be notarized.

First, there is no requirement that request be notarized. Any written request that reasonably describes the records sought should be sufficient.

Second, your request refers to the federal Freedom of Information and Privacy Acts. Those statutes pertain only to records maintained by federal agencies. They would not apply in the context of a request directed to an entity of state or local government, such as the Village. In my view, the State's Freedom of Information Law would be the governing statute.

Third, as a general matter, the Freedom of Information Law pertains to existing records. An agency ordinarily is not required to create or prepare records in response to a request. Similarly, the Freedom of Information Law does not require that an agency provide information in response to questions. Therefore, rather than raising a question, as in item (9)(f), it is suggested that you request existing records.

Fourth, one of the exceptions to the rule that an agency need not create a record relates to the first aspect of your request, which involves a "master index." With respect to the "master index", reference to that phrase appears in a section of the regulations promulgated by the Department of Correctional Services. It is 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. It has been suggested that the records retention schedule promulgated by the State Archives and Records Administration, a unit of the State Education Department, be adopted by a municipality as its subject matter list, for it is more complete than a subject matter list must be. Therefore, I suggest that you seek the records retention schedule from the Village Clerk, who, by statute, is the Village's records management officer.

Fifth, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to many of the records that you requested, based on the language of the Law and its judicial interpretation, I believe that 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 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 suggested earlier, with certain exceptions, the Freedom of Information Law is does not require an agency to create records. Section 89(3) of the Law states in relevant part that:

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

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law. Moreover, I believe that the payroll record and other related records identifying employees and their salaries, as well as attendance records, must be disclosed.

Of relevance is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." However, payroll information has been found by the courts to be available [see e.g., Miller v. Village of Freeport, 379 NYS 2d 517, 51 AD 2d 765, (1976); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NYS 2d 954 (1978)]. In Gannett, supra, the Court of Appeals held that the identities of former employees laid off due to budget cuts, as well as current employees, should be made available. In addition, this Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d

562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)]. As stated prior to the enactment of the Freedom of Information Law, payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

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

In a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Insofar as attendance records or time sheets include reference to reasons for an absence, it has been advised that an explanation of why sick time might have been used, i.e., a description of an

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

With respect to phone bills and related records, I am unaware of the kinds of records that might be maintained by the Village. Again, it would not be required to create, prepare or acquire records in response to a request. In terms of access to existing phone use records, 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 agency who uses an agency 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 or perhaps portions of those numbers (i.e., the last four digits) 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.

You also requested minutes of meetings and executive sessions held by the Board of Trustees. In this regard, I direct your attention to §106 of the Open Meetings Law which provides that:

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

> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Joseph Bilancini
Marianne Piscitelli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10029

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 10, 1997

Mr. Craig S. 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 March 20, as well as the correspondence attached to it. You have sought my views regarding requests directed to Prisoners' Legal Services in which you cited 5 USC §§552 and 552a.

In this regard, the statutes that you cited are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes pertain only to entities of the federal government. As such, they would not be applicable to records maintained by Prisoners' Legal Services.

Similarly, the State's Freedom of Information Law pertains to records maintained by agencies. 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 Prisoners' Legal Services is not an entity of state or local government, the Freedom of Information Law would not include Prisoners' Legal Services within its coverage.

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-10030

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Dennis N. Hawthorne, Sr.
Oswego County District Attorney/Coroner
Public Safety Center
38 Churchill Road
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 District Attorney/Coroner Hawthorne:

I have received your letter of March 25 addressed to William Bookman, Chairman of the Committee on Open Government. As indicated above, the staff of the Committee is authorized to respond on its behalf.

In your capacity as counsel for the New York State Association of County Coroners and Medical Examiners, you have requested an advisory opinion concerning public access to the records of the investigation of a death under the Freedom of Information Law.

Notwithstanding the provisions of §677(3)(b) of the County Law, you wrote that you have been receiving requests for the records in question with increasing frequency from civil plaintiff's attorneys and newspaper reporters. You added that in some instances, the files may include police investigation reports that are requested after an investigation has been closed.

From my perspective, rights of access to the records described in §677 of the County Law are governed by that statute rather than the Freedom of Information Law. In this regard, I offer the following comments.

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

ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §677 of the County Law, which refers to autopsy reports and related records. As you are aware, 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 or other records described in §677, for the ability to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records.

Second, as I understand §677, it pertains to the autopsy report and the "writings" of the coroner or medical examiner. I do not believe that it includes records prepared by a police department, for example, that come into the possession of a coroner or medical examiner. Those records, in my view, would be subject to the Freedom of Information Law, i.e., they would be available or deniable in whole or in part in conjunction with the grounds for denial appearing in §87(2) of that statute.

Lastly, while §677(3)(b) may grant limited rights of access, there is nothing in that statute or the Freedom of Information Law that would prohibit a coroner or medical examiner from disclosing records subject to §677. As such, coroners or medical examiners may and often do disclose various aspects of those records.

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-1003/

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Larry G. Mack
[redacted]

The staff of the Committee on Open 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 31. As I understand its contents, you have requested records indicating firearms and ammunition assigned to each officer of the Cattaraugus County Sheriff's Department. You added that the weapons and ammunition are purchased by the Department.

The County has denied your request, and you have sought an opinion on 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.

While I believe that records reflective of the purchase of equipment by an agency and the use of the equipment by its employees must typically be disclosed, one of the grounds for denial may be pertinent in the context of your request. Specifically, §87(2)(f) permits an agency to withhold records when disclosure would "endanger the life or safety of any person." Insofar as disclosure of the information sought would jeopardize the lives or safety of law enforcement personnel or others, a denial of access would, in my opinion, be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County Administrator
County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10032

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Alvin McLean
93-A-9397
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. McLean:

I have received your letter of March 21 in which you raised a series of questions concerning access to records.

The first area of inquiry involves a request directed initially in 1993 to the office of a district attorney. In response to the request, you were informed that the records, which consist of your "entire trial folder", have been lost.

In this regard, 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, there is likely an alternative source of the records. While the Freedom of Information Law does not apply to the courts

or court records, court records are generally available pursuant to other provisions of law (see e.g., Judiciary Law, §255). It is suggested that a request be made to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law.

You wrote that you have initiated a lawsuit in federal court "pertaining to a virtual denial by the F.B.I.", and you asked whether you can "amend [your] suit to include the District Attorney office."

In my view, you cannot do so. The F.B.I. is a federal agency subject to the federal Freedom of Information Act. Litigation brought under that statute must be commenced in federal court. An office of a district attorney is subject to the State's Freedom of Information Law. A challenge to a denial of access under that statute may be initiated by commencing a proceeding under Article 78 of the Civil Practice Law and Rules in State Supreme 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

FOIL-AO-10033

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

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 March 24. You have asked whether you can use the Freedom of Information Law to direct a request to the phone company for records of incoming calls made to your home telephone.

In my view, the Freedom of Information Law would not be applicable. That statute pertains 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 generally includes records of entities of state and local government within its coverage; it does not include records of a private entity, such as a telephone company.

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-10034

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Robert Rose
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. Rose:

I have received your letter of March 24. You have asked whether "school records are private."

In this regard, records of public schools are subject to 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."

Based on the foregoing, records of entities of state and local government, including those maintained by public school districts, clearly fall within the coverage of the Freedom of Information Law.

I note that access to records identifiable to students is governed by a federal statute, the Family Educational 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 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 under the age of eighteen or to the student when he or she reaches that age. Concurrently, education records are confidential with respect to others, unless the parents of students or students at least eighteen years of age waive their right to confidentiality.

You also asked "to know about information that is spoken by someone that obtained the information in their professional position on the job." While your question is not entirely clear, I point out that the Freedom of Information Law pertains to records. If there is no record of a "spoken" communication, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10035

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Alcimus Cargill
94-R-8114
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. Cargill:

I have received your letter of March 24. You wrote that you "filed an inmate request to review [your] medical and dental records in January of 1997." However, as of the date of your letter, you had received no response.

In this regard, I offer the following comments.

First, assuming that your request involves records maintained by the Department of Correctional Services or its facilities, I note that the regulations promulgated by an inmate for medical records pertaining to him should be directed to the Assistant Commissioner of Health Services, NYS Department of Correctional Services, Building 2, State Campus, Albany, NY 12226.

Second, although the Freedom of Information Law deals generally with access to records of state and local government, §18 of the Public Health Law pertains specifically to medical records. In brief, that statute provides rights of access to medical records to the subjects of the records.

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 at the Department of Correctional Services designated to determine appeals is 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-1036

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 14, 1997

Mr. Guy W. Midkiff
[redacted]

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

Dear Mr. Midkiff:

I have received your letter of March 31, as well as the correspondence attached to it. You referred to "10 separate attempts" to gain access to records of the Roosevelt Island Operating Committee (RIOC). On behalf of the Roosevelt Island Residents' Association, you have asked: "where does our organization go from here."

In this regard, when records are requested and denied, and when an appeal of the denial is affirmed, an applicant for records may challenge the agency's denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. I note that the burden of proof, when such a proceeding involves a denial of access to records under the Freedom of Information Law, is on the agency [see Freedom of Information Law, §89(4)(b)]. Further, in such a proceeding, if certain conditions are present, a court may award attorney's fees payable by the agency [see §89(4)(c)]. In my view, however, litigation should be a last resort. One of the functions of the Committee on Open Government involves the preparation of advisory opinions. While the opinions are not binding, it is my hope that they serve to enhance compliance with and understanding of the Freedom of Information Law. With that as our goal, I offer the following comments.

One of the issues involves the promptness of responses to requests and limitations on the amount of time that has been permitted to review records. In several instances, you were given a half hour or less to inspect records.

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 records access officer has the duty of "coordinating" an agency's response to requests. That person's absence cannot, in my view, be cited as a justification for delaying disclosure or limiting the time of inspection of records.

Further, §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 the matter and the foregoing is a decision rendered by the Appellate Division. Among the issues was 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].

Therefore, if it has been determined that records are accessible, and if they have been retrieved, I believe that the RIOC would be

required to permit you or others to inspect the records during "regular business hours."

While the RIOC has determined to disclose some of the records sought, it has denied access to others. Those others, as I understand the matter, involve certain employees of the RIOC and their job descriptions, educational background, previous work experience and qualifications to hold their current positions. The remaining records withheld consist of commercial leases and records indicating the "payment history" starting in 1996, "of all Roosevelt Island commercial leases." RIOC's General Counsel wrote that the records in question may be withheld as an "unwarranted invasion of personal privacy", because they are "contained in intra-agency memorandums", and because certain "items are disputed and currently in negotiations therefore they do not represent final agency determinations."

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, with one area of possible exception, the records must be disclosed.

Leases, agreements signed by the RIOC and others, are contracts, and there would be no basis for denying access to those records. Similarly, I do not believe that the RIOC could withhold records of payments made by entities located on Roosevelt Island. Of potential relevance is §87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." While future leasing of certain properties might indeed be the subjects of current negotiations, records of payments already made, or perhaps missed, involve the manner in which an existing agreement, contract or lease is being carried out. Those records pertain to agreements previously reached, not to contracts or leases yet to be signed. Therefore, I do not believe that §87(2)(c) could be justifiably asserted to withhold the kinds of records at issue.

With respect to a denial as it refers to "intra-agency memorandums", relevant is a recent decision by the Court of Appeals, the State's highest court, concerning a claim by the New York City Police Department that certain records could be withheld in their entirety based on their characterization as intra-agency materials.

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 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Records of payments, although perhaps contained in intra-agency materials, would consist of factual information available under §87(2)(g)(i).

The personnel records that you requested might also consist of intra-agency materials. However a job description would, in my view, be accessible, for it would represent factual information indicating the duties inherent in a particular position that must be disclosed under the same provision. Alternatively, a job description would represent the policy of an agency concerning the duties of those who hold a position and would, therefore, by available under §87(2)(g)(iii).

With respect to the remaining personnel records, the provision in the Freedom of Information Law of most significance is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the

performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

In a discussion of the intent of the Freedom of Information Law by the state's highest court in a case cited earlier, the Court of Appeals in Capital Newspapers, supra, found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (67 NY 2d at 566).

Based upon the foregoing, with respect to the qualifications of employees, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that the records sought contain information pertaining to the requirements that must have been met to hold a position, they should be disclosed. Again, I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]. However, information included in a document that is irrelevant to criteria required for holding the position, such as 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 is also noted that it has been held that the educational background of a public employee must be disclosed [Ruberti, Girvin & Ferlazzo v. Division of State Police, 641 NYS 2d 411, 415, ___ AD2d ___ (1996)].

As suggested earlier, in an effort to encourage compliance with and foster knowledge of the Freedom of Information Law and its interpretation, copies of this opinion will be forwarded to officials of the RIOC.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jerome H. Blue
Frank J. Rubino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10037

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 15, 1997

Mr. D. Madison
94-A-7376
Eastern Correctional Facility
Box 338
Napanoch, NY 12458

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

Dear Mr. Madison:

I have received your letter of March 16, which reached this office on March 27.

You indicated that you wrote to the office of Auction Proceeds Claims of the Property Clerk Division of the New York City Police Department to obtain records pertaining to the auctioning of a particular vehicle, but that you received no response as of the date of your letter to this office.

In this regard, 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, and requests should generally be directed to that person. 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 your request to the records access officer, it is suggested that you resubmit your request to the Department's records access officer at One Police Plaza.

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)].

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel to the Deputy Commissioner for Legal Matters.

You also asked how you can obtain your "trial transcript from Brooklyn's District Attorney or whomever." Here I direct your attention to the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held 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." I note 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, 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.

It is suggested that a request for a transcript of your trial be directed to the clerk of the court in which the proceeding was conducted. While the courts and court records are not subject to the Freedom of Information Law, those records are often available under other provisions of law (see e.g., Judiciary Law, §255).

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-1003P

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 18, 1997

Ms. Elizabeth Manning
Ms. Laura Boyd
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. Manning and Ms. Boyd:

I have received your letters, which are dated, respectively, March 27 and March 28, as well as correspondence between yourselves and the New York City Police Department.

Both letters pertain to responses to requests for records of the Department concerning cases that have resulted in convictions. The records at issue include police reports prepared in conjunction with investigations that led to arrests and convictions, police "memobook entries" concerning particular cases, and related records.

With respect to one of the cases, People v. Montalvo, you (Ms. Manning) wrote that:

> "To [your] knowledge, there is no ongoing investigation in this case. There were no co-defendants, nor was the arrest part of a larger-scale police operation to apprehend members of a major drug ring. Thus, any police investigation ended with Mr. Montalvo's arrest. Also to [your] knowledge, there is no judicial proceeding concerning this case, inasmuch as Mr. Montalvo has already been convicted and sentenced."

Notwithstanding your contentions, the request was denied on the ground that "such records/information, if disclosed, would interfere with an on-going investigation or judicial proceeding."

The same basis for denial was offered with respect to a request for records involving People v. Hames, despite your (Ms. Boyd's) statement that the drug transactions leading to a conviction occurred "several years ago" and your belief that there is no ongoing investigation relating to Mr. Hames' arrest or conviction. You specified that although the conviction has been appealed, "any documents received as a result of [your] request could not be used in connection with Mr. Hames' appeal since the documents could not be part of the record on appeal", and that, therefore, "disclosure would not interfere with any on-going judicial proceeding."

You (Ms. Boyd) also requested a series of records regarding a third case, People v. Kershaw, on September 16, 1996. In a response dated March 5, you were informed that the portion of your request dealing with "complaint follow-up reports", also known as "DD5's", had not yet been determined and that you would be informed when a determination would be reached with regard to those records. In your appeal, specific reference was made to the recent decision rendered by the Court of Appeals in Gould v. New York City Police Department [87 NY2d 267 (1996)]. In responding to your appeal, although the Department found that some of the records should be disclosed, it determined that the majority of the DD5's would be withheld in their entirety, citing "sect. 87(2)(e)(iii&iv) as release of the records in question would disclose confidential sources and/or non-routine investigatory techniques." In response to your request for the patrolman's memo book, it was asserted that the Department's representative was "unable to access any records on the basis that your request is too broad in nature and does not reasonably describe a specific document."

He added that payment for copies of records would have to be made by check or money order and that "[p]ayment in cash will not be accepted." In addition, even though the reply is characterized as a "response to your appeal", it indicates in closing that you may appeal that decision to the Special Counsel to the Deputy Commissioner for Legal Matters.

From my perspective, the responses to your requests are inconsistent with the language and intent of the Freedom of the Freedom of Information Law and its judicial construction. Further, they appear to evince a refusal to follow or recognize the clear direction provided by the State's highest court less than five months ago in Gould. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the

phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the Department contended that DD5's could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your requests. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276), and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should

> conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your requests, the same kinds of records have been withheld in their entirety, in these instances on the basis of different grounds for denial. Rather than citing §87(2)(g) as a basis for a blanket denial of access to the records at issue in Gould, the Department has engaged in a blanket denial citing different provisions in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Department for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "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" (id., 277; emphasis added).

Second, the specific grounds for denial cited by the Department indicate that an agency may withhold records or portions thereof 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; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

If your contentions are accurate, that the cases involve investigations that terminated long ago and that they do not relate to broader or current investigations, it is difficult to envision how subparagraph (i) of §87(2)(e) could justify a denial. In short, if the investigations to which the records relate are over, disclosure could not interfere with those investigations.

Similarly, since the investigations resulted in convictions, although the cases to which they relate may be the subjects of appeals, I cannot envision how disclosure would in any way interfere with a judicial proceeding. As you are aware, appeals and appellate proceedings deal with matters of law and fact, but only those issues of law and fact contained in the record of the proceedings in the trial court. Moreover, the records submitted in trial court proceedings or used as exhibits would be available not only to defendants, but to the public generally [see Moore v. Santucci, 543 NYS2d 103, 151 AD2d 677 (1989)]. Further, while the courts and court records are not subject to the Freedom of Information Law, those records, particularly with regard to convictions of adults, would be available under other provisions of law (see e.g., Judiciary Law, §255). In short, the record on appeal is available to both parties and to the public. How disclosure at this juncture could in some way interfere with a judicial proceeding is difficult if not impossible to conceive.

The principles expressed earlier would in my view clearly be applicable with respect to the Department's assertion of §87(2)(e)(iii). In Kershaw, in citing that provision, the Department referred to the disclosure of "confidential sources." If indeed the records include names or other identifying details pertaining to confidential sources that have not otherwise been made known, those portions of the records might properly be deleted. However, it is reiterated that the presence of those details would not justify a blanket denial of access to records.

It is noted that, to qualify as a confidential source, it has been held that an individual must have been given a promise of confidentiality. In a case involving records maintained by the New York City Police Department relating to a sexual assault, it was held that:

> "NYPD has failed to meet its burden to establish that the material sought is exempt from disclosure. While NYPD has invoked a number of exemptions with might justify its failure to supply the requested information, it has failed to specify with particularity the basis for its refusal...
>
> "As to the concern for the privacy of the witnesses to the assault, NYPD has not alleged that anyone was promised confidentiality in exchange for his cooperation in the investigation so as to qualify as a 'confidential source' within the meaning of the statute (Public Officers Law §87[2][e][iii]" [Cornell University v. City of New York Police Department, 153 AD 2d 515, 517 (1989); motion for leave to appeal denied, 72 NY 2d 707 (1990).

The remaining basis for denial pertains to "non-routine investigative techniques." 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)."

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 is my understanding that complaint follow-up reports are typically brief. It is possible that in some instances, they may include references to "non-routine investigative techniques and procedures." However, upon information and belief, they generally contain factual information relating to a particular event; ordinarily, they would not contain detailed descriptions of investigative techniques. From my perspective, as the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. However, in view of the general contents of DD5's, it would likely be rare that §87(2)(e)(iii) would serve as a basis for withholding.

As you are aware, in addition to DD5's, police officers' memo books were at issue in Gould. In short, the Police Department contended that memo books, also known as "police activity logs", were not "records" that fell within the coverage of the Freedom of

Information Law, but rather were the personal property of police officers. In rejecting the Department's position, the Court found that:

> "Activity logs are the leather-bound books in which officers record all their work-related activities, including assignments received, tasks performed, and information relating to suspected violations of law. Significantly, the Police Department issues activity logs to all its officers, who are required to maintain these memo books in the course of their regular duties and to store the completed books in their lockers; the officers are obligated to surrender the activity logs to superiors for inspection upon request; and the contents of the logs are meticulously prescribed by departmental regulation (*accord, Matter of Washington Post Co. v. New York State Ins. Dept.*, 61 N.Y.2d 557, 564-565. 475 N.Y.S.2d 263, 463 N.E.2d 604 [minutes of meetings of private insurance companies, required by regulation to be turned over to Insurance Department for inspection, are 'records' under FOIL]). Thus, although the officers generally maintain physical possession of the activity logs, they are nevertheless 'kept [or] held' by the officers for the Police Department, which places these documents squarely within the statutory definition of 'records' (*see, Matter of Encore Coll. Bookstores v. Auxiliary Serv. Corp.*, 87 N.Y.2d 410, 417, 639, N.Y.S.2d 990, 663 N.E.2d 302). Subject to any applicable exemption and upon payment of the appropriate fee (*see*, Public Officers Law, § 87[1][b][iii]), the activity logs are agency records available under provisions of FOIL" (id., 278-279).

The contention offered by the Department in Gould represented a possible method of excluding the activity logs in their entirety from the disclosure requirements of the Freedom of Information Law. In this instance, a similar attempt has been made, but on a different basis, that the request does not reasonably describe the record.

By way of background, I note that the Freedom of Information Law as originally enacted in 1974, required that an applicant seek "identifiable records" (see original Freedom of Information Law, §88). That requirement resulted in a variety of problems, for members of the public frequently could not name or identify a record with particularity. The current standard, which has been in effect since 1978, requires that an applicant must "reasonably describe" the records sought. 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 the context of your request, if it can be assumed that the records relating to a case identify the police officer or officers who made an arrest or who were present at an incident and prepared a DD5, it would seem that the Department would have the ability to locate that officer and acquire the activity log for the purpose of determining rights of access to those portions pertaining to the case. If that is so, I believe that the request would "reasonably describe" the records as required by the Law.

As suggested earlier, the foregoing is not intended to indicate that the content of a police officer's activity log must be disclosed in its entirety; on the contrary, the suggestion is that the record would be available or deniable, in whole or in part, based upon its specific content.

Next, I believe that the Police Department is required to accept cash, as legal tender, as payment of fees for photocopies. 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 dealing with that issue, it was found that a 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 same case, Reese, also considered a local law in which a "two-tiered appeals procedure" had been established. As you are aware, a response to an initial request made under the Freedom of Information Law is typically rendered by the agency's designated records access officer. I believe that the records access officer designated by the Police Department is Sgt. Louis Lombardi. When a request is denied in writing or constructively, i.e., by means of a failure to respond within an appropriate time or near the approximate date given by an agency in accordance with §89(3), the denial may be appealed pursuant to §89(4)(a). That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 the appeal procedure relates to the Kershaw request, the records access officer responded to a request made on September 16. You appealed to the Department's Special Counsel, but Sgt. Lombardi wrote to you on April 2 "in response to your appeal to the Special Counsel." Nevertheless, at the end of that letter, he wrote that "[S]hould you so desire, you may appeal this decision..." to Special Counsel. If I understand the facts accurately, Special Counsel should have responded to your appeal, and you should not be required to appeal twice. I also note that the regulations promulgated by the Committee on Open Government specify that the records access officer and the appeals officer cannot be the same person [21 NYCRR, §1401.7(b)].

Lastly, one of the items of correspondence involves a request made on October 4 for records relating to the case of People v. Lampkin. As of the date of your letter to this office, you have received no response.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §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, which was quoted earlier. In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 the Records Access Officer and Special Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1039

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 18, 1997

Mr. Darrell Jones
93-A-1836
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 letter of April 1. You referred to a request directed to the New York City Police Department in which you sought a "police officer voucher form" that identifies the officer who found "the victim money on [your] person...on the date of [your] arrest." You wrote that you had received no response to the request. In addition, you wrote that the form was not made available to you at your trial.

It is noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to acquire records on behalf of an individual or compel an agency to grant or deny access to records. Nevertheless, in an effort to assist you I offer the following comments.

First, you did not indicate the name or title of the person to whom you addressed your request. In this regard, 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 an agency's response to requests.

I believe that the person in receipt of your request should have responded directly in accordance with the Freedom of Information Law or transmitted your request to the records access officer. It is suggested that you send a request to the records access officer if you have not done so already. The person so designated by the Department is Sgt. Louis Lombardi, whose office is located at Room 110C at One Police Plaza.

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 Susan Petito, Special Counsel.

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

It would appear that the voucher that you described would be available, for it relates to an incident that resulted in a

conviction and likely consists of factual information available under §87(2)(g)(i).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi
Marcel J. Lajoy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10040

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 18, 1997

Mr. Gary Sickler
69-A-0177
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. Sickler:

I have received your letter of March 31. You have asked for assistance in obtaining the minutes of your parole hearing. You indicated that you wrote to the Division of Parole requesting the minutes and to your parole office at your facility. Nevertheless, as of the date of your letter to this office, you had received no response to your requests.

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. I believe that the person in receipt of your request should have responded directed in accordance with the Freedom of Information Law or transmitted your request to the records access officer. It is suggested that you send a request to the records access officer if you have not done so already.

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:jm

cc: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 21, 1997

Mr. Brian R. Copeland
[redacted]

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

Dear Mr. Copeland:

I have received your letter of April 1, which reached this office on April 7. You wrote that you are "trying to obtain the 1993 P.A.M. (Performance Assessment in Mathematics) test scores of the seventh graders and the 1994 C.A.T. (California Achievement Test) test scores of the eight graders that attended Lincoln Academy", which is a public middle school in New York City. You added that you requested the records in question from the New York City Board of Education Office of Access and Compliance but that you have received no response.

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 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.

In a case dealing with a similar request, the records of test scores were prepared by class alphabetically. The school district contended that, even if names of students were deleted, because the lists were maintained alphabetically, the identities of some students could be made known. In determining the issue, the Court ordered that names be deleted from the records and that the records be "scrambled" in order to protect against the possible identification of students. In my view, the School District would be required to disclose test scores in a manner in which students' identities are protected. Stated differently, the test scores must be disclosed, but any identifying details pertaining to students must, in my view, be withheld.

Second, 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. Although your request was not made to the records access officer, I believe that the person in receipt of the request should have responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer. It is suggested that you contact the person in receipt of your request and/or the records access officer in an effort to determine the status of the request.

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, I believe that the person designated by the Board of Education to determine appeals is Ron LeDonni, Interim Secretary to the Board.

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-10043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 21, 1997

David P. Marinucci, Esq.
Village of Colonie
Village Hall
2 Thunder Road
Albany, NY 12205

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

Dear Mr. Marinucci:

I have received your letter of April 3. In your capacity as attorney for the Village of Colonie, you wrote that a request has been made for a copy of a life insurance policy concerning a former elected official. You indicated that the Village does not and has never maintained the "record or even a copy of such insurance policy." You have asked whether the Village is required to obtain the record in question from another source.

From my perspective, it is unlikely that the Village would be required to do so.

As you may be aware, the Freedom of Information Law pertains to agency records. Section 86(4) of the 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, if records are maintained by an agency or are kept, held, filed or produced for an agency, I believe that they fall within the coverage of the statute, even though they may not be in the physical possession of an agency.

If my understanding of the matter is accurate, the insurance policy itself, which never came into the possession of the Village, would not be kept for the Village, but rather for the policy holder. In a case which may be in some ways analogous, a request was made to an industrial development agency for records concerning a project that it had funded that were maintained by a bank. The industrial development agency did not have possession of the records, and it was determined that the bank in possession of the records was not a "repository" for the industrial development agency's records. The Court found that the bank was not the agent for the agency and that there was no statutory or contractual obligation on the part of the bank to maintain records for the agency. As such, it was determined that the records were those of a private agency, not an agency, and that they were held for the beneficiaries rather than a governmental entity [see United Food and Commercial Workers District Union, Local One v. City of Schenectady, 204 AD2d 887 (1994)].

Again, if my understanding of the facts is correct, it does not appear that records sought would be subject to the Freedom of Information Law or that the Village would be required to obtain them on behalf of an applicant.

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 10043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 22, 1997

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:

I have received your letter of April 4 concerning requests made under the Freedom of Information Law for records of the Town of Greenburgh. In short, the Town replaced its old request form with a new one and requires that you complete it in order to seek Town records.

In my opinion, an agency cannot require that a request be made on a prescribed form.

The Freedom of Information Law, §89(3), and the regulations promulgated by the Committee (21 NYCRR 1401.5), which have the force of law and govern the procedural aspects of the Law, require that an agency respond to a request that reasonably describes the record sought within five business days of the receipt of a request. Further, the regulations indicate that "an agency may require that a request be made in writing or may make records available upon oral request" [21 NYCRR 1401.5(a)]. As such, neither the Law nor the regulations refer to or authorize the use of standard forms. Accordingly, it has consistently been advised that any written request that reasonably describes the records sought should suffice.

It has also been advised that a failure to complete a form prescribed by an agency cannot serve to delay a response or deny a request for records. A delay due to a failure to use a prescribed form might result in an inconsistency with the time limitations imposed by the Freedom of Information Law. For example, assume that an individual, such as yourself in the situation that you described, requests a record in writing from an agency and that the agency responds by directing that a standard form must be submitted. By the time the individual submits the form, and the

agency possesses and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that the agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of prescribed forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alfreda A. Williams, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10044

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 22, 1997

Mr. Steve Orr
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. Orr:

I have received your letter of March 31, as well as the correspondence attached to it. You have sought an advisory opinion concerning a request made under the Freedom of Information Law for data maintained by the Department of Motor Vehicles.

According to the materials, a request was initially made on February 11 for a portion of the Department's Traffic Safety Law Enforcement and Disposition (TSLED) database for certain counties in your coverage area. The Department disclosed the data in great measure, but denied access to information pertaining to judges and justices assigned to cases referenced in the database. In an ensuing letter of March 11, you asserted that your earlier request included code numbers that could be used to identify judges or justices to whom cases in the database were assigned. In addition, you requested "names and/or unique identifying numbers for motorists" included in the database that had also been withheld. You indicated that you were informed by the Department that it does not release that personally identifiable data "as a matter of policy." My understanding is that the data in question involves cases in which people were charged with violations of law. You expressed a belief in that letter that the Department cannot validly withhold the names of all such motorists, but only those whose cases were dismissed or who were acquitted.

In this regard, I offer the following comments.

First, as you are aware, the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a

request. It is 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)].

If electronic information can be extracted or generated with reasonable effort, I believe that an agency would be required to do so based upon the thrust of judicial interpretations of the Freedom of Information Law and the expressed intent of the Law indicating that agencies are required to make records available "wherever and whenever feasible" (see Freedom of Information Law, §84).

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, irrespective of the Department's policy, the kinds of date in which you are interested, assuming that they can be generated in accordance with the preceding commentary, must be disclosed.

As the request relates to the identification of judges and justices, the only issue in my view involves §87(2)(b), which permits an agency to withhold records insofar as 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].

In my opinion, it is clear that disclosure of the data as it relates to judges and justices would constitute a permissible invasion of privacy, for the data clearly relates to the performance of their official duties. Moreover, determinations rendered by judges typically occur in proceedings open to the public, and court records, although not subject to the Freedom of Information Law, that include the kind of information that you are seeking would generally be available from the courts under other provisions of law (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a).

As your request pertains to motorists, I believe that the issue involves the protection of privacy by means of the application of statutes requiring confidentiality. When such a statute is applicable, records would be exempted from disclosure

pursuant to §87(2)(a) of the Freedom of Information Law. As you may be aware, there is a distinction in terms of rights of access between those situations in which a person has been found to have engaged in a violation of law, and those in which charges against an individual have been dismissed in his or her favor. In the latter case, records relating to an event that did not result in a conviction ordinarily become sealed pursuant to §160.50 and perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a violation, i.e., for speeding, the records would be available from the courts in which the proceedings occurred. Further, the Court of Appeals, the State's highest court, determined in 1984 that traffic tickets issued and lists of violations of the Vehicle and Traffic Law compiled by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to provisions of the Criminal Procedure Law [see Johnson Newspaper Corp. v. Stainkamp, 61 NY2d 958).

It is my understanding that the data sought as it relates to motorists is essentially the same in substance as that determined by the Court of Appeals to be available to the public. In my view, assuming that it can generate the data, equivalent data maintained by the Department of Motor Vehicles should also be disclosed by the Department.

I note further that §508(3) of the Vehicle and Traffic Law states that the Commissioner of the Department "shall keep a record of every license issued which records shall be open to public inspection..." I believe that the license record includes an individual's driving history for a period of time, including convictions for violations of the Vehicle and Traffic Law. If that is so, again, the information sought would be analogous to data accessible from the Department in a different form.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ray Hull
George Christian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10045

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 24, 1997

Mr. Wallace S. Nolen
94-A-6723
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. Nolen:

I have received your letter of March 25 in which you requested an advisory opinion concerning what appear to be conflicts between procedures adopted by the Department of Correctional Services. In brief, the regulations promulgated by the Department under the Freedom of Information Law and Directive #2010 are, in your view, inconsistent.

From my perspective, since an agency's regulations published in the New York Code of Rules and Regulations (NYCRR) have the force and effect of law, they would prevail in the case of a conflict with a statement of policy or similar kind of document. In §5.20 of the regulations, which is entitled "Examination of inmate record by subject or his attorney", subdivision (1) states in part that "[a] present inmate shall direct his request to the facility superintendent or his designee" when the request involves an inmate record. I believe that to be so, for the beginning of that provision refers to the ability of an inmate to "request to inspect and copy that portion of his record to which he is entitled..." "His record" would appear to mean records pertaining to an inmate falling within the scope of §5.5(g) of the regulations. Further, §5.20(c) refers to the ability to appeal when there is a denial of access "to the records under this section." As I understand the regulations, requests for other records should be made to the Department's records access officer identified in §5.11 of the regulations.

I note that §5.24 deals specifically with requests for medical records pertaining to inmates and specifies that requests for those

records may be submitted to the Assistant Commissioner for Health Services.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci
Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10046

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 24, 1997

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 letter of April 5, as well as the materials attached to it. You questioned whether fees charged by the Town of Southampton for searches of records relating to real property are consistent with law. In brief, the Town assesses a fee of one dollar for each search including a copy of certificates found.

Although some of the following remarks may be repetitive to those offered in the past, they will be restated.

From my perspective, 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 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, advisory opinions are maintained by this office. However, in addition, the opinions are also distributed to various libraries throughout the state. The Supreme Court Law Library in East Islip maintains opinions rendered by this office for the past four years on disks. There are approximately 2,500 opinions rendered during that period regarding the Freedom of Information Law and 500 concerning the Open Meetings Law. In the alternative, copies of all opinions rendered by this office since its creation are maintained by the Supreme Court Law Library in Mineola in Nassau County. As such, Albany is not the only source of the opinions.

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-10047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 25, 1997

Ms. Patricia A. Pancoe
Assistant Corporation Counsel
City of Buffalo Department of Law
1100 City Hall - 65 Niagara Square
Buffalo, NY 14202-3379

Mr. Joseph M. Finnerty
Stenger & Finnerty
1800 Main Place Tower
Buffalo, NY 14202

Dear Ms. Pancoe and Mr. Finnerty:

I have received the materials that you have forwarded to enable me to review and determine the extent to which the contents may be withheld under the Freedom of Information Law.

As we discussed during our initial conversation on the matter, it is emphasized that the function of the Committee on Open Government is advisory in nature. Rarely do I engage in an in camera inspection of records for the purpose of either offering an opinion or rendering a determination concerning rights of access to the records. Nevertheless, due to the nature of the records at issue and in an effort to resolve the matter without resort to litigation, I believe that it was appropriate, with your consent and encouragement, to engage in the process that you mutually suggested.

I am grateful for your confidence in the Committee on Open Government and our reputation for impartiality.

In terms of the process of review, in an effort to be as impartial as possible, I read the unredacted materials first, independent of consideration of the redactions made by the City. In some instances, portions of the documentation are unclear. In several passages, for example, whether a statement is a reflection of policy or an opinion is conjectural. Based on my discussions with Ms. Pancoe, the authorship of several of the documents is unknown. Consequently, there was no method of ascertaining what may have been the actual meaning or intent of various aspects of the documentation. In a manner that I believe would be consistent

with the thrust of judicial decisions, where it could not be established whether a statement reflected opinion as opposed to fact or policy, it was determined that the statement should be disclosed. That reasoning is based not only upon the thrust of judicial decisions, but on the reality that an agency bears the burden of proof when a proceeding is brought under Article 78 of the Civil Practice Law and Rules to review an agency's determination to deny access to records[see Freedom of Information Law, §89(4)(b)]. In short, if the author of a document cannot be identified and there is no proof that a statement represents advice or an opinion, rather than a fact or a policy, a court, would, in my view, require disclosure.

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

The only ground for denial of significance under the circumstances is §87(2)(g), for all of the documentation consists of intra-agency material. Nevertheless, due to the structure of that provision, it frequently requires substantial disclosure. Specifically, the cited provision permits an agency to withhold records that:

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

The language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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.

Pertinent in my view is a recent decision rendered by the Court of Appeals in which the Court focused on what constitutes "factual data", stating that:

> "...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, 490 N.Y.S. 2d 488, 480 N.E.2d 74 [quoting Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD2d 546, 549, 442 N.Y.S.2d 130]). 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, 463 N.Y.S.2d 122, mod on other grounds, 61 NY2d 958, 475 N.Y.S.2d 272, 463 N.E. 2d 613; Matter of Miracle Mile Assocs. v. Yudelson, 68 AD2d 176, 181-182. 417 N.Y.S.2d 142)" [Gould v. New York City Police Department, 89 NY2d 267, 276, 277 (1996)].

From my perspective, the specific language of §87(2)(g), coupled with the direction offered by the Court of Appeals, provide the basis for reviewing and determining the extent to which the records in question might justifiably be withheld. Reference was made earlier to the thrust of the Freedom of Information Law, and the Court in Gould reiterated its stance taken in previous decisions, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested

> falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered and held that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

With regard to most of the deletions, the basis for withholding was obvious, for the language was clearly reflective of expressions of opinion, advice or recommendation. I note that in the set of materials that I marked, there are frequent brief notations, particularly where it might have been unclear whether a statement or phrase represented fact or opinion. There are other instances in which the contents of a document might have been bracketed or marked similarly. In those cases, my feeling was that the material could have been withheld because it consists of opinions. Nevertheless, for whatever the reason, in comparing the unmarked material with that redacted by the City, the City chose to disclose.

Lastly, without knowledge of the context in which the materials were prepared, I cannot conjecture as to their significance. However, some of the deletions, although they might consist purely of opinion, appear to be innocuous. Irrespective of my feelings regarding the effects of disclosure, it is my belief that a deletion could justifiably be made when the nature of the material unquestionably fell within the scope of the exception.

Enclosed for each of you is a set of the materials with redactions. To ensure that my use of the magic marker achieved its intended purpose, the materials consist of photocopies of my

redacted set. As such, there is no possibility that deleted material could be seen through the markings.

I hope that I have been of assistance. If there are any questions concerning the process or the content of the material, please free to contact me.

Once again, I appreciate your confidence in the Committee on Open Government.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1004/a

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 28, 1997

Dr. S.K. Sen Gupta
[redacted]

The staff of the Committee on 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. Sen Gupta:

Over the course of weeks, I have received a variety of copies of requests that you have made under the Freedom of Information Law.

In an effort to provide information concerning the use of that law, I offer the following comments.

Perhaps most importantly in the context of your requests, it is noted that the title of the Freedom of Information Law is somewhat misleading. That statute does not deal with information *per se*, but rather with existing records. The Freedom of Information Law does not require that an agency provide information by responding to questions. Further, §89(3) of that statute provides in part that an agency is not required to create or prepare a record in response to a request. Therefore, if, for example, there is no "breakdown" of certain expenses, an agency would not be required to prepare a breakdown of expenses on your behalf.

In the future, instead of seeking information by raising questions, it is suggested that you seek existing records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jim Brown
Christa Schafer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10048

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 28, 1997

Mr. Juan Nadal
95-A-2233
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642

Dear Mr. Nadal:

I have received your letter of April 23 in which you appealed a denial of access to records by the facility.

Please be advised that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have the authority to determine appeals or compel an agency to grant or deny access to records.

The provision dealing with 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."

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

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-10049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 29, 1997

Mr. Eric Anderson
92-A-7918
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. Anderson:

I have received your letter of April 7. You have sought assistance in obtaining your mental health records, as well as records involving your receipt of SSI through the Department of Social Services.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to governmental entities. Therefore, it would not apply to a private facility or mental health practitioner. That statute, however, does apply to a government agency, such as the Department of Correctional Services.

Second, 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 a hospital or clinic maintains records pertaining to you, 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, if the records in question were transferred or prepared when you were placed in a state correctional facility, 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. It is noted that under §33.16, there are certain limitations on rights of access.

Third, with respect to records of SSI payments, it is suggested that a request be made to the "records access officer" at the agency that maintains the records. I believe that the agency would be the Department of Social Services in the county that made the payments.

With regard to access to the records, §136 of the Social Services Law states, in brief, that records identifiable to applicants for or recipients of public assistance are confidential and cannot be disclosed to the public. In my view, because the records in question are exempted from disclosure to the public, the Freedom of Information Law does not govern rights of access to them; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With respect to access by the subject of case files, state regulations, 18 NYCRR §357.3, provide in relevant part that:

> "(c) Disclosure to applicant, recipient, or persons acting in his behalf. (1) The case record shall be available for examination at any reasonable time by the applicant or recipient or his authorized representative upon reasonable notice to the local district. The only exceptions to access are:
>
> > (i) those materials to which access is governed by separate statutes, such as child welfare, foster case, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and

(iii) the county attorney or welfare attorney's files.

(2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Although access to the records discussed above is governed by provisions of law other than the Freedom of Information Law, enclosed is an explanatory brochure dealing with the Freedom of Information Law that includes a sample request letter 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-1005D

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 29, 1997

Hon. William Grzyb
Supervisor - Town of Amsterdam
415 Lepper Road
Fort Johnson, NY 12070

The staff of the Committee on 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 Grzyb:

I have received your letter of April 7 and the materials attached to it.

In your capacity as Supervisor of the Town of Amsterdam and a member of the Montgomery County Board of Supervisors, you wrote that a HUD audit of the County Revolving Loan Fund was released on February 18 to 19 persons, including the members of the Board of Supervisors, and that the "report was called a draft and all officials where [sic] requested to keep it confidential." Nevertheless, you indicated that soon thereafter, the report was "leaked" and its contents published. Consequently, the Chairman of the Board of Supervisors has called for an investigation by the County Board of Ethics concerning the leaking of the report. Based on your understanding of the Freedom of Information Law, you wrote that it is your belief that "there was nothing wrong with the release of this document" and that "this was a public document the moment it was distributed to the supervisors and the county had an obligation to make it [sic] contents public."

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

First, irrespective of its characterization as a "draft", I believe that the document in question fell within the coverage of the Freedom of Information Law as soon as it came into the possession of the County. That statute pertains to agency records, and §86(4) defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form

> whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, whether a document is a draft or final, it constitutes a "record" subject to rights of access conferred by the Freedom of Information Law. That is not to suggest that a record must be disclosed, but rather that it falls within the coverage 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. 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 short, I do not believe that a promise or assertion of confidentiality would serve to remove from public rights of access records that would otherwise be available.

Third, in terms of public 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, if the draft had been requested under that statute by a member of the public, most, but perhaps not all of its contents, would have been available.

I note that 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, I do not believe that §87(2)(g) could be cited to withhold communications between the County and a federal agency, such as HUD. 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. 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 prepared or transmitted by such an entity, for it, i.e., HUD, would not be an "agency" for the purpose of the State's Freedom of Information Law. Further, 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)].

In my opinion, the only pertinent ground for denial would have been §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Much of the report focuses on the activities, policies and procedures of entities, such as the County, the Montgomery County Economic Development Corporation (MCEDC), and the Economic Development Board (EDB). Those portions of the report, in my view, would have been available under the Freedom of Information Law, for the exception concerning the protection of personal privacy pertains to natural persons, not corporate entities, such as those identified in the preceding sentence. However, even though they do not name them, other portions of the report clearly identify individuals by means of their titles or positions.

Insofar as those portions of the report identifiable to individuals include recommendations or opinions regarding their ethical conduct or possible conflicts of interest, for example, I believe that they could have been withheld if no final determination concerning their conduct had been reached. In situations in which a person is the subject of allegations or questions involving impropriety or misconduct that have not yet been determined or did not result in disciplinary action, it has been held that records relating to those allegations or questions may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see e.g., Herald Company

v. School District of City of Syracuse, 430 NYS2d 460 (1980). Similarly, to the extent that allegations or charges are found to be without merit, such records may in my view be withheld.

Lastly, with regard to "leaks", I point out that the Freedom of Information Law is permissive. In other words, while that statute authorizes 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 not 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)].

Although there may be no prohibition against disclosure of records that could be withheld, the foregoing is not intended to suggest such disclosures would be uniformly appropriate or ethical. Obviously, the grounds for withholding records under the Freedom of Information Law relate in most instances to the ability to prevent some sort of harm. Inappropriate disclosures could work against the interests of a public body as a whole, such as a Board of Supervisors, 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. Disclosures made contrary to or in the absence of consent by the majority or in a manner inconsistent with the policies or procedures adopted by a public body, such as those established under §87(1) of the Freedom of Information Law, 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 Supervisors

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10051

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 29, 1997

Mr. Jacinto Cabral
96-R-6863
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. Cabral:

I have received your letter of April 1 and the correspondence attached to it. You have sought assistance in obtaining various court records under the Freedom of Information Law.

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

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

This is not to suggest that many court records are not available to the public, for other provisions of law often grant broad rights of access to those records (see e.g., Judiciary Law,

§255). It is suggested that you seek court records from the clerk of the court, citing an applicable provision of law.

Lastly, since some of the records in which you are interested relate to grand jury proceedings, I point out that §190.25(4) of the Criminal Procedure Law provides 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, any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure, such as a different provision of the Criminal Procedure 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 10052

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 29, 1997

Mr. Richard G. Seager
87-C-356
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. Seager:

I have received your letter of March 31. In brief, you wrote that you have attempted without success to obtain records pertaining to your case from the Oneida Sheriff's Department. Although you were informed that the fee for copies would be twenty-five cents per page and have asked how many pages would be copied, the Department has not responded.

From my perspective, the failure to respond to your inquiries represents a constructive denial of access that may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body 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 note that you referred in your correspondence 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: Daniel G. Middaugh, Sheriff
Laurie Lyndaker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1005 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 29, 1997

Mr. Roy Johnson
96-A-7302
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. Johnson:

I have received your undated letter, which reached this office on April 7. You have sought assistance in relation to an appeal made under the Freedom of Information Law on March 10 to Anthony J. Annucci, Counsel to the Department of Correctional Services. Your request involved records relating to an incident that you described as a "dormitory window (that was already broken) blowing out and striking" you.

In this regard, having reviewed your request, I point out that two of the statutes that cited, the federal Freedom of Information and Privacy Acts, pertain only to records of federal agencies; they do not apply to records maintained by a state agency. The applicable statute is 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.

It appears that one of the grounds for denial is pertinent in determining rights of access. However, due to its structure, that provision frequently requires the disclosure of significant portions of records. 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, since you requested that fees for copies be waived, I note that the State's Freedom of Information Law, unlike the federal Freedom of Information Act, contains no provision concerning the waiver of fees. Moreover, it has been held that an agency may charge its established fee for copying, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

A copy of this response will be forwarded to Mr. Annucci.

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-10054

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 30, 1997

Mr. Larry 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 April 7 and the materials attached to it.

The first attachment is a copy of a your initial request for records directed to the Lynbrook School District and is dated February 27, 1996. The receipt of your request was acknowledged on the same day and you were informed that the District "anticipate[d] being able to respond within sixty working days of this date." You did not receive any other communication from the District until July 24. Since more than sixty days passed, you asked whether you are "responsible", "even though [you] feel [you]'ve been denied."

Having reviewed my letter to you of April 5, 1996, a copy of which is enclosed, I believe that I responded to the issues that you have raised. It is reiterated, however, that if an agency fails to grant or deny access to records for an unreasonable time after the approximate date for response given in its acknowledgement of the receipt of a request, the request may, in my view, be considered to have been constructively denied. In that situation, the applicant would have the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: John A. Beyrer, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10055

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 30, 1997

Mr. Norman W. Frey
93-A-2032
Bare Hill Correctional 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. Frey:

I have received your letter of April 7. You indicated that a request to view the master index maintained by the Department of Correctional Services was denied. You were informed that you could purchase a copy, but that you could not inspect the record. You added that you recently appealed the denial.

In this regard, reference to a master index appears in a section of the Department's regulations 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 for inspection at each facility.

In an effort to enhance compliance with the Freedom of Information Law and the Department's regulations, copies of this opinion will be forwarded to your facility superintendent and Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10056

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 30, 1997

Mr. Guy Thomas Cosentino
Executive Director
Options for Independence Inc.
75 Genesee 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. Cosentino:

I have received your letter of April 9. In your capacity as Executive Director and a member of the Board of Directors of Options for Independence Inc., you wrote that Options for Independence Inc. is a not-for-profit corporation that is partially funded through the Department of Education. You have asked whether "the individual salary details of [y]our employees are public information since [you] receive money from the State of New York."

In this regard, as you may be aware, 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 on the foregoing, as a general matter, the Freedom of Information Law applies to state and local governmental entities. In my view, since Options for Independence is a not-for-profit corporation that is not a governmental entity, it would not be obligated to disclose its records under the Freedom of Information Law. The fact that an entity receives governmental funding is not determinative of whether it is subject to the Freedom of Information Law; rather the determining factors involve whether the

entity is governmental in nature or is subject to significant government control.

I note that there may be records pertaining to Options for Independence that are available from agencies. For instance, Options for Independence might be required to file annual reports with the Office of Charities Registration at the Department of Law. In addition, the form 990 filed with the IRS would be available to the public from that agency. Nevertheless, I do not believe that Options for Independence 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

FOIL-AO 10057

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 30, 1997

Ms. Beverly Petcoff-Jansen
[redacted]

The staff of the Committee on 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. Petcoff-Jansen:

I have received your letter of April 4 and the materials attached to it, which did not reach this office until April 15. You have sought assistance concerning the difficulty encountered in attempts to obtain information from the Village of Sleepy Hollow under the Freedom of Information Law.

Having reviewed the materials, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and states that, in general, an agency, such as the Village, is not required to create records in response to requests for information or provide answers to questions. 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..."

Therefore, rather than seeking information by raising questions, for example, it is suggested that you request records. Similarly, if a list is requested but does not exist, an agency would not be required to prepare a new record on your behalf. I have enclosed an explanatory brochure, "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request.

Second, one of the records that you requested, the current list by subject matter, is one of the records "specified in

subdivision three of section eighty-seven". That provision states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. Further, the regulations promulgated by the Committee on Open Government state that such a list should be sufficiently detailed to enable an individual to identify a file category of the record or records in which that person may be interested [21 NYCRR 1401.6(b)].

It has been suggested that the records retention and disposal schedules developed by the State Archives and Records Administration at the State Education Department may be used as a substitute for the subject matter list. The village clerk, who serves as the "records management officer" pursuant to §57.19 of the Arts and Cultural Affairs Law, should be familiar with that document.

Third, since you were informed that your request was too "vague", I point out that when the Freedom of Information Law was initially enacted in 1974, it required that an applicant request "identifiable" records. Under that standard, without knowledge of the existence, the name, title or specific contents of records, applicants frequently were unable to identify the records sought. Often applicants were faced with what was characterized as a "catch-22"; while they might have known that records in their area of interest were maintained by an agency, unless they could identify the records with particularity, they could not submit legally sufficient requests. Nevertheless, the original Freedom of Information Law was repealed and replaced by the current version in 1978. Since then, §89(3) of the Law has merely required that an applicant "reasonably describe" the records sought. As such, an applicant is not required to request "identifiable" records or "specify" the records in which he or she may be interested. Moreover, it has been held by the Court of Appeals, the State's highest court, that a request reasonably describes the records when the agency can locate and identify the records based on the terms of a request, and that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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.

With regard notices of claim, as I understand §50-f of the General Municipal Law, the Village is required to maintain a record of all such claims. If that is so, the record should be readily retrievable. Specifically, subdivision (1) of §50-f states in relevant part that:

> "Wherever a notice of claim is required by section fifty-e of this chapter as a condition precedent to the commencement of an action or proceeding against a municipal corporation or any authority or commission heretofore or hereafter continued or created by the public authorities law, or any officer, appointee or employee thereof, every such municipal corporation and every such authority or commission shall make and keep a record, numbered consecutively and indexed alphabetically according to the name of the claimant, of each notice of claim filed in compliance with such requirement and of the disposition of the claim so noticed...The record shall be made and kept by an officer or employee designated for that purpose by the by the governing body of such municipal corporation or of such authority or commission...The record of each claim shall be preserved for a period of five years after the date of the final disposition thereof."

Based on the foregoing, I would conjecture that it would not be difficult to locate the claims that are the subject of the request.

Further, I believe that notices of claim must be disclosed. In short, none of the grounds for denial would apply. While those records pertain to potential or actual litigation, since they are served upon the Village by a potential or actual adversary, there is nothing privileged about them; they are maintained by both parties.

With respect to payments to an attorney or 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.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil

Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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
L. David, Village Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10058

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

April 30, 1997

Mr. Tom Lisborg
[redacted]

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

Dear Mr. Lisborg:

I have received your letter of April 17 as well as the materials attached to it. You have sought advice concerning a response to a request made under the Freedom of Information Law that you received from the Office of the District Attorney of New York County. You suggested that the response includes a factual error and that the Office of the District Attorney should have considered two requests that you made separately. Although one was answered, the other was not.

Your first request, which is dated October 31, involved records that might be maintained by the Office of the District Attorney concerning certain Surrogate's Court files. You were informed in response that the District Attorney could not determine what records you might have requested because it was unclear whether the files to which you referred relate to a criminal act. At that time, it was suggested that if the matter involves a criminal case, an indictment or docket number or other identifying information would be of use in attempting to locate records maintained by that agency.

In a second request dated November 10, you sought records from the Office of the District Attorney regarding five companies and two persons. Again you referred to a case before Surrogate's Court in 1958. That request was not answered.

In response to an appeal, Assistant District Attorney Galperin reiterated that records could not be found without additional detail and described the standard for requesting records under the Freedom of Information Law. As such, he dismissed your appeal.

In this regard, while the Office of the District Attorney did not respond directly to your second request, in view of the contents of the response to the initial request as well as the response to the appeal, I do not believe that an answer to your second request would have differed from the contents of those two other replies to you. As Mr. Galperin indicated, §89(3) of the Freedom of Information Law requires that an applicant must "reasonable describe" the records sought. Therefore, a request must include sufficient detail to enable an agency to locate and identify the records. It appears that the Office of the District Attorney does not maintain its records in a manner in which it has the ability to locate those of your interest. It appears further that its records can be retrieved by means of a name of a defendant, a person charged, an indictment or docket number or perhaps by manes of other information coupled with an indication of the time in which events might have occurred. In short, based upon the correspondence, it is my understanding that the Office of the District Attorney has no way of locating the kinds of records in which you are interested, if they exist, on the basis of the terms of your request.

Lastly, it is unclear why you believe that the Office of the New York County District Attorney might maintain records within the subject of your interest. That agency prosecutes crimes occurring in New York County (Manhattan). If any agency maintains the records in which you are interested, I believe that it would likely be an agency of the United States government, such as the Department of State or the Immigration and Naturalization Service. It is suggested that you consider seeking records from those agencies pursuant to the federal Freedom of Information Act (5 USC §552).

Although the federal Freedom of Information Act is separate and distinct from the New York Freedom of Information Law, I note that both statutes require that an applicant "reasonably describe" requested records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin
Carmen A. Morales

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10059

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 1, 1997

Ms. Marla G. Simpson
The City of New York
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, unless otherwise indicated.

Dear Ms. Simpson:

I have received your letter of April 16, as well as the correspondence attached to it. You have sought an advisory opinion on behalf of Manhattan Borough President Ruth Messinger concerning the Freedom of Information Law.

By way of background, in your capacity as General Counsel to the Borough President, on April 1, you requested from thirty-three New York City agencies, first, all requests made under the Freedom of Information Law from January 1, 1995 through March 21, 1997 that were denied in whole or in part; second, all requests covering the same period that an agency had not answered or completed its response; and third, all correspondence between an agency and the applicant for the records pertaining to first two categories of requests.

One of the attachments to your letter to me is a copy of a communication addressed to the Borough President by Paul A. Crotty, Corporation Counsel, in which he advised that the Borough President is not authorized by law "to review the FOIL operations of City agencies" and that "it is inappropriate for City agencies to respond to your request." I note in good faith that I have also received a copy of a letter addressed to the Borough President by Mr. Crotty on April 23 in which he reiterated his position.

In this regard, the functions of the Committee on Open Government do not include the interpretation of the New York City Charter or the resolution of issues pertaining to the powers and

duties of a borough president. However, it has been the practice of the Committee since its creation and its duty under §89(1)(b)(ii) of the Freedom of Information Law to "furnish to any person advisory opinions or other appropriate information regarding this article." Therefore, while I will not address the issue of the authority of the Borough President, I offer the following comments as I would with respect to any request for an advisory opinion sought by a member of the public or government official.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, with the exception of portions of certain kinds of requests, the records sought are accessible under the law.

In my view, the only instances in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contensts, disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §§87(2)(b) and 89(2)]. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

As stated by the Court of Appeals, the exception in the Freedom of Information Law pertaining to the protection of personal privacy involves details about one's life "that would ordinarily and reasonably be regarded as intimate, private information" [Hanig v. State Department of Motor Vehicles, 79 NY2d 106, 112 (1992)]. In most instances, a request or the correspondence pertaining to it between the agency and the applicant for records does not include intimate information about the applicant. For example, if a request is made for an agency's budget, the minutes of a meeting of a community board, or an agency's contract to purchase goods or services, the request typically includes nothing of an intimate nature about the applicant. Further, many requests are made by firms, associations, or persons representing business entities. In those cases, it is clear that there is nothing "personal" about the requests, for they are made by persons acting in a business or similar capacity (see e.g., American Society for the Prevention of Cruelty to Animals v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, Nay 10, 1989; Newsday v. NYS Department of Health, Supreme Court, Albany County, October 15, 1991).

Agencies have in some instances denied access because the records sought do not reflect a final agency determination. That kind of consideration might arise in the context of §87(2)(g), which pertains to "inter-agency or intra-agency materials." I do

not believe that it is pertinent in the context of your inquiry, because the records sought are neither inter-agency nor intra-agency materials; they consist of communications between members of the public or persons representing business entities or community groups, none of which constitute agencies [see definition of "agency", §86(3)] and entities of City government. As such, §87(2)(g) would not in my opinion serve as a basis for a denial of access.

Among the attachments to your letter are several responses from agencies, some of which are, in my view, inconsistent with the requirements of the Freedom of Information Law. That statute provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, if the acknowledgement does not include an approximate date indicating when a request will be granted or denied, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, when records are available under the Freedom of Information Law, their intended use is largely irrelevant [see M. Farbman & Sons v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984); Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); Gould, Scott and DeFelice v. New York City Police Department, 6523 NYS 2d 54, 89 NY 2d 267 (1996)]. Therefore, insofar as records are disclosed under that statute, I believe that the recipient of the records may do with them as he or she sees fit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul A. Crotty, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10060

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 1, 1997

Mr. R. Carter
84-A-7677 C2-45B
Cayuga Correctional Facility
P.O. Box 1186
Moravia, NY 13118

Dear Mr. Carter:

I have received your letter of April 28 in which you appealed a denial of access to records by the clerk of the Queens County Supreme Court.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have the power to determine appeals or otherwise compel the disclosure of records.

Further, the Freedom of Information Law would not apply with respect to the records that you requested. 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 on the foregoing, the Freedom of Information Law does not apply to the courts or court records.

This is not to suggest that court records may not be public, for other provisions of law often require disclosure (see e.g., Judiciary Law, §255).

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-10061

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 2, 1997

Mr. Ray Sartori
[redacted]

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

Dear Mr. Sartori:

I have received your letter of April 15. You wrote that in your capacity as a member of the Board of Education of the Dover Union Free School District, you have encountered some resistance in your attempts to obtain records from the District.

In this regard, I am unaware of any statute that deals with specifically with requests by members of boards of education for school district records or any unique authority that board members enjoy, individually, concerning their capacity to obtain copies of district records.

With respect to the Freedom of Information Law, that statute is, in my view, intended to enable the public to request and obtain accessible records. Further, it has been held that accessible records should be made equally available to any person, without regard to status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City, 62 NY 2d 75 (1984)]. Nevertheless, if it is clear that records are requested in the performance of one's official duties, the request might not be viewed as having been made under the Freedom of Information Law. In such a situation, if a request is reasonable, and in the absence of a board rule or policy to the contrary, I believe that a member of a public body should not generally be required to resort to the Freedom of Information Law in order to seek or obtain records.

However, viewing the 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 public, and that person could be assessed fees at the same rate as any member of the public.

Further, in conjunction with the authority conferred by §1709 of the Education Law, I believe that the Board of Education could adopt rules or procedures pertaining to the right or privileges of its members concerning the disclosure of records, as well as the imposition or perhaps the waiver of fees for copies under prescribed circumstances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AD-10062

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 5, 1997

Mr. George R. Simpson, President
Office Management Systems Corp.
PO Box 775
Hampton Bays, NY 11946

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

Dear Mr. Simpson:

I have received your letter of April 14 and the materials related to it.

As I understand the matter, the issue involves rights of access to computer generated lists of real property inventory data. In a memorandum prepared by Robert E. Marcincuk, Deputy Town Attorney for the Town of Southampton, it was advised that the Freedom of Information Law authorizes an agency to withhold a list of names and addresses if the list would be used for commercial or fund-raising purposes, and that, therefore, "prior to releasing the real property inventory information, an applicant must submit a certification stating the requested information will not be used for commercial or fund-raising purposes" (emphasis his). You wrote that Mr. Marcincuk has claimed that there is "new case law" that justifies his position, which you have questioned.

From my perspective, the issue involves whether access to the records is governed by a provision of law other than or in addition to the Freedom of Information Law. In this regard, I offer the following comments.

First, 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 or its equivalent 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].

I would surmise that Mr. Marcincuk was alluding to the Siegel decision, which involved a list apparently derived from assessment data in which the court upheld the agency's ability to withhold the data absent a certification that the firm requesting the list would not use the list for a commercial or fund-raising purpose.

Second, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, Real Property Tax Law, §516. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

In the context of a request for the data in question sought for a commercial purpose, if the Freedom of Information Law solely governs rights of access, an agency could in my view seek the kind of certification referenced earlier. If a different statute requires disclosure independent of the Freedom of Information Law, I believe that an agency would be required to disclose, notwithstanding the intended use of the data.

Pertinent to your inquiry is §501 of the Real Property Tax Law, entitled "Examination of assessment inventory and valuation data." That statute requires the publication of a notice stating "that the assessor has available for review assessment inventory and valuation data, that an appointment may be made to review this information during certain times as specified in the notice..." Having discussed the matter with a representative of the State Office of Real Property Services, it was suggested that if the term "review" is construed to include inspection and copying, §501 would

require disclosure to any person, irrespective of the intended use of the data. However, if that term is construed to mean only the right to inspect, a different conclusion might be reached. In short, resolution of the matter appears to involve the interpretation of §501 of the Real Property Tax Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Robert E. Marcincuk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10063

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 5, 1997

Mr. Daniel Horn
93-A-2405
Drawer B
Stormville, NY 12572

Dear Mr. Horn:

I have received your letter of April 28 in which you appealed a denial of a request for records sought from the "social security agency" in Far Rockaway.

In this regard, the Committee on Open Government is a New York State agency that has the authority to provide advice concerning the New York Freedom of Information Law. The Committee has no authority to determine appeals or otherwise compel an agency to grant or deny access to records.

When an agency subject to the State's Freedom of Information Law denies access, the denial may be appealed pursuant to §89(4)(a) of that statute. That provision states in relevant part that:

> "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."

Notwithstanding the foregoing, the Social Security Administration is a federal agency. If your request involves federal agency records, the federal Freedom of Information Act would apply. The State law would have no application, and this office would not have any jurisdiction or role in the matter. If the request pertains to records of an office of the Social Security Administration, it might be appropriate to contact its freedom of

Information coordinator at the FOIA Office, Room 3-a-6 Operations, 6401 Security Blvd., Baltimore, MD 21235.

I hope that the preceding remarks serve to enhance your understanding 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-10064

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 5, 1997

Ms. Shirin Parsavand
The Gazette Newspapers
P.O. Box 1090
Schenectady, NY 12301-1090

The staff of the Committee on 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. Parsavand:

I have received your letter of April 14, as well as the materials attached to it.

As in the case of our recent correspondence, you have sought an advisory opinion concerning a denial of access to a record by the Schenectady School District. The record consists of a list of "proposed budget reductions." According to your letter, the District's attorney contends that the list is "inherently opinion, not factual information", and that, therefore, the denial of access was appropriate.

Having reviewed the opinion addressed to you on April 3, I believe that there is little that I can add to it. However, for purposes of clarification, reference is made once again to two judicial decisions, Dunlea v. Goldmark [380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)] and Professional Standards Review Council of America, Inc. v. NYS Department of Health [597 NYS 2d 829, 193 AD 2d 937 (1993)]. From my perspective, the records at issue in those cases also dealt with records that were "inherently opinion" but which were determined to be available. The budget worksheets in Dunlea, were, by their nature, preliminary and subject to change; they were essentially expressions of opinion appearing in the form of numerical estimates. Nevertheless, due to the form in which they were prepared, each of the courts that the reviewed the matter found that they constituted "statistical tabulations" that must be disclosed. Similarly, the rating sheets at issue in Professional Standards, by their nature, consisted of opinions. In that case, the staff of an agency reviewed submissions to the agency in response to requests for proposals and prepared ratings of the proposals based on certain criteria.

Although the ratings represented a combination of opinions, because they were presented in a statistical format, they were found to be available.

I am not suggesting that a narrative expression of opinion or recommendation must be disclosed. Nevertheless, when a series of opinions, recommendations or estimates appears in some sort of tabular, graphic or numerical format, the courts have consistently determined that they constitute "statistical tabulations" that must be disclosed, even though, as stated by the Appellate Division in Dunlea, they do not reflect facts or "objective reality" (supra, 54 AD2d 446, 448).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Raymond Colucciello
Shari Greenleaf

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10065

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

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

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

Dear Ms. Maxam:

I have received your letters concerning your requests for records of the Warren County Sheriff's Department.

According to the first, you had received from the Department a particular record which consisted of ten pages of information that covered a period of a year. However, having requested the same record recently, you were informed that, due to a change in format, disclosure would involve twelve times the number of pages and, therefore, a fee of thirty dollars instead of the two and a half dollars that you had been charged in the past. You added that:

> "The agency's practice was not to produce or provide the record until payment was received so they provided nothing until and unless they had payment in hand and sometimes, even then, would refuse to provide the copies requested. While I expected to pay $2.50 for the copies requested and provided payment in advance, I was then told I had to pay $30 to receive them. I said no thank you, withdrew the request; they kept my advance payment, and produced nothing."

Moreover, you wrote that the agency has "refused to allow [you] to inspect any records" and will not permit you to do so or accept any other requests for records until you pay the thirty dollars it contends you owe. You have asked whether the agency has the authority to do so.

In this regard, 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.

Nevertheless, under the circumstances, in conjunction with principles of fairness and the intent of the Freedom of Information Law, it seems that you could justifiably have assumed that your request would have involved fees for copies in the amount of two and a half dollars, rather than thirty dollars. It also appears that you could have relied on the agency's past practice of not preparing copies until it received payment. Further, if the Department has not already made copies, in my opinion, nothing would be owed.

It is noted, too, as a general matter, that an agency cannot charge a fee for the inspection of records that must be disclosed under the Freedom of Information Law.

Lastly, this office does not maintain any sample forms for use in an Article 78 proceeding. It is suggested that form books might be available for use at the Warren County Supreme Court Library.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Sheriff's Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10066

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

Mr. Peter A. Tulin
City Attorney
City of Saratoga Springs
City Hall, Room 9
Saratoga Springs, NY 12866-2296

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

Dear Mr. Tulin:

As you are aware, I have received your letter of April 14 and the correspondence attached to it.

The correspondence consists of a request for a list of participants in the softball clinic run by the City of Saratoga Springs Youth Commission for the past three years. The applicant wrote that he wants to compare the list with the names of members of the varsity and junior varsity softball teams at Saratoga Springs High School and indicated that he would be "willing to make do with a list of last names and first initials."

From my perspective, the City would not be required to disclose any identifying details concerning the participants in the clinic. 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, 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. I know of no judicial decision that deals with the matter directly. Nevertheless, 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. The same kind of disclosure would be made in this instance, for release of the information sought would focus on children falling within a small age group and would indicate a certain interest or perhaps talent.

I recognize that reasonable people frequently have different views concerning disclosure, especially when dealing with issues involving personal privacy. However, particularly because the information in question focuses on the activities of children, I believe that the City could justifiably deny access to any portion of its records that would identify the children on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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-10067

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

Ms. Cheryl Vaillancourt
[redacted]

The staff of the Committee on 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. Vaillancourt:

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

By way of background, in 1995, you alleged that there may have been fraud or misconduct in relation to the filing of designating petitions prior to an election in Tupper Lake. Neither the State Police nor the Franklin County District Attorney investigated, and it was suggested that you contact the State Board of Elections. Thereafter, you complained to the Board, which investigated and concluded that "in the absence of 'reasonable cause to believe that a violation warranting criminal prosecution has taken place,' Election Law §3-104(3), the Board will close this matter with a letter of admonishment to the individuals responsible for the violation." Following the issuance the determination, you requested records "pertaining to all written information turned into you" [the Board] by Senior Investigator Owens" concerning the case. The Board denied the request, citing §§87(2)(e) and (g) of the Freedom of Information Law, and you have sought my response concerning the propriety of the Board's denial of access.

In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the

Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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, one of the grounds for denial cited by the Board, §87(2)(g), was the subject of a recent decision by the Court of Appeals, the State's highest court, concerning "complaint follow up reports" prepared by police officers 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 <u>nonfinal</u> 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996) emphasis added by the Court].

Based on the foregoing, I believe that those portions of the records that you requested consisting of factual information must be disclosed, unless a different basis for withholding can justifiably be asserted.

The other basis for denial offered by the Board, §87(2)(e), permits an agency to withhold records that:

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

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

The 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).

Since the investigation has been completed and the Board has closed the case, it would appear that disclosure would not at this juncture interfere with any investigation or judicial proceeding or deprive any person of a right to a fair trial or impartial adjudication. Whether disclosure would identify a confidential source or involve "confidential information relating to a criminal investigation" that could be withheld under §87(2)(e)(iii) is unknown to me. However, that would appear to be the only basis for denying access under §87(2)(e).

I note that the Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law and stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In sum, while I am unfamiliar with the records that have been requested, it is likely in my view that some aspects of the records should be disclosed in accordance with the preceding commentary.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas R. Wilkey
Lee Daghlian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10068

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

Mr. William Secrest
95-A-6527
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. Secrest:

I have received your letter of April 14. You indicated that you wrote to the Office of the District Attorney "requesting a 'Subject Matter List' for [your] indictment number." The request was denied. Consequently, you have sought information concerning the Freedom of Information Law.

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

With respect to the subject matter list, §87(3) of the Freedom of Information Law requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. It is emphasized that a subject matter list is not prepared with respect to records pertaining to a single individual or case. However, an agency's subject matter 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 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-10069

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

Mr. Gary Johnson
83-A-0184
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. Johnson:

I have received your letter of April 12 in which you questioned your right of access to an employee manual of the Department of Correctional Services.

In this regard, it is likely that portions of that document could justifiably be withheld, while the remainder must be disclosed. As such, 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. In my view, 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 record sought 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, 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 record 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 record 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-10070

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 6, 1997

Mr. Stephen Roberts
93-A-7854
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. Roberts:

I have received your letter of April 13 concerning requests made under the Freedom of Information Law.

According to your letter, in January, you requested a copy the "Security Classification Guidelines Manual" from your facility. Having received no response, you appealed to Counsel to the Department of Correctional Services. You also referred to a statement indicating that:

> "A policy and procedures manual governing many aspects of the classification process is given to all appropriate Department Heads and Correction Counselors and is available to the population via the facility Law Library and General Library."

Notwithstanding the foregoing, you have received no response. Consequently, you have asked for "intervention and appropriate action(s)."

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 intervene in the legal sense or compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to

requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Second, from my perspective, while I am not familiar with the specific contents of the manual, portions of that document might justifiably be withheld, while the remainder 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. In my view, 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 record sought 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, 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 record 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 record 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

cc: J. Jindsay
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10071

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 7, 1997

Mr. Timothy Gillette
93-A-5372
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. Gillette:

I have received your letter of April 9, which reached this office on April 16. You have asked for an advisory opinion concerning a request made under the Freedom of Information Law to the Division of Parole.

You have requested records that define the phrase "approved residence", that specify "the exact criteria used to make the final determination as to what does and does not constitute an 'approved residence'", and the job titles and office locations of Division employees "responsible for the making of the final determination concerning an approved residence.

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, if, for example, there is no record that defines the phrase "approved residence" or that specifies the criteria for determining what constitutes an approved residence, the Division would not be required to develop a definition or criteria, thereby creating new records, in response to your request.

Second, insofar as the information sought exists in a record or 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 they exist, the kinds of records that you requested would be available, for none of the grounds for denial would apply. Pertinent to the matter is §87(2)(g), one of the grounds for denial. Due to its structure, however, it frequently requires disclosure. That provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. A definition of "approved residence" or the criteria that you requested would appear to consist of either instructions to staff that affect the public that would be available under §87(2)(g)(ii) or (iii); the names and work addresses of staff would consist of factual information available under §87(2)(g)(i).

Lastly, if requests are not answered, you asked what might be "consider[ed] 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10072

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 7, 1997

Mr. Kenneth W. Lovett
President
Virtual Information Systems, Inc.
609 Main Street
Stroudsburg, PA 18360

The staff of the Committee 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. Lovett:

As you are aware, I have received your letter of April 15 and the materials related to it.

You wrote that your company "is in the process of performing a map scanning project throughout New York", and that you have been in contact with several counties to attempt to obtain permission to scan their property tax maps. During a conversation with you, you indicated that some agencies have "refused entry" and prohibited you from using your equipment, a machine approximately one foot by three feet. In particular, you questioned the response given by Putnam County, which informed you that if it is determined that the use of your scanning procedures would involve "too great an inconvenience...and/or disruption" of the Office of the Real Property Tax Services, the County would "exercise its right to deny your company access to our facilities for such purposes." Moreover, you were informed that "the County is not willing to waive the per map charge of $5.00, irrespective of who does the copying."

From my perspective, the foregoing raises several issues. In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying [see §87(2)]. If an applicant seeks to inspect accessible records, no fee may be charged. Further, an applicant may take notes or copy the contents of records on his or her own.

In a case in which one of the issues involved the ability of a member of the public to bring and use his own photocopier, the court upheld regulations adopted by a village prohibiting the use of personal photocopiers, holding that:

> "This Court must balance the petitioner's rights against the respondents' need to carry out their responsibilities. Given the voluminous requests for documents, respondents were justified in establishing regulations which would prevent unreasonable interference with their other governmental duties" [Murtha v. Leonard, Supreme Court, Nassau County, June 16, 1993; modified on other grounds, 210 AD2d 411 (1994)].

I note that the municipality in Murtha, the Village of Island Park, had a small amount of space and limited staff. In my opinion, the ability of an agency, such as Putnam County, to prohibit the use of one's own copying or scanning equipment would be dependent on the reasonableness of a prohibition in view of the physical arrangements of the agency's premises and its staffing requirements or needs. If the use of scanning equipment would not be significantly inconvenient or disruptive, it is questionable whether an agency could prohibit the use of the equipment, especially in consideration of the intent of the Freedom of Information Law to make records available "wherever and whenever feasible" (see §84).

If it is determined that you should be able to use your own equipment, it would seem that the only cost to an agency would involve the use of electricity. I do not believe that a fee of $5.00 per map or any similar fee could be justified if you make the copies.

Second, assuming that there is a valid basis for prohibiting the use of your equipment, the amount of the fee sought to be charged by the County for copies of the maps may be inconsistent with law. By way of background, until October of 1982, §87(1)(b)(iii) of the Freedom of Information Law stated 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 Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, ___ AD 2d ___ (1996); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)].

In a decision that focused specifically on the fee charged by a county for copying real property tax maps, it was held that the county's fee of $4.00 per map established by a committee of the county legislature was improper. In brief, the Court referred to §87(1)(b)(iii) of the Freedom of Information Law, which, again, permits an agency to charge a fee based on the actual cost of reproduction when records are larger than nine by fourteen inches or cannot be photocopied. It was also determined that the action taken by a committee of the county legislature did not constitute a statute and therefore could not establish a fee inconsistent with the Freedom of Information Law. Further, in its analysis of the actual cost, the Court found that:

> "The copying expenses claimed by the County, excluding map maintenance expense, total $1.15 per tax map copy. Petitioner argues, however, that the actual cost of reproduction is $.25 per map or less. He bases his estimate on economies of scale, citing retail prices ranging from $1.40 for one map to an average of $.64 per map for a quantity of 1,138 maps (Petition, appendix, p. 1). He argues that the actual cost is much less than even the retail prices.
>
> "Actual reproduction cost is defined in 21 NYCRR § 1401.8(c)(3) as 'average unit cost for copying a record, excluding fixed costs of the agency such as operator salaries.' I interpret this phrase to require the agency to

> average out the copying costs for each type of record not covered by the $.25 per page fee based on its experience over a period of time. Undoubtedly, where the number of copies per order increases for a particular record over a period of time, the economies of scale will result in a lower unit cost over that time period" [Szikszay v. Buelow, 436 NYS 2d 558, 561-562 (1981)].

In short, if $5.00 does not represent the County's actual cost of reproducing the maps, I believe that it must attempt to determine the fee on the basis of that standard.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Carmody
George Michaud

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10073

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 7, 1997

Hon. Julie Conley Holcomb
City Clerk
City of Ithaca
108 East Green 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, unless otherwise indicated.

Dear Ms. Holcomb:

As you are aware, I have received your letter of April 14. You referred to an advisory opinion of January 8 addressed to Mr. Kevin Harlin of the Ithaca Journal concerning the fees charged by the City of Ithaca for copies of the City's Municipal Code. The Code is maintained in a two volume hard copy edition and in an electronic version. In brief, it was advised that the fee for the electronic version should be based upon the actual cost of reproduction.

In your letter to me and in our conversation, you indicated that the City contracted with a private firm that developed the electronic version of the Code. You indicated that the City pays for quarterly supplementation of the Code, as well as software upgrade fees and an annual licensing fee. Part of the product made available by the publisher is "a stand-alone computer program which includes not only the text of the City's code, but also the programming necessary to allow a query mechanism, clipboards, bookmarks, highlighter, tutorial, etc." The software bears a license that appears to be equivalent to a copyright, and with the software, you wrote that the electronic information made available to the City "is much more than simply the City's code on five computer disks."

When preparing the opinion at the request of Mr. Harlin, I was unaware of the fact that the electronic version of the Code includes licensed software. From my perspective, that factor likely would have required a somewhat different response.

I note that there is no judicial decision of which I am aware in New York that deals with a request made under the Freedom of Information Law that includes information or records that are copyrighted or licensed by a party outside of government. 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 material 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.

In the context of the situation that you described, it is likely that you have the ability to disclose or reproduce the software only in a manner consistent with the terms of an agreement

between the City and the holder of the copyright or license. Disclosure absent consideration of the terms of such an agreement might subvert the purpose for which the copyright or license exists. Consequently, it appears that the City has the ability to charge a fee for reproduction in conjunction with the terms of such an agreement, for the work in question includes software licensed by a third party.

Lastly, your letter and our conversation also included reference to the City's subscription service for updates to the Code. In my view, providing records by means of a subscription represents an action that would exceed an agency's obligations under the Freedom of Information Law.

The Freedom of Information Law pertains to existing records. Therefore, a request that is prospective, involving records that have not yet been prepared and which do not yet exist, need not be honored under the Freedom of Information Law. In a technical sense, an agency can neither grant nor deny access to records that do not yet exist. When an applicant for records seeks to engage in an agreement with an agency and the agency promises to make records available on an ongoing or periodic basis, i.e., by means of a subscription, the agency in my opinion would be providing a service above and beyond the requirements of the Freedom of Information Law. In that kind of situation, I do not believe that the agency would be bound by the provisions of that statute pertaining to fees. It could in my view establish fees in accordance with a subscription agreement separate from the requirements of the Freedom of Information Law.

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: Kevin Harlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10074

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 7, 1997

Mr. Chris Payton
96-A-0796
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. Payton:

I have received your letter of April 13. You asked how you might obtain a portion of a "police officer's memo pad." You indicated that you have received portions of the memo pad "with a signature blotted out" and asked how you might obtain the record "with the signature unblotted."

In this regard, I offer the following comments.

First, it is noted that the Court of Appeals, the State's highest court, held recently that police officers' memo books constitute "records" that fall within the coverage of the Freedom of Information Law [see Gould v. New York City Police Department, 89 NY 2d 267 (1996)].

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 of the grounds for denial may be pertinent to an analysis of rights of access.

Section 87(2)(b) permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." It is possible that a name or signature of a witness or informant, for example, could be withheld under that provision if that person's identity has not previously been disclosed.

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 be withheld to the extent that disclosure would result in the harmful effects described in subparagraphs (i) through (iv) of §87(2)(e).

Section 87(2)(f) permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Without knowledge of the facts and circumstances of your case, I could not conjecture as to the relevance of that provision.

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-10075

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 8, 1997

Mr. Gerard Cannon
93-A-0514
Sullivan Correctional Facility
Box AG
Fallsburg, NY 12733

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

Dear Mr. Cannon:

I have received your letter of April 14. 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10076

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 8, 1997

Mr. Stephen R. Ward
Business & Finance Administrator
East Islip School District
Craig B. Gariepy Avenue
Islip Terrace, NY 11752-2800

The staff of the Committee on Open 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 18. You have asked for my views concerning the following two contentions relating to requests made under the Freedom of Information Law:

> "1) If an individual does not pay us for the cost of the copies that we have made (25 cents per copy), we have the right to deny that individual any future Freedom of Information requests.
>
> 2) If an individual Freedom of Information request initially appears to be voluminous as far as copies go, we have the right to ask that individual for an estimated amount of money, in advance, to cover such copying costs."

In this regard, with respect to your first contention, 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.

With respect to the second contention, it has been held that an agency may require payment in advance of photocopying records when the request involves a voluminous number of records (Sambucci v. McGuire, Sup. Ct., New York Cty., Nov. 4, 1982).

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-10077

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 9, 1997

Mr. Darrell James
94-A-8579
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. James:

I have received your letter of April 12. You have asked how you might obtain statements and other records of the Civilian Complain Review Board.

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." That person has the duty of coordinating the agency's response to requests, and a request should be directed to him or her.

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 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.

While I am unfamiliar with the proceeding or the nature of the records in which you are interested, of potential significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy. That provision might apply with respect to statements or other records pertaining to witnesses, victims, etc.

With regard to the outcome of a case brought before the Civilian Complaint Review Board, I note that, 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].

Also pertinent 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. Insofar as a 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.

On the other hand, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10078

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 9, 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 April 16, as well as the correspondence attached to it. You have raised several questions relating to your requests for records of the Town of Hebron.

You asked initially whether you are entitled to inspect records "in order to decide what [you] would like copies of, as opposed to being required to send a check first (without knowing what [you're] getting." In this regard, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying. Therefore, if an applicant seeks to inspect records, I believe that he or she has the right to do so free of charge. If, after review of the records, the applicant requests photocopies of certain records, the agency may charge a fee of up to twenty-five cents per photocopy.

Second, you asked whether it is appropriate that you be required to "request, obtain and hopefully inspect records through and at" the home of the Town Assessor, rather than through the records access officer.

In this regard, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require the Town Board as the governing body of a municipality 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. Consequently, requests may be and typically are made to the designated records access officer. In my view, requests for Town records may be made to that person. As part of the records access officer's functions as coordinator of the Town's response to requests, I believe that he may in appropriate circumstances direct an applicant to the location where

the records are kept. However, if, for example, there is no photocopy machine at the Assessor's home, it would be appropriate in my view for the records access officer to acquire the records sought temporarily in order that they could be inspected at Town offices and be available for photocopying.

Third, you asked whether it is the Supervisor's responsibility to inform you in writing why some or all of the records that you requested were being denied. In this regard, the records access officer or a person acting at the direction of the records access officer, as well as the appeals person or body, have a responsibility to inform an applicant in writing that is or her request has been denied in whole or in part. Pursuant to the regulations promulgated by the Committee, the records access officer is responsible for assuring that agency personnel "make records promptly available", or "deny access to the records in whole or in part and explain in writing the reasons therefor" [see §1401.2(b)(3)]. Similarly, if any aspect of a record is denied following an appeal, §89(4)(a) of the Freedom of Information Law requires that any such denial be "fully explain[ed] in writing."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arch R. Craig, Supervisor
Francis Sloan, Records Access Officer
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10079

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 9, 1997

Mr. Dennis B. Riscen
94-B-2298
Groveland Correctional Facility
Route 36 - 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. Riscen:

I have received your letter of April 14 and the correspondence attached to it.

You requested a variety of records from the Office of the Erie County District Attorney pertaining to your arrest and conviction. The request was denied on the basis of Civil Rights Law, §79 or §79-a, which deal with the forfeiture of one's civil rights. You have asked whether those provisions would be applicable, and if they are not, whether the records sought must be disclosed.

In this regard, I offer the following comments.

First, I know of no judicial decision in which it has been held that the provisions of the Civil Rights Law cited by the Office of the District Attorney serve in any way to prohibit an inmate or any other person from asserting rights under the Freedom of Information Law. On the contrary, it has been held that when a person seeks records under the Freedom of Information Law, that person is as a member of the public [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)], and that records accessible under that statute must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Similarly, in a recent decision rendered by the Court of Appeals, the State's highest court, the court

> "recognize[d] that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is

> governed generally by CPL article as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such categorical limitation in the statute" [Gould v. New York City Police Department, 89 NY2d 267, 274 (1996)].

Second, one aspect of your request involves a list of all records in possession of the Office of the District Attorney relating to your case. In this regard, I note 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, no such list exists, the agency would not be required to prepare a list on your behalf.

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. While some aspects of the records sought might properly be withheld, relevant is the Gould decision cited earlier, for it dealt with complaint reports prepared by police officers 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. Axelrod, 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" [(id., 276- 277) emphasis added by the Court].

Based on the foregoing, neither a police department nor an office of a district attorney can claim that the kinds of reports that you requested 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 or other 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: John J. DeFranks
J. Michael Marion

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10080

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 9, 1997

Mr. Gerald Simpson
95-A-6947
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. Simpson:

I have received your letter of April 16 in which you sought guidance concerning a request for records pertaining to yourself and a victim of a crime for which you were convicted. You indicated that you directed a request to the State Police in Liberty, but that you received no response. You also asked for assistance in your appeal.

In this regard, the primary function of the Committee on Open Government involves providing advice concerning public access to government records. The matter of your appeal is beyond the jurisdiction of this office. It is suggested that you confer with a representative of Prisoners' Legal Services.

As your request involves access to records, 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. While I believe that the person in receipt of your request should have responded in accordance with the Freedom of Information Law or transmitted your request to the records access officer, it is suggested that you resubmit your request to the Records Access Officer, Inspector Timothy B. Howard, NYS Division of State Police, State Campus, Building 22, Albany, NY 12226-5000.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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 <u>nonfinal</u> 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. Axelrod, 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, the agency could not claim that the complaint reports 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.

Further, 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).

The Court in Moore also specified that an agency "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, the nature of the crime for which you were convicted is not stated in your letter. If it was a sexual offense, I note that §50-b of the Civil Rights Law prohibits the disclosure of any information that would identify the victim of a sex offense, except in accordance with the provisions 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-10081

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Pedro Rosario, Jr.
94-A-2927
Shawangunk Correctional Facility
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. Rosario:

I have received your letter of April 12, which reached this office on April 21. You have sought guidance with respect to delays in your efforts to obtain records from the Office of the Bronx 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Coddington
Jennifer Correale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10082

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Robert Smith
80-A-0827
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

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

Dear Mr. Smith:

I have received your letter of April 15. You allege that the Division of Parole has engaged in "selective discrimination" in relation to its limited disclosure of records that you have requested.

In this regard, while I am unaware of the volume or contents of records maintained by the Division relating to you, I note that if any portion of a request for records is denied, the applicant has a 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 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 by the Division of Parole to determine appeals is 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

OML-AO-2255
FOIL-AO-10083

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Ms. Robin Kitson
Corresponding Secretary
Ripley Taxpayer Watchgroup
PO Box 504
Ripley, NY 14775

The staff of the Committee on 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. Kitson:

I have received your letter of April 16 in which you raised issues relating to both the Freedom of Information and Open Meetings Laws. You also asked how you or your organization might prohibit a particular individual from serving as Ripley Town Attorney.

In this regard, the advisory jurisdiction of the Committee on Open Government is limited to matters involving access to government records and meetings. As such, issues pertaining to conflicts of interest or the attorney are outside the functions of this office.

The initial issue involves the timeliness of responses to requests for records directed to the Town. Here 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 note that although 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 a 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, a delay beyond five business 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. 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).

The second issue involves minutes of meetings and especially those concerning executive sessions. In this regard, I direct your attention to §106 of the Open Meetings Law which 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 that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. However, when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person must be recorded in minutes and would be available to the public under the Freedom of Information Law. Further, as required by §106(3), such minutes must be prepared and made available within one week of an executive session.

In an effort to enhance compliance with and understanding of the Open Meetings Law, a copy of this response will be forwarded to the Ripley Town Board.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:pb

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10084

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Michael Matthews
#97002006
B4 - D9
C.S. 1072
Hicksville, NY 11802

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

Dear Mr. Matthews:

I have received your letter of April 18. You have sought assistance pertaining to a request made to the Hempstead Police Department for records relating to your arrest.

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 all 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 a portion of your request involves 911 tapes, potentially relevant 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."

If Hempstead functions within E-911 systems, tapes of calls made into the system would be confidential.

In considering the other records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

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-10085

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Jazzie Samuel
95-R-8376
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. Samuel:

I have received your letter of April 20 in which you requested information concerning your ability to obtain records pertaining to your sentence.

In this regard, the Committee on Open Government is authorized to offer guidance concerning rights of access to government records, primarily under the Freedom of Information Law. The Committee does not maintain records generally, and it has no custody or control of the records in which you are interested.

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

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

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The foregoing is not intended to suggest that the records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the records of your interest from the clerk of the court in which the proceeding was conducted, 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

OML-AO- 2256
FOIL-AO-10086

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Judson U. McCargar
[redacted]

The staff of the Committee on 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 McCargar:

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

You have sought guidance concerning a series of events pertaining to the Town of Westville's participation among "Communities Pursuing Municipal Power" in conjunction with the Wing Group. The Wing Group has conducted a series of events with a number of municipalities in order to develop a means of achieving a reduction in electricity rates.

One of the elements of participation involves the requirement that each community shall have one representative present at each meeting of a committee. The Town Board appointed an individual to serve on that committee, but he moved from the Town. Thereafter, according to your letter, the Supervisor appointed the son of another member of the Town Board to fill the vacant position. You wrote that the appointment was made "without any input or approval from the Town Board." In addition, you indicated that the Supervisor appointed himself and his brother-in-law to serve as representatives to the Committee, also without approval.

From my perspective, the Town Supervisor likely could not have validly determined to make the appointments that you described on his own. In this regard, I offer the following comments.

In my opinion, in those situations in which action must be taken by the Board, collectively, as a body, such action may in my view be taken only at a meeting of the Board during which a majority of its members is present and only by means of an affirmative vote of a majority of its total membership.

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."

I believe that a town board clearly constitutes a "public body" that is subject to the requirements of the Open Meetings Law and that it is required to have a quorum present to conduct its business.

Relevant to the issue 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 town board 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. I note, too, that if a majority of the Board meets to conduct public business but does not inform you of the meeting, despite the presence of a majority, there would be no quorum. In that situation, I do not believe that those present could validly carry out their powers or duties as the Town Board.

You also wrote that since the Committee first met in July of 1996, "no minutes of its meetings have been given to the Town Board members or were made available to the public." The memorandum distributed by the Wing Group concerning the Organization of the Group of Communities refers to minutes and states that:

> "Minutes of the Meeting will be disbursed within several days of the Meeting. The recipient (likely the municipal Clerk) will provide copies to each Representative and to every Municipal Board Member. All the Representatives should familiarize themselves with the Minutes and direct questions first to the attending Representative and then to Wing."

From my perspective, if the minutes in question have been forwarded to any office of the Town or any Town official, they would fall within the scope of the Freedom of Information Law. That statute pertains to agency records, and §86(4) of 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, even though they might have been prepared by a private firm, once the minutes or other documentation come into the possession of the Town of a Town official, I believe that it constitutes 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. It is unlikely in my view that there would be any basis for withholding the kinds of records in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Paul Wood, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10087

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Ms. Sara Brown Ryan
[redacted]

The staff of the Committee on 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. Ryan:

I have received your letter of March 28. For reasons unknown, it did not reach this office until April 23. Please accept my apologies for the delay in response.

According to your letter, on October 24, your husband made a written request, presumably for records, to the Code Administration Officer for the Village of Waterloo concerning a citation issued by the Village. Approximately two weeks later, the Officer indicated that "he was too busy to respond to his request." Although the Village Board of Trustees is familiar with the matter, it appears that no action has been taken to ensure a response to the request.

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. I believe that the person in receipt of your request should have responded in accordance with the Freedom of Information Law or transmitted your request to the records access officer.

Second, it is emphasized 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 note that although 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)].

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

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-10088

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Mark M. 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 April 20 concerning your ability to obtain information from the courts.

In this regard, 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 "judiciary" to mean:

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

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The foregoing is not intended to suggest that court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available

under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the records of your interest from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law.

Lastly, it is unclear whether you requested court records or guidance in the nature of legal advice from a court. If you sought the latter, it is suggested that you attempt to acquire legal advice from your attorney or a representative of Prisoners' Legal Services.

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-10059

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 12, 1997

Mr. Matthew John Matagrano
96-A-4326
Sullivan Correctional Facility
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. Matagrano:

I have received your letter of April 14. You indicated that your requests for records directed to several offices under the Freedom of Information Law had not been answered.

Based on the list of the persons or entities to which your requests were made, I do not believe that the Freedom of Information Law would apply. That statute pertains 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."

In view of the foregoing, the Freedom of Information Law pertains to entities of state and local government in New York. Since your requests were apparently made to a private attorney and several non-governmental entities, again, the Freedom of Information Law would not be applicable.

Because you indicated that the records sought were requested "to further litigate [your] legal actions", it is suggested that you discuss the matter with an attorney.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10090

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. Theodore F. Given, Jr.
87-C-0438
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. Given:

I have received your letter of April 21 in which you complained that your request for records at your facility and your ensuing appeal have been "ignored."

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)].

Since a portion of your request relates to the contents of the "master index", I note that reference to the master index appears in a section of the regulations of the Department of Correctional Services 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 or form used by 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci
Karen Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10091

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. Norman J. Charnock, III
95-B-0544
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. Charnock:

I have received your letter of April 23 in which you sought assistance in obtaining mental health treatment records pertaining to your mother. You indicated that you have been given "full authorization, under the Seal of a Notary Public, to receive" those records.

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. It is suggested that you review that statute.

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 6 of subdivision (a) of that section defines that phrase to include "an adult child of an adult patient or client" in certain circumstances. It appears that you may be 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10092

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. Aramis Fournier, Jr.
96-B-0805
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open 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 April 23. You have sought assistance in obtaining a copy of an arrest or search warrant from a police department or the office of a district attorney.

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 the agency's response to requests. If you have not done so already, it is suggested that requests be directed to the records access officers at the police department or office of district attorney that would maintain the record in which you are interested.

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 office of the district attorney that prosecuted.

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-10093

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. Rafael Robles
88-A-8275 E-4-18
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 April 21. You have sought assistance in obtaining the criminal history records of prosecution witnesses from the Office of the Kings County District Attorney.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10094

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. Silvio Reynoso
82-A-4739
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. Reynoso:

I have received your letter of April 21 in which you sought assistance in obtaining records under the Freedom of Information Law.

As I understand the matter, at your trial fifteen years ago, the assistant district attorney who prosecuted informed the court that there were no written statements by an informant whose identity is at this time known to you. Now the Bronx County Office of the District Attorney has indicated that it has possession of such statements but is denying access to them pursuant to §87(2)(e)(i) and (iii) of the Freedom of Information Law. You have asked how the statements in question can be "exempt from disclosure -- when at trial the ADA who tried [your] case denied the existence of [the] statements." In addition, you asked whether I could recommend an attorney who might handle your case on a pro bono basis and whether I might ask the District Attorney to investigate your case.

In this regard, this office does not provide referrals to attorneys, but it is suggested that you discuss the matter with a representative of Prisoners' Legal Services. Perhaps that organization can recommend attorneys to you.

With respect to access to the statements, the grounds for denial offered by the Office of the District Attorney relate to the ability to withhold records compiled for law enforcement purposes to the extent that disclosure would, under subparagraph (i) of §87(2)(e), "interfere with law enforcement investigations or judicial proceedings" or, under subparagraph (iii), "identify a

confidential or disclose confidential information relating to a criminal investigation."

Due to the passage of time, some fifteen years since your trial, it is unlikely in my view that disclosure of the records in question would interfere with any ongoing investigation or judicial proceeding. If that is so, subparagraph (i) would not serve as a proper basis for withholding. If you know the identity of the informant who made the statements, that factor would likely diminish the ability to assert subparagraph (iii) as a basis for a denial of access. Nevertheless, without knowledge of the nature of the statements or, for example, the extent to which information contained in the statements was effectively disclosed at trial, I could not advise with certainty as to the extent to which those records might continue to be justifiably withheld.

In an effort to assist you, a copy of this response will be forwarded to Peter Coddington, the person designated by the District Attorney to determine appeals under the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10095

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 13, 1997

Mr. John Grace
95-A-3584
Greenhaven Correctional Facility
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. Grace:

I have received your letter of April 21. As I understand the matter, on December 30, the person designated by the New York City Police Department to determine appeals under the Freedom of Information Law overturned an initial denial of your request for records. However, the records have not yet been made available, despite several ensuing letters from you.

You have asked what procedural steps might be taken in an effort to acquire the records. In this regard, I offer the following comments.

First, the person who determined your appeal identified in your letter no longer serves in that capacity. Susan Petito, Special Counsel, was recently designated to determine appeals under the Freedom of Information Law. It is suggested that you write to her and indicate that the denial of your request was reversed by her predecessor.

Second, as you may be aware, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal and states in relevant part that, in response to an appeal, the person designated to determine the appeal must either fully explain in writing the reason for a further denial of access, "or provide access to the record sought." As such, when the determination was made that the records should be disclosed, I believe the Department was responsible for making the records available to you.

Third, under the circumstances, although a determination to overturn the denial of your initial records was rendered, since you do not yet have the records, it appears that the appeal has been

constructively denied. If that is so, I believe that you have the ability to challenge the denial of access by initiating a proceeding under Article 78 of the Civil Practice and Rules.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10096

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 16, 1997

Mr. Albert Heitzer
89-A-7171
354 Hunter Street
Ossining, NY 1062-5442

Dear Mr. Heitzer:

I have received your letter of April 27 in which you requested records concerning a particular correction officer.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. As such, this office does not maintain records generally and, therefore, does not have possession of the records in which you are interested. It is suggested that you direct your request to the Deputy Commissioner for Administration at the Department of Correctional Services.

However, in an effort to enhance your understanding of the Freedom of Information Law, I offer the following comments.

With regard to personnel records of correction officers, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 an analysis of rights of access.

For instance, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. Based upon judicial interpretations of the Freedom of Information Law, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, supra]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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

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

iii. final agency policy or determinations; or

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

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

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., 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 some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10097

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 19, 1997

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 letter of April 21, as well as the materials attached to it.

While most of the issues raised in the correspondence involve interpretations of or compliance with the Election Law, one of the issues involves the timeliness of response to your requests for records by the Village of Lake Grove. 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: Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10098

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 19, 1997

Mr. Rodney Johnson
89-T-1524
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. Johnson:

I have received your letter of April 25. You wrote that you requested photographs pertaining to an incident and that the inmate records coordinator at your facility indicated that she would provide the photographs to you upon payment of the fee for developing the photographs. Although your request was made in February, you had not yet received a response as of the date of your letter to this office.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

Lastly, the foregoing is not intended to suggest that each of the photographs would necessarily 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. It is possible that one or more of the grounds for denial would be pertinent to the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Linda Cole, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10099

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 19, 1997

Ms. Carolyn Schurr
General Counsel
Newsday
235 Pinelawn Road
Melville, NY 11747-4250

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

Dear Ms. Schurr:

I have received your correspondence of April 25. You have questioned the propriety of a denial of a request by Suffolk County for the names and salaries of all full time and part time employees of the County Police Department assigned to the Office of the District Attorney. Although their salaries were disclosed, the names of the officers were withheld "on the ground that disclosure would endanger the safety of the officers."

From my perspective, the denial is unnecessarily broad and inconsistent with law. In this regard, I offer the following comments.

First, the legislative history of the Freedom of Information Law is, under the circumstances, pertinent to the matter. Since its enactment in 1974, the statute has included a requirement that agencies prepare lists that identify employees by name, address, title and salary. The original version did not specify which address of a public employee, the home address or the business address, should be included in such a list. However, it did specify that neither the names nor the addresses of law enforcement officers were required to be included in the list. The current version of the Freedom of Information Law, which was enacted in 1977 and became effective in 1978, requires that each agency is required to maintain a record setting forth the name, *public office address*, title and salary of every officer or employee of the agency. In my view, the Legislature recognized that home addresses of public employees would, if disclosed, represent a significant infringement of privacy in some instances. Further, the home address of an officer or employee is not generally relevant to the

performance of one's official governmental duties; pertinent, however, is an employee's business or public office address. In short, it was determined by means of the legislation that agencies must prepare records that identify public officers and employees and indicate their work locations.

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

One of the grounds for denial, §87(2)(b), 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)].

I agree that the only exception to rights of access that could potentially be cited with respect to the information sought would be §87(2)(f). The cited provision states that an agency may withhold records or portions of records when disclosure would "endanger the life or safety of any person." In my view, disclosure of the identities and assignments of municipal employees, including law enforcement officers, would not in most instances endanger their lives or safety. Even in the case of assignments to the Office of the District Attorney, it is unlikely

that disclosure of the name of every officer so assigned would pose a threat to his or her safety. In my opinion, §87(2)(f) would not apply with respect to disclosure of the identities of those who are not in face to face contact or "constant interaction" with the "criminal element." Further, even with respect to those who may work undercover with the criminal element, I would conjecture that they do not use their real names, display any identification that would indicate that they are law enforcement officers, or work regular business hours in carrying out their duties. If that is so, I do not believe that the County would have any justifiable basis for withholding names of the employees in question.

The denial of your appeal referred to case law asserting that an agency may withhold records merely by demonstrating that there is a "possibility" that disclosure would endanger one's life or safety [e.g., Ruberti, Girvin & Ferlazzo v. Division of State Police, __ AD2d __, 641 NYS2d 411, 415 (1996)]. Nevertheless, in my view, such an assertion is simply too broad. Aside from the undercover situation, police officers and other law enforcement officers typically identify themselves, wear nameplates, or display badge or shield numbers in the performance of their duties. In those cases, I believe that the kind of information that you are seeking must be disclosed. Again, even in the situation in which officers carry out undercover duties, it seems unlikely that they would do so in a manner in which disclosure of their real names would jeopardize their safety.

I hope that I have been assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick J. Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10100

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 20, 1997

Mr. Anthony J. Stancato
[redacted]

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

Dear Mr. Stancato:

I have received your letter of April 26 and the materials attached to it. You have sought an advisory opinion concerning requests made under the Freedom of Information Law for records of the Marcy Correctional Facility. You indicated that several of the requests had not been answered.

Having reviewed the correspondence, I offer the following comments.

First, it appears that your requests might have been inappropriately directed. The records sought appear to involve purchase orders and related records, and an Inspector General's report, and your requests were made to the facility's inmate records coordinator. That person would likely have no jurisdiction or control with respect to the records sought. That being so, it is suggested that you might resubmit your requests to the Department's records access officer. According to the Department's regulations, the records access officer is the Deputy Commissioner for Administration, whose office is located at Building 2, State Campus, Albany, NY 12236.

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.

In my view, purchase orders and similar records are typically available, for none of the grounds for denial would be applicable. In the context of the Department of Correctional Services, however, due to the nature of its functions, it is possible that some aspects of those kinds of records could be withheld pursuant to §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."

Several grounds for denial may be pertinent with respect to a report prepared by the Inspector General. Of potential 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". 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)], 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)].

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 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

OML-AO- 2258
FOIL-AO- 10101

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 20, 1997

Ms. Terry Simmons
[redacted]

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

Dear Ms. Simmons:

I have received your letters of April 29 and May 12, as well as related correspondence. You have raised a series of questions concerning the implementation of both the Freedom of Information Law and the Open Meetings Law by the Town of Stillwater.

An initial issue pertains to requests for records concerning the Town's budget and budget-related documentation. Although the Town Supervisor acknowledged the receipt of the requests, no indication was given as to when the materials would be made available to you. 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 in writing but fails to provide a written "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). Although receipt of your request was acknowledged in writing, the written acknowledgement provides no estimated date indicating when a determination concerning access would be made. In a somewhat 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'...
>
> "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)].

The authority of an agency to take up to five business days to respond to a request or, if warranted, to take additional time by acknowledging the receipt of a request in accordance with §89(3), is not intended to enable agencies to delay disclosure unnecessarily. As stated by the Court of Appeals, the State's highest court, 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 Town must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

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.

While one of the grounds for denial is relevant to an analysis of rights of access, due to its structure, I believe that it requires the disclosure of the kinds of records in which you are interested. 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.

The records that you are seeking would constitute "inter-agency or intra-agency" materials. However, I believe that they must be disclosed, for they would appear to consist of "statistical or factual tabulations or data" available under §87(2)(g)(i) or represent an "external audit" available under §87(2)(g)(iv).

Further, some of the material may be the same in substance as that required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the Supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of

> his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

Lastly, you referred to a meeting held by three members of the Town Board during which a decision was made. Having contacted the Town Clerk to learn more about the meeting, you were informed that notice of the meeting was not posted and that no minutes were prepared.

In this regard, 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 the Town Board gathers to discuss public business, in their capacities as Board members, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

Moreover, every meeting must be preceded by notice. Section 104 of the Open Meetings Law pertains to notice of meetings and states that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

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.

When action is taken by a public body, minutes must be prepared in accordance with §106 of the Open Meetings Law. That provision states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

I note, too, that §63 of the Town Law provides in part that "The vote upon every question shall be taken by ayes and noes, and names of the members present and their votes shall be entered in the minutes."

In an effort to enhance compliance with and understanding of the Freedom of Information and Open Meetings Laws, copies of this response will be forwarded to the Supervisor and the Town Board.

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

cc: Hon. Paul Lilac, Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10102

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 20, 1997

Mr. John B. Schamel
NEA/New York Field Representative
Elmira Service Center
147 West Gray Street, Suite 200
Elmira, NY 14901

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

Dear Mr. Schamel:

I have received your letter of April 30, as well as the correspondence attached to it. The materials involve your requests for records of the Odessa-Montour Central School District. You have sought an opinion concerning "the totality of conduct of the superintendent" and his contention that my letter of January 27 addressed to him need not be disclosed to you because, in his words, "We did not request that letter from Mr. Freeman and that letter is not an official record of the Odessa-Montour Central School District."

In this regard, I will not comment with respect to "the totality" of the superintendent's conduct. My views regarding your request for records were presented in detail in the opinion addressed to Mr. Gooley.

Nevertheless, I am expressing the opinion that the letter that I addressed to him is a District record subject to the Freedom of Information Law, even though it may be in the physical custody of the District's attorney.

The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda,

> opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

There are many instances in which documentation is delivered or sent to an agency on the initiative of persons outside of government and not at the request of the agency. Parents and taxpayers frequently transmit written communications to school districts that are unsolicited. Those kinds of documents, whether they are accessible to the public or otherwise, would clearly constitute records that fall within the scope of the Freedom of Information Law. In this instance, I prepared a letter and sent it to Mr. Gooley at his school district address. That being so, based on the clear and expansive language of §86(4), I believe that it constitutes a "record" subject to the Freedom of Information Law. Moreover, even though Mr. Gooley might have forwarded the letter to the District's attorney, that letter in my opinion is being kept or held for the District or the Superintendent by the attorney. Consequently, while the letter may not be maintained at the physical premises of the District, since it is being maintained for the District by its attorney, again, I believe that it is a District record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Gooley, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10103

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 21, 1997

Ms. Susan Petito
Special Counsel to the
Deputy Commissioner, Legal Matters
New York City Police Department
One Police Plaza
New York, NY 10038

Dear Ms. Petito:

I appreciate receipt of your response to an appeal by Ms. Elizabeth Thomas rendered under the Freedom of Information Law on April 3, which reached this office on May 1.

The matter pertains to a denial of a request for records on the ground that the applicant provided "insufficient information to locate records..." You wrote that in order to submit an appropriate request, the applicant should "include the precinct of occurrence, the time and exact location of the incident, specific identifying information regarding any individual(s) arrested in the connection with the incident, etc." You concluded that "[a]bsent such additional information", a request and appeal would be denied.

While I am unaware of the terms of the request, it appears that the conditions that you prescribed in order to make a valid request for records may be more onerous than the law requires.

By way of background, when the Freedom of Information Law 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 likely that staff could locate records pertaining to an incident by means of identifiers different from or less precise than some of those to which you referred. In short, assuming that records sought can be located with reasonable effort, I believe that a request would meet the requirement that you "reasonably describe" the records.

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-10104

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 21, 1997

Mr. Jack Chase
96-B-0041
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

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

Dear Mr. Chase:

I have received your letter of April 28 and the materials attached to it. As I understand your remarks, it is your belief that photographs, a tape recording and perhaps other records were prepared during the investigation of an incident for which you were convicted. You have questioned whether you may be able to obtain those records under the Freedom of Information Law. In addition, you asked whether an insurance company falls within the coverage of the Freedom of Information Law.

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

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

Based on the foregoing, in general, the Freedom of Information Law applies to governmental entities. Private entities, such as insurance companies, are not subject to the requirements of that statute.

Second, irrespective of whether they might have been used or introduced at your trial, insofar as an agency, such as an office

of a district attorney or a police department, maintains tape recordings, photographs or other documentation relating to the incident, I believe that those materials would fall within the scope of the Freedom of Information Law. 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."

Therefore, to the extent that the materials of your interest are maintained by an agency, I believe that they constitute "records" subject to rights of access.

Third, with respect 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. 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.

In considering the records falling within the scope of your request, potentially relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports can be withheld in their entirety on the ground that they constitute intra-agency materials. Nevertheless, 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, 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: Robert M. Winn, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10105

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 21, 1997

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 April 26, as well as the materials attached to it.

You have asked that I "reprimand" Sullivan County's records access officer for failing to specify an approximate date when your request for records "will be granted." In addition, you expressed the view that "[t]he file cannot be denied because it is [your] file and contains information only concerning [you]." The file consists of materials maintained by the Office of the District Attorney concerning a case brought against you, People v. Todor Macordov.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice and opinions relating to the Freedom of Information Law. The Committee cannot compel an agency to grant or deny access to records. Similarly, neither the Committee nor myself has the authority to "reprimand" an agency employee. Insofar as the matter involves the interpretation of the Freedom of Information Law, I offer the following comments.

First, 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..."

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.

I point out 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.

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

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

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

Second, although the records might pertain to you, I do not believe that they are your records. From my perspective, they are the property and in the legal custody of Sullivan County (see Arts

and Cultural Affairs Law, Article 57-A). It is possible, however, that substantial portions of the records may be accessible to you.

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

In considering the records falling within the scope of your request, potentially relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arleen S. Glass, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10106

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 21, 1997

Mr. Josh Margolin
Staff Writer
The Times Herald Record
P.O. Box 2046
Middletown, NY 10940

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

Dear Mr. Margolin:

I have received your letter of April 24 in which you requested assistance in your efforts in gaining access to records of the Department of Motor Vehicles.

The correspondence that you forwarded indicates that on April 9 you sent a request to the Department, on behalf of the Times Herald Record, in which you sought "a computerized listing of all licensed passenger-car drivers residing in Orange, Sullivan and Ulster counties." You asked that a cost estimate be made prior to the fulfillment of the request and that you be given an opportunity to consult with the Department's "technical people to determine which computer program would best meet the needs of both [the] agency and [y]our data systems." In a response dated April 17, you were informed that "on the advice of Counsel, we [the Department] will not be able to provide you a copy of these records as requested. Our records are stored on a name and client information basis." It was also stated that, "should you wish to provide a specific name and or client ID number, we would be able to provide your newspaper the requisite data."

From my perspective, the only issue is whether the Department has the ability to generate the data that you requested based upon its existing computer programs.

Your request is one among several in which the news media has sought a variety of data from the Department of Motor Vehicles in an electronic format. In my view, part of the difficulty involves the language of §202 of the Vehicle and Traffic Law, the statute that focuses on requests and the fees that may be charged for a

variety of records maintained by the Department. The provisions of that statute do not, in my opinion, envision the kind of request that you made, i.e., for a portion of a database.

Specific direction is offered in subdivision (2) of §202 concerning searches for records and the fees that may be assessed. Paragraph (e) of that provision states in part that "a search shall consist of a single entry of an acceptable identifier for the purpose of obtaining specific categories of information relating to a person, vehicle or number plate." Nothing in §202, however, with the exception of reference to registration lists, pertains to a request for a database or a portion of a database, as opposed to a "search" based upon "an acceptable identifier." Similarly, nothing in §202 or any other statute of which I am aware would prohibit an applicant from seeking a database or a portion of a database consisting of driver license information. That being so, I believe that the provisions of the Freedom of Information Law, rather than the Vehicle and Traffic Law, are determinative in the context of your request. In short, if the Department has the capacity to generate the data that you are seeking based upon its existing programs, and if the Times Herald Record is willing to pay the actual cost of reproduction in accordance with §87(1)(b)(iii) of the Freedom of Information Law, I believe that the data must be disclosed to you.

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

If electronic information can be extracted or generated with reasonable effort, I believe that an agency would be required to do so based upon the thrust of judicial interpretations of the Freedom of Information Law and the expressed intent of the Law indicating that agencies are required to make records available "wherever and whenever feasible" (see Freedom of Information Law, §84).

I note that §89(6) of the Freedom of Information Law provides that when records are available under some other provision of law, they remain available notwithstanding the remaining provisions of the Freedom of Information Law. Pertinent in my view is §508(3) of the Vehicle and Traffic Law, which states that the Commissioner of the Department "shall keep a record of every license issued which record shall be open to public inspection..." I believe that the license record includes an individual's driving history for a period of time, including convictions for violations of the Vehicle and Traffic Law. If that is so, the information sought would be analogous to data accessible from the Department in a different form, and nothing in the Freedom of Information Law would serve as a basis for a denial of access. Somewhat analogous is an early case in which an applicant learned that real property assessment records, which had been kept on paper, were maintained electronically. In granting access, it was found that the provisions of the Freedom of Information Law could not restrict access to records available under another statute, and that the format in which the records were kept, i.e., computer tapes, did not alter public rights of access [Szikszay v. Buelow, 107 Misc. 2d 886, 436 NYS 2d 558 (1981)].

In an effort to resolve the matter and avoid litigation, copies of this opinion will be forwarded to officials at the Department of Motor Vehicles.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Raymond Hull
George Christian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2259
FOIL-AO-10107

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 22, 1997

Ms. Kim Massie
Citizens Accord, Inc.
452 Whitfield Road
Accord, NY 12404

The staff of the Committee on 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. Massie:

I have received your letter of May 1, as well as a variety of related correspondence concerning your efforts to obtain records from the Town of Rochester.

The initial issue involves access to records of a meeting of the Town Board, and you expressed particular interest in exchanges occurring during the meeting between specific individuals. In this regard, minutes of meetings need not include an account of those exchanges. The Open Meetings Law provides what might be characterized as minimum requirements concerning the contents of minutes. Section 106(1) pertains to minutes of open meetings and states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Based on the foregoing, it is clear in my view that minutes are not required to include reference to comments made during a meeting or exchanges between or among those who have spoken. A clerk may include reference to those aspects of a meeting, but he or she would not be required by the Open Meetings Law to do so.

In a related vein, there is no requirement that a public body must tape record its meetings. Many public bodies choose to do so, and in those instances, the tape recording would clearly be accessible under the Freedom of Information Law. I note that that

statute pertains to agency records and that §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 upon the definition, a tape recording of an open meeting prepared by or for an agency would constitute a "record." Further, it has been held that a tape recording of an open meeting must be made available for listening and/or copying (see Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, December 27, 1978). In short, insofar as a meeting was recorded, a tape recording in my view must be disclosed. However, again, there is no requirement that a meeting be recorded, or that it be recorded in its entirety.

If you are interested in maintaining a complete record of a meeting, I point out that the courts have determined that any person in attendance at a meeting may tape record the meeting so long as the recording is accomplished in a manner that is not disruptive [see e.g., Mitchell v. Board of Education of the Garden City School District, 113 AD 2d 924 (1985)].

A second issue involves your request for records, and the Town Clerk's response that the request was "unreasonably burdensome."

The request involved:

> "All revisions or clarifications of Town of Rochester local laws by means of codification or recodification, including local laws which have been amended, deleted, clarified or in any way revised during the twenty years preceding this date and which pertain to any definition of codification, recodification, or procedures or clarifications of local laws which the Town of Rochester has adopted or follows as a matter of custom or practice during said period."

From my perspective, the issue concerns 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 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. 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.

Notwithstanding the foregoing, based upon your most recent correspondence, it appears that the Town has indicated that the records in question can be made available in book form.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert K. Baker, Supervisor
Hon. Veronica I. Sommer, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10108

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 22, 1997

Mr. Theodore Feuerstein
[redacted]

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

Dear Mr. Feuerstein:

I have received your letters of May 2 and May 16, as well as a variety of correspondence relating to them. You have asked for assistance in your attempts to acquire records from the Village of Atlantic Beach.

Based upon the correspondence, it appears that the Village has made available some of the records of your interest and that the remaining issue pertains to your request for records relating to a recent audit of the Village. The final audit, which is referenced as the "Comptroller's report", is not yet in possession of the Village, and you were informed that it would be made available to you when it is received and upon payment of the appropriate fees. With respect to your request for records pertaining to the audit, you were informed that your request did not involve "documents" that are "specified" and, therefore, "is too broad." In addition, reference was made to a decision concerning access to work papers prepared in conjunction with an audit (Matter of Polansky v. Regan, 81 AD2d 102), and the Village Attorney indicated in that case, "certain records were found to be exempt from disclosure" and that "the request was directed to the State Comptroller, the proper entity."

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" 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, insofar as the Village maintains records, irrespective of who or what agency might have prepared them, I believe that they would constitute Village records that fall within the scope of the Freedom of Information Law and that the Village must respond accordingly. It has been held that if records were prepared by one agency and would be available from that agency, a second agency in possession of those records is required to respond to a request for the records and to disclose pursuant to the Freedom of Information Law [Muniz v. Roth, 620 NYS 2d 700 (1994)]. Therefore, insofar as the Village maintains records falling within the scope of your request, I believe that it is required to respond, even though the same records might be maintained by the Office of the State Comptroller.

Second, I believe that the Village Attorney's reference to the decision involving audit work papers and his description of the holding is incomplete. The records in question fall within one of the grounds for denial appearing in the Freedom of Information Law. Nevertheless, due to the structure of that provision, it may require substantial 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.

In a recent decision rendered by the Court of Appeals, although the issue involved records different from those at issue, so-called "complaint follow-up reports" prepared by New York City police officers, it is pertinent to your request. One of the contentions offered by New York City was that the reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 89 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277).

In short, insofar as the records sought that are maintained by the Village constitute statistical or factual information, I believe that the Village is obliged to disclose.

Third, because the Village indicated that your request is too broad, I note by way of background that the Freedom of Information Law as originally enacted required that an applicant seek "identifiable" records. However, the current version of the Law, which became effective in 1978, provides that an applicant must merely "reasonably describe" the records sought [see Freedom of Information Law, §89(3)]. 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 Village'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. 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.

Lastly, since the fees for copies appears to be an issue, I point out that §87(1)(b)(iii) of the Freedom of Information Law permits an agency to charge up to twenty-five cents per photocopy. Further, an agency may require payment in advance.

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. Emily Siniscalchi, Village Clerk
Perry S. Reich, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10109

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 22, 1997

Mr. Darryl Wright
87-A-0971
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. Wright:

I have received your letter of May 5. You have asked whether under the Freedom of Information Law you may obtain records pertaining to grand jury proceedings.

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."

Since the provision quoted above pertains not only to testimony, but "any matter attending a grand jury proceeding", I believe that the records in question would be exempted from 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-10110

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 22, 1997

Mr. Thomas B. Fish
95-A-7132
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. Fish:

I have received your letter of May 5. You referred to an advisory opinion addressed to you on April 8, copies of which were sent to the Village of Depew Department of Police. As I understand the matter, the Department has reconsidered it position based on the opinion and has indicated that additional time is needed to evaluate the records that you requested and that some of the records were likely disclosed previously to you or your defense counsel. You have asked whether you should await a response and whether you may initiate a proceeding under Article 78 of the Civil Practice Law and Rules (CPLR).

In this regard, since you requested the records initially in March, appealed the denial of your request, and have not yet received any of the records sought, I believe that you have exhausted your administrative remedies and may initiate a proceeding under Article 78 [see e.g., Matter of Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)]. Nevertheless, it is suggested that you assume that the Department is acting in good faith and wait a reasonable time to obtain its formal response. I note that a person has up to four from the date of an agency's denial of an appeal to initiate an Article 78 proceeding.

With respect to the possibility that certain records had previously been disclosed to you or your attorney, pertinent is the decision rendered in Moore v. Santucci [151 AD 2d 677 (1989)], in which it was held 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: James A. Brennan, Chief of Police
Thomas J. Domino, Captain

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1011

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Gary S. Keegan
Assistant County Attorney
County of Albany
County Office Building
112 State Street
Albany, NY 12207

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

Dear Mr. Keegan:

I have received your letter of May 6 in which you sought an advisory opinion concerning the "feasibility and legality" of a proposed cooperative effort on the part of several agencies to "further their goal of ensuring community safety."

Specifically, you referred to the "Albany County J-FIRE (Juvenile Fire Intervention, Response and Education) Committee", which was created to "address the problem of juvenile firesetting" throughout the County. According to your letter, the Committee wants to maintain records concerning juveniles "suspected of fire-setting activity", particularly those who move from one community in the County to another. The Committee would want to share the records with the appropriate authorities in the new community "in order to 'tip off' the fire department to keep a watchful eye before a tragedy occurs." The intent, in addition, is to have the ability to withhold those records from the public. The records in question would not involve situations in which there may be or have been arrests. You also questioned whether "anything [would] preclude the various departments from compiling databases concerning adults in the same manner as they would like to with juveniles."

In this regard, I offer the following comments.

First, I am unaware of any provision of law that would prohibit an agency from maintaining records pertaining to suspected criminal activity, whether the suspected activity involves adults or others.

Second, insofar as a database or documentation in another form may be created and maintained, I believe that it would constitute a "record" that falls within the coverage of the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Despite the breadth of rights of access conferred by the Freedom of Information Law, the kinds of records at issue could in my opinion be withheld from the public pursuant to one and perhaps two of the grounds for denial.

Section 87(2)(b) permits an agency to withhold records the disclosure of which would constitute "an unwarranted invasion of personal privacy." From my perspective, when a person is a suspect or perhaps the subject of an unsubstantiated allegation, disclosure of that person's identity would result in an unwarranted invasion of personal privacy. In short, mere suspicion or an allegation could not in my view be equated with a finding of guilt and would not reflect any final determination pertaining to an individual's action or conduct. In the case of juveniles, even when there is a finding of guilt, the records pertaining to them are confidential under the Family Court Act, §784 and, therefore, would be exempt from disclosure under the Freedom of Information Law. Further, in other contexts, it has been advised that personally identifying details based on age may justifiably be withheld based on considerations of privacy. For example, 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 within small age ranges. In those cases, 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 privacy.

Also pertinent is §87(2)(e)(i), which permits an agency to withhold records compiled for law enforcement purposes when disclosure would "interfere with law enforcement investigations." It is possible that the cited provision could appropriately be asserted, particularly after fire-setting incidents have occurred and those events are the subjects of investigations.

In short, I believe that agencies would have the authority to withhold the names of suspects, whether the suspects are juveniles or adults, for the reasons described in the preceding commentary.

Third, notwithstanding the ability to withhold the information as issue from the public, neither the Freedom of Information Law nor any other statute of which I am aware would prohibit agencies from sharing or exchanging the information. Those kinds of disclosures would not in my view be equivalent to the release of records in response to requests made by members of the public; on

the contrary, they would be made to government officials acting in the performance of their official duties.

Moreover, it is emphasized that the Freedom of Information Law is permissive. While an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals has held that the agency is not obliged to do so and may choose to disclose [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986). The only situations in which an agency could not disclose would involve those instances in which a statute other than the Freedom of Information Law prohibits disclosure. As you suggested in your letter, one such situation would pertain to police records relating to the arrest of a juvenile. As you are aware, those records would be confidential pursuant to §784 of the Family Court Act, and they could not be shared or exchanged between or among agencies.

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-10112

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Hon. Marlene Burr
Town Clerk
Town of Bethel
P.O. Box 300
White Lake, NY 12786-0300

The staff of the Committee on 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. Burr:

I have received your letter of May 2 and the correspondence attached to it. In addition, as you may be aware, Jeffrey Gordon, Records Access Officer for the Office of the State Comptroller, forwarded your correspondence to me. Mr. Gordon indicated correctly that the Committee on Open Government is the agency authorized to offer advice and opinions concerning the Freedom of Information Law.

You have requested my views concerning requests for records made by John J. Driscoll, III, a member of the Bethel Town Board, and your responses to his requests.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) that pertains to a particular form that must be used to request records. It has been advised that a failure to use an agency's prescribed form cannot serve as a valid basis for delaying a response to a request or denying access to records. Pursuant to §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. In general, so long as a request is made in writing and reasonably describes the records, the request should be sufficient. In the context of the correspondence, I do not believe that you may require Mr. Driscoll to submit a request that is typewritten. To the extent that a handwritten request is legible, there should be no need to do so.

Second, from my perspective, 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 mayor or 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 board of trustees, as the governing body of a public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see 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. Absent such a law or rule, a member seeking records could presumably be treated in the same manner as the public generally.

Third, as indicated earlier, §89(3) of the Freedom of Information Law provides that an applicant must merely "reasonably describe" the records sought [see Freedom of Information Law, §89(3)]. 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. 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. For example, in the context of the request, I am unaware of the manner in which repair invoices concerning Town vehicles prepared since 1991 are maintained. If there are specific files involving the repairs of Town vehicles, it may be easy to locate those kinds of records. In that kind of situation, such a request would in my opinion "reasonably describe" the records sought. On the other hand, if the invoices are maintained chronologically, rather than by subject matter, and there is no way to locate them other than by reviewing each invoice covering a period of six years, it is likely that the request would not reasonably describe the records.

Fourth, 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.

I point out 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.

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

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

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

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

In my view, records reflective of expenditures incurred or payments made by a municipality would be available, for none of the grounds for denial would be pertinent. With specific respect to payments to an attorney or a law firm, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John J. Driscoll, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10113

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Fitzroy Wright
95-A-4419
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Wright:

I have received your letter of May 4. You indicated that you requested records from the Records Access Officer of the Ossining Police Department on April 11 but that you received no response to the request. As such, you have asked for the "intervention" of this office.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee is not empowered to intervene in a legal sense or to compel an agency to grant or deny access to records.

Nevertheless, I point out that the Freedom of Information Law provides specific 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 - 1011 4

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Darrell James
94-A-8579
3622 Wende Road
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. James;

I have received your letter of May 6 in which you requested information concerning the Freedom of Information Law. You also asked what would your next step be if an agency did not respond to a request.

In this regard, enclosed is copy of a brochure entitled "Your Right to Know", which describes the Freedom of Information Law.

Further, the Freedom of Information Law provides specific 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

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10115

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Ronald J. Fitzgerald
[redacted]

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

Dear Mr. Fitzgerald:

I have received your correspondence of May 9. You indicated that you requested records from the Willsboro Central School District on April 16 and that as of the date of your letter to this office, you had not yet received a 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheila Vanags, District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10116

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Jon M. Moore
Moore and Associates
Route 4, Box 108
Dayton, TX 77535

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

Dear Mr. Moore:

I have received your letter of May 6, as well as the correspondence attached to it. The materials involve your attempts to acquire records from Essex County. Having reviewed the materials, I offer the following comments.

First and perhaps most important in the context of the correspondence, I note that the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. In short, if the County, as indicated by the County Attorney, does not maintain the records in which you are interested, it would not be required to prepare new records on your behalf, and the Freedom of Information Law would not apply.

For future reference, I point out that every agency is required to designated 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 generally should be directed to that person. It is suggested that the Clerk of the County Legislature would either be the records access officer or have the ability to inform you of the identity of the designated records access officer.

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

> "Each entity subject to the provisions of this article, within five business days of the

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

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

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

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

I hope that 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: Hon. George Canon
Richard B. Meyer
Kathleen W. Lawliss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-214
FOIL-AO-10117

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

Mr. Roger Scales
Field Representative
NYS Public Employees Federation
P.O. Box 12414
Albany, NY 12212-2414

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

Dear Mr. Scales:

I have received your letter of May 8, in which you requested an interpretation of the Personal Privacy Protection Law.

According to your letter, the Division of State Police requires job applicants for the position of Forensic Scientist to undergo a polygraph exam. In conjunction with that exam, you wrote that a "document is created that includes the examiner's observations", which are used with other investigative records to determine whether to employ an individual. You indicated that if an applicant is not hired, the documentation is retained for three years. If the person is hired, the documentation becomes a permanent part of a file on the individual. Further, the records at issue are not kept in a Personal History File accessible to the individual, but rather in a separate "other" file.

You have asked whether an individual has rights of access to the file that contains the polygraph results that is separate from the Personal History File, and if he or she cannot gain access to the entire file, whether that person would have the right to view the polygraph results.

In this regard, there is a judicial decision which appears to deal with the kinds of records to which you have referred. In that decision, it was determined, in brief, that the records fell beyond the scope of a data subject's rights of access under the Personal Privacy Protection Law.

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 O'Shaughnessy v. NYS Division of State Police [202 AD2d 508 (1994)], the petitioner requested records concerning the rejection of his application for a position as State Trooper. In considering the material at issue, it was stated that:

> "...we find that it is not subject to disclosure because it consists of 'public safety agency records' to which the statute does not apply (Public Officers Law § 95 [7]; *see generally, Matter of Building a Better N. Y. Commn. v. New York State Commn. on Govt. Integrity*, 138 Misc 2d 829). A public safety agency record is defined in relevant part, as 'a record of * * * the division of state police * * * if such record pertains to investigation' (Public Officers Law § 92 [8]). The material sought by the petitioner consists entirely of evaluative documents gathered by the New York State Police pursuant to an extensive investigation into his background and qualifications for the position of New York State Trooper; hence, disclosure under Public Officers Law § 95 is inapplicable. Moreover, disclosure of such material would

> clearly impede the investigation of candidates for positions in the New York State Police and would interfere with the Superintendent's broad discretion in this area (*see,* Executive Law § 215; *Matters of Shedlock v Connelie*, 66 AD2d 433, *supra*) (id., 510-511).

In short, due to the similarity between the situation that you described and the records at issue in O'Shaughnessy, again, it appears that the Personal Privacy Protection Law would not serve as a vehicle under which the subject of the records could gain access to them.

It is possible, however, that some aspects of what you characterized as the "other" file would be available to the subject of the file under the Freedom of Information Law. That statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The kinds of records to which you referred, such as those prepared in conjunction with a polygraph exam, urinalysis, drug testing and the like, would constitute intra-agency materials. Those kinds of materials fall within the scope of §87(2)(g), which permits an agency to withhold records that:

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

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

As such, evaluative materials and similar subjective comments or opinions could be withheld under §87(2)(g). However, insofar as the materials consist of statistical or factual information, I believe that they would be available to the subject of the records, unless a different ground for denial applies.

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-10118

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 23, 1997

John and 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 May 6 in which you complained that the Division of State Police had failed to respond to your requests and appeals made under the Freedom of Information Law in a timely manner. You also asked whether the Department forwarded appeals to this office as required by §89(4)(a) of the Freedom of Information Law and asked for a response on the matter.

In this regard, the Division of State Police forwarded several items to the Committee during the time period to which you referred. They include a response to your appeal of February 15, which is dated February 25 and was received by this office on February 27. The other appeal to which you referred dated April 11 was forwarded to this office on April 28. In addition, the Division also sent a copy of an appeal of March 5 that was received by this office March 18.

With respect to the timeliness of responses, 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: Col. James A. Fitzgerald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10119

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 27, 1997

Mr. Clarence 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 Mr. Jones:

I have received your letter of May 8. You have asked that I "point [you] in the right direction" to obtain your arrest report.

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 to requests, and a request should be directed to that person at the agency that maintains the report in question. It appears that the arrest report would be maintained by the police department that made the arrest or the office of the district attorney that prosecuted.

Second, §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the record sought. Therefore, when making a request, you should include sufficient detail to enable agency staff to locate and identify the record.

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the record in which you are interested or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

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

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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-10120

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 27, 1997

Mr. Brian G. Nearing
Daily Gazette
1339 Central Avenue
Albany, NY 12205

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

Dear Mr. Nearing:

I have received your letter of May 7, as well as a variety of correspondence relating to your efforts in obtaining records from the Capital District OffTrack Betting Corporation ("OTB").

As I understand the matter, in brief, you have requested computer-generated records reflective of financial information pertaining to OTB, its operating expenses in several areas, and breakdowns regarding its budget. Despite your attempts to clarify the kinds of records in which you are interested, OTB's public information officer, Roger L. Dworsky, who also serves as Secretary and General Counsel, has offered a series of responses suggesting that he cannot determine what you are seeking. Your requests have been characterized as "ambiguous", and you wrote that he indicated that "a database is not a record." You have asked whether, in my view, OTB has complied with the Freedom of Information Law.

Having reviewed the materials, it appears that OTB has acted in a manner inconsistent with that statute. In this regard, I offer the following comments.

First, I agree with Mr. Dworsky's contention that the Freedom of Information Law pertains to existing records and that an agency is not required to create a record in response to a request [see Freedom of Information Law, §89(3)]. Therefore, if, for example, OTB does not possess a "list of all computerized spreadsheets and databases currently maintained by the corporation", it would not be required to prepare such a list on your behalf.

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

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

In my opinion, which differs from that of OTB's records access officer and its president, a database constitutes a "record" that falls within the coverage of the Freedom of Information Law. Some aspects of databases may be available to the public, while others might justifiably be withheld. Just as in the case of a lengthy compilation or report, the contents of those materials, not their length or the medium in which they are maintained, determine the extent to which they must be disclosed.

Further, 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)].

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, so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, I believe that an agency should follow the more reasonable and less costly and labor intensive course of action.

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:

> "The files are maintained in a computer format that Brownstone can employ directly into its system, which can be reproduced on computer tapes at minimal cost in a few hours time-a cost Brownstone agreed to assume (see, POL [section] 87[1] [b] [iii]). The DOB, apparently intending to discourage this and similar requests, agreed to provide the information only in hard copy, i.e., printed out on over a million sheets of paper, at a cost of $10,000 for the paper alone, which would take five or six weeks to complete. Brownstone would then have to reconvert the data into computer-usable form at a cost of hundreds of thousands of dollars.
>
> "Public Officers Law [section] 87(2) provides that, 'Each agency shall...make available for public inspection and copying all records...' Section 86(4) includes in its definition of 'record', computer tapes or discs. The policy underlying the FOIL is 'to insure maximum public access to government records' (Matter of Scott, Sardano & Pomerantz v. Records Access Officer, 65 N.Y.2d 294, 296-297, 491 N.Y.S.2d 289, 480 N.E.2d 1071). Under the circumstances presented herein, it is clear that both the statute and its underlying policy require that the DOB comply with Brownstone's reasonable request to have the information, presently maintained in computer language, transferred onto computer tapes" [166 Ad 2d, 294, 295 (1990)].

In 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 information sought is available under the Freedom of Information Law, and that the it can be transferred from the format in which it is maintained to a format in which you request it, I believe that OTB 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.

Third, among the issues in my view is the function of OTB's public information officer. By way of background, 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, 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."

If Mr. Dworsky does not have the technical knowledge to respond appropriately to your request, as part of his responsibility to assist you in identifying requested records, I believe that it is his duty to confer with those in the agency who possess the expertise to locate and provide you with the records in which you are interested.

In a related vein, §89(3) of the Freedom of Information Law provides that an applicant must "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 OTB'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. From my perspective, your requests have been quite precise. For instance, in your request of April 7, you sought "samples of computer-generated records" that include information "listed in the corporations's current schedule of operating expenses: advertising, computer services, insurance, maintenance, office expense, professional fees, retirement benefits, rental of buildings, repair of equipment, telephone and travel." It appears that you are seeking information based on the contents of records previously disclosed by OTB, and that, consequently, you have met the standard of reasonably describing the records. If Mr. Dworsky can not determine the nature of the information sought on the basis of your request, again, it is his responsibility, in my view, as records access officer, to confer with staff familiar with OTB's electronic information systems in order locate and extract the information that you are seeking.

Lastly, it was contended that you are requesting a copy of OTB's software, and that it is "custom software which is a proprietary program under copyright..." As I understand your requests, you are not seeking a duplicate of copyrighted software; rather, you are seeking information that can be generated by the software. If that is so, I do not believe that Mr. Dworsky's contention can serve as a valid basis for failing to disclose the information sought.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Davis M. Etkin
Roger L. Dworsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10121

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 27, 1997

Mr. Herman Myrick
92-B-0731
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. Myrick:

I have received your letter of May 5, which reached this office on May 12.

You have sought guidance concerning the procedure for requesting records from the Albany Police Department. You indicated that you made a request several months ago for copies of the property receipt prepared upon your arrest and a portion of a property log book indicating the property "allegedly taken from [you] upon arrest." Because you received no response, you sent a second request. Nevertheless, as of the date of your letter to this office, you have not receive any 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 the agency's responses 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 or forwarded the request to the records access officer, it is suggested that you renew your request and direct it to the records access officer. For your information, the person so designated by the City of Albany is the City Clerk, whose office is located at City Hall.

Second, I point out that §89(3) of the Freedom of Information Law states in part that an applicant must "reasonably describe" the records sought. Therefore, when making a request, an applicant

should include sufficient detail to enable agency staff to locate and identify the records.

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

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

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

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

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

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 does not appear that any of the grounds for denial would be applicable with respect to the kinds of records that you are seeking, for they pertain solely to you.

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-10122

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 27, 1997

Ms. Carolyn Schurr
General Counsel
Newsday
235 Pinelawn Road
Melville, NY 11747-4250

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

Dear Ms. Schurr:

I have received your correspondence of May 13 as well as related materials pertaining to a request made by Newsday for a document maintained by the New York City Police Department commonly known as the "homicide ledger." The ledger consists of a "compilation of the names, ages, and addresses and places of death of the homicide victims in New York City for 1995 and 1996."

Although the documentation at issue has been granted in the past, the Police Department's Records Access Officer denied access on the basis of "section 87(2)(g)(iii) as such records are inter-agency or intra-agency materials which are not final agency policy or determination." He also indicated that the documentation could be withheld under §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

From my perspective, the denial of the request is inappropriate. In this regard, I offer the following comments.

First, it appears that the denial as it refers to §87(2)(g) evidences a failure on the part of the Police Department to recognize or understand a decision rendered by the Court of Appeals in November concerning Police Department records. As you are aware, due to its structure, §87(2)(g), one of the grounds for denial, often requires disclosure. 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.

One of the contentions offered by New York City in the recent decision was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277)

The information sought clearly consists of factual data; that some of it may relate to investigations that have not yet been closed is irrelevant. As such, in my view, §87(2)(g) would not serve as a basis for a denial of access.

Lastly, I do not believe that disclosure of the minimal details regarding homicide victims could be characterized as an unwarranted invasion of personal privacy. As you pointed out in your appeal to Susan Petito, Special Counsel, case law indicates that the language of the privacy exception is intended to involve personal details pertaining to the living [Tri-State Publishing Company v. City of Port Jervis, 138 Misc. 2d 147, 523 NYS 2d 954, Supreme Court, Orange County (1988)]. In this instance, all of those identified are deceased. Notwithstanding that holding, the fact of one's death by means of a homicide would not in my view represent the kind of personal or intimate detail that could justifiably be withheld as an unwarranted invasion of personal privacy. Additionally, it is likely that information equivalent to that sought is contained in a variety of records maintained and disclosed by the Police Department.

In sum, I do not believe that the Department has the authority to withhold the documentation sought by Newsday. In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to attempt to resolve the matter without resort to litigation, copies of this response will be forwarded to officials of the Police Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Sgt. Louis Lombardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10123

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 28, 1997

Mr. Sidney G. Sloves
[redacted]

Dear Mr. Sloves:

I have received your letter of May 20. You referred to an appropriation made in last year's budget for the Second Precinct Police Community Council in Yonkers. The Council encourages local officials and members of the Yonkers Police Department to meet with residents to discuss community problems. Pursuant to the Freedom of Information Law, you have requested "an itemized accounting of how" the money is spent.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and it is not empowered to compel the disclosure of records. In short, this office does not maintain the information in which you are interested. Nevertheless, in an effort to assist you, 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, entities of state and local government fall within the coverage of the Freedom of Information Law; private, not-for-profit organizations do not.

Second, if the Council has a relationship with an agency, and if the agency maintains records concerning the Council or its expenditures, they would constitute agency records subject to

rights of access conferred by the Freedom of Information Law. Whether any agency possesses the kinds of records about the Council that you are seeking is unknown to me.

If you believe or know that an agency maintains records pertaining to the Council, a request should be directed to the agency's "records access officer." The records access officer has the duty of coordinating the agency's response to requests. When making a request, I note that §89(3) of the Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, I point out that the Freedom of Information Law pertains to existing records. Section 89(3) states in part that an agency is not required to create a record in response to a request. If, for example, there is no record consisting of an accounting of the Council's expenses, an agency would not be required to prepare an accounting on your behalf. Insofar as agency records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10125

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 29, 1997

Mr. Alphonse Kouaho Okossi
[redacted]

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

Dear Mr. Okossi:

I have received your letter of May 1, as well as related correspondence. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a request directed to the State University at Albany [SUNY] for copies of "records or portions thereof pertaining to all [your] foreign degree and transcripts prior to those of SUNY." You referred specifically to records prepared for the University of Ivory Coast that were submitted with your SUNY application. In a response to the request by Nancy L. Smith, Interim Associate Registrar, reference was made to the federal Family Educational Rights and Privacy Act (FERPA), and you were informed that under FERPA, "you have a right to view your student file and make notes from the information contained in your file, but you may not make copies of the materials contained in your file." Ms. Smith added that "FERPA provides a right to view, but not an automatic right to copies."

From my perspective, while FERPA may provide only the right to inspect the records in question, other statutes, specifically the New York Freedom of Information Law and the Personal Privacy Protection Law, require SUNY to provide copies upon payment of the requisite fee. In this regard, I offer the following comments.

By way of background, FERPA, in brief, 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." The federal regulations define the phrase "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 SUNY. 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. I note that the regulations promulgated by the U.S. Department of Education define the term "education record" broadly to include "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..." Based on the foregoing, insofar as SUNY maintains the records sought, I believe that they would constitute "education records" subject to rights conferred by FERPA.

I am in general agreement with Ms. Smith's statement that FERPA provides only a right to review records. Reference to copies of records appears in §99.10(d) of the federal regulations, which states that "The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records."

Separate from the FERPA is 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 definition, the materials that you requested, irrespective of their origin, would constitute agency records if they are maintained by SUNY.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 of access could be asserted to withhold the records from you. I note, too, that §89(2)(c)(iii) specifies that, unless there is a basis for withholding, an agency must disclose "when upon presenting reasonable proof if identity, a person seeks access to records pertaining to him."

Also relevant is the Personal Privacy Protection Law, which 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. As I understand your request, none of those exceptions would apply.

Lastly, when records are accessible under the Freedom of Information Law, §87(2) requires that they be made available for inspection and copying. Moreover, §89(3) requires that an agency prepare copies of records upon payment of the appropriate fee. Under §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy. Similarly, §95(1)(c) of the Personal Privacy Protection Law requires that copies of records be made available to data subjects in accordance with "the fee prescribed by section eighty-seven of this chapter", which is the Freedom of Information Law.

In sum, while FERPA does not appear to confer a right to obtain copies of the records that you have requested, I believe that the other statutes considered in the preceding commentary require that copies be made available to you upon payment of the proper fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy L. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10125

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 29, 1997

Mr. Alphonse Kouaho Okossi
[redacted]

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

Dear Mr. Okossi:

I have received your letter of May 1, as well as related correspondence. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a request directed to the State University at Albany [SUNY] for copies of "records or portions thereof pertaining to all [your] foreign degree and transcripts prior to those of SUNY." You referred specifically to records prepared for the University of Ivory Coast that were submitted with your SUNY application. In a response to the request by Nancy L. Smith, Interim Associate Registrar, reference was made to the federal Family Educational Rights and Privacy Act (FERPA), and you were informed that under FERPA, "you have a right to view your student file and make notes from the information contained in your file, but you may not make copies of the materials contained in your file." Ms. Smith added that "FERPA provides a right to view, but not an automatic right to copies."

From my perspective, while FERPA may provide only the right to inspect the records in question, other statutes, specifically the New York Freedom of Information Law and the Personal Privacy Protection Law, require SUNY to provide copies upon payment of the requisite fee. In this regard, I offer the following comments.

By way of background, FERPA, in brief, 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." The federal regulations define the phrase "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 SUNY. 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. I note that the regulations promulgated by the U.S. Department of Education define the term "education record" broadly to include "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..." Based on the foregoing, insofar as SUNY maintains the records sought, I believe that they would constitute "education records" subject to rights conferred by FERPA.

I am in general agreement with Ms. Smith's statement that FERPA provides only a right to review records. Reference to copies of records appears in §99.10(d) of the federal regulations, which states that "The educational agency or institution shall give the parent or eligible student a copy of the records if failure to do so would effectively prevent the parent or student from exercising the right to inspect and review the records."

Separate from the FERPA is 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 definition, the materials that you requested, irrespective of their origin, would constitute agency records if they are maintained by SUNY.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 of access could be asserted to withhold the records from you. I note, too, that §89(2)(c)(iii) specifies that, unless there is a basis for withholding, an agency must disclose "when upon presenting reasonable proof if identity, a person seeks access to records pertaining to him."

Also relevant is the Personal Privacy Protection Law, which 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. As I understand your request, none of those exceptions would apply.

Lastly, when records are accessible under the Freedom of Information Law, §87(2) requires that they be made available for inspection and copying. Moreover, §89(3) requires that an agency prepare copies of records upon payment of the appropriate fee. Under §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy. Similarly, §95(1)(c) of the Personal Privacy Protection Law requires that copies of records be made available to data subjects in accordance with "the fee prescribed by section eighty-seven of this chapter", which is the Freedom of Information Law.

In sum, while FERPA does not appear to confer a right to obtain copies of the records that you have requested, I believe that the other statutes considered in the preceding commentary require that copies be made available to you upon payment of the proper fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Nancy L. Smith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10126

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 29, 1997

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 May 12, as well as the correspondence attached to it. You have questioned the propriety of responses to requests for salary records by the Hilton Central School District.

In brief, having made a request in April for a list including the names, titles and salaries of teachers and administrators employed by the District, you were informed that the request "is currently being processed and will either be approved or denied in approximately 45 business days." When you requested essentially the same records in 1995, you received the same 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..."

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 "in approximately 45 business 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, 45 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 so long. 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).

When the kind of record that you are seeking is requested, I do not believe that there would be any valid reason for delaying disclosure for as long as 45 business days. As you may be aware, one of the few instances in which an agency is required by the Freedom of Information Law to maintain a particular record involves a payroll list. Specifically, §87(3)(b) states that "[e]ach agency shall maintain...a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Since the kind of record that you are seeking must exist on an ongoing basis and is clearly available to the public, again, there would appear to be no justification for such a delay in disclosure.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Donald C. Peck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10127

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

Mr. Fitzroy Wright
95-A-4419
Greenhaven Correctional Facility
Drawer B
Stormville, NY 12582

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

Dear Mr. Wright:

I have received your letter of May 9 concerning a request for records of the Westchester County Office of the District Attorney. According to your letter, the request was made on April 13, but as of the date of your letter to this office, you had received no response. You have sought assistance in the matter.

In this regard, 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 District Attorney is Richard E. Weill.

Since you referred to the case of Gould v. New York City Police Department [89 NY2d 267 (1996)] and the particular records referenced in that case, i.e., "DD5's", I note that agencies of government outside of New York City may maintain records that are not characterized in the same way as in that decision.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard E. Weill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10128

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

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:

I have received your letter of May 13.

Having submitted a request to the Records Access Officer for the Town of Greenburgh for copies of rules of procedures of the Planning Board, you received a telephone response in which you were advised that the Planning Department "had different procedures than the Town for FOIL requests." You were also advised that you were "welcome to visit the Planning Board Office at Greenburgh Town Hall, ask for the records, makes copies [your]self etc." You asked that the records be copied and mailed to you, and you have sought my views on the matter.

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 mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

In short, I do not believe that an agency may require you to visit its offices to obtain records. 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, as inferred earlier, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing board of a public corporation, the Town of Greenburgh, is the Town Board, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law applicable to all governmental units within Town government. In my view, there should be no separate procedures applicable to the Planning Board.

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 duty to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access Officer is responsible for assuring that agency personnel:

(1) Maintain an up-to-date subject matter list.
(2) Assist the requester in identifying requested records, if necessary.
(3) Upon locating the records, take one of the following actions:

(i) make records promptly available for inspection; or
(ii) deny access to the records in whole or in part and explain in writing the reasons therefor.

(4) Upon request for copies of records:

(i) make a copy available upon payment or offer to pay established fees, if any; or
(ii) permit the requester to copy those records.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: A. Williams, Records Access Officer
Town Board
Planning Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10129

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

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, unless otherwise indicated.

Dear Mr. Mayes:

I have received your letter of May 12 in which you sought assistance concerning the application of the Freedom of Information Law.

At issue is your request for a Form 990 that is required by the IRS to be prepared and maintained by not-for-profit corporations. In brief, you described a series of difficulties in obtaining copies of the Form 990 for certain years from the Hudson Headwaters Health Network.

In this regard, as you may be aware, the jurisdiction of the Committee on Open Government in terms of access to records pertains to the New York Freedom of Information Law. That statute is applicable 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 generally applies to records maintained by entities of state and local government.

Having reviewed our previous correspondence concerning the entity in question, it appears to be private. If that is so, if it is not a governmental entity, it would not be subject to the requirements of the Freedom of Information Law.

This is not to suggest that the forms in question should not be disclosed, for it is my understanding that IRS rules require not-for-profit corporations to disclose them. Nevertheless, such a disclosure requirement would be separate and distinct from the Freedom of Information Law; rather, it would be a requirement imposed by federal law that is beyond the jurisdiction of this office.

If you wish to contact the IRS, its "FOIA" office can be contacted at 1111 Constitution Avenue, NW, Washington, DC 20224 or by phone at (202) 622-6250.

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-10130

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

Mr. Peter Barbarisi
95-R-2544
Franklin Correctional Facility
Bare Hill Road
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. Barbarisi:

I have received your letter of May 6, which pertains to your lengthy and so far unsuccessful attempts to obtain certain records from the New York City Police Department. Having reviewed your correspondence, I offer the following comments.

First, throughout your requests, reference was made to 5 USCA §§552 and 552a. Those references pertain to the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The applicable statute under the circumstances is the New York Freedom of Information Law, Public Officers, Article 6.

Second, you requested the "Master Index Files pertaining to the...Alert Bulletin/Wanted Poster." In this regard, 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. I would conjecture that there is

no master index concerning the particular record to which you referred.

Lastly, the provision dealing with 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."

Based on the foregoing, I believe that an agency must respond in one of two ways within ten business days of its receipt of an appeal: it must either grant access to the records sought, or fully explain in writing the reasons for further denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10131

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

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 May 8. 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10132

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

May 30, 1997

Mr. Harold T. Shell
96-A-3042
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. Shell:

I have received your letters of May 10, May 21 and May 23, as well as a variety of related correspondence.

As requested, enclosed is a copy of the Committee's latest annual report.

You have sought assistance in obtaining records relating to your arrest from the Division of State Police, the City of Poughkeepsie Police Department and the Office of the Dutchess 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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Col. James A. Fitzgerald, Chief Inspector
D.J. Czaplicki, Administrative Sergeant
Records Access Officer, Dutchess County Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10133

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

Major Philip L. Cooper
[redacted]

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

Dear Major Cooper:

I have received your letter of May 15, as well as the correspondence attached to it. You have sought assistance in your efforts in obtaining information concerning the South Setauket Park District and its expenditures.

In this regard, having reviewed the materials, 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, insofar as an agency does not maintain records containing the information sought, it would not be obliged to prepare new records that contain that information. In the future, rather than seeking to elicit information by raising a series of questions, it is suggested that you request existing records.

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.

Third, while I am not an expert on the subject of park districts, it appears that the information in which you are interested, if it exists, must be disclosed. Park districts are

considered specifically in Chapter 205 of the Unconsolidated Laws, a copy of which is enclosed. They are corporate entities separate from the towns in which they are located, and they are governed by a board of park commissioners, which "shall have entire charge, control and management of the establishment, maintenance, operation and improvement of such park, and may employ such persons and expend such amounts of money as may be necessary... (see §9). In addition, §12 states that: "The board of park commissioners shall annually in each year file with the town board a detailed report of its receipts and expenditures, during the preceding calendar year, or in accordance with the accounting period of the town."

I hope that the preceding commentary and the enclosed material will be of use to you, 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-10134

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

R.G. Pratt, Town Historian
Town of Orwell
P.O. Box 23
Orwell, NY 13426

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

Dear Town Historian Pratt:

I have received your letter of May 15. You have sought guidance concerning a variety of issues relating to access to records.

The initial area of inquiry involves which records may be characterized as "confidential" or "restricted", and how those terms are defined. In this regard, enclosed is an excerpt from the latest annual report of the Committee on Open Government that focuses on the issue of confidentiality. In brief, it is our view that the term "confidential" pertains to those situations in which a statute, either an act of Congress or the State Legislature, forbids an agency from disclosing particular records. From my perspective, the situations in which a town is prohibited from disclosing are relatively rare.

There is no definition of the term "restricted." However, that term might be used to pertain to those situations in which there is no prohibition against disclosure, but where an agency has the authority to deny access to records. For instance, those aspects of a memorandum transmitted by a town supervisor to members of a town board in which he or she offers an opinion or a recommendation could be withheld, for they would consist of intra-agency material deniable under §87(2)(g) of the Freedom of Information Law. However, an agency could choose to disclose. Stated differently, the Freedom of Information Law is permissive; even though an agency may deny access to records in accordance with the grounds for denial appearing in §87(2) of the Law, it is not obliged to do so. Again, the only situation in which an agency could not disclose would involve the case in which a statute prohibits disclosure.

Birth and death records are generally confidential pursuant to §§4173 and 4174, respectively, of the Public Health Law. Marriage records are generally available under §19 of the Domestic Relations Law and the Freedom of Information Law. However, when they are sought for genealogical purposes, disclosures of birth and death records are permitted in accordance with rules issued by the Bureau of Vital Records at the State Department of Health. To obtain additional information on the matter, it is suggested that you confer with your town clerk or contact the Bureau of Vital Records, Department of Health, Empire State Plaza, Corning Tower, Albany, NY 12237 or by phone at (518) 474-3055.

I note 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."

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

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

Based on the foregoing, while the Freedom of Information Law includes virtually all entities of state and local government within its coverage, it excludes the courts. This is not to suggest, however, that court records are not public. On the contrary, other provisions of law often require that court records be disclosed. Justice court records, for example, are available under §2019-a of the Uniform Justice Court Act, unless a statute prohibits disclosure, i.e., when records have been sealed by the court.

Since you referred to library records, while most public library records must be disclosed, I point out that a statute dealing directly with records pertaining to library users requires that those records be confidential. Specifically, §4509 of the Civil Practice Law and Rules states that:

> "Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database

> searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute."

Lastly, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, unless a different fee is authorized by statute, an agency can charge up to twenty-five cents per photocopy or the actual cost of reproducing other records (i.e., those records that cannot be photocopied, such as tape recordings, computer disks, etc.); no fee may be charged for inspection of or search for records. One area in which a different fee is prescribed by statute involves genealogical searches. As indicated earlier, the provisions of the Public Health Law deal 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 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-10135

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

Mr. Thomas Grieco
[redacted]

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

Dear Mr. Grieco:

I have received your letter of May 11, as well as the correspondence attached to it. You have asked that I "inform the Oneida County Sheriff's Department of their rights and responsibilities regarding [your] request" for records. The request involves records of complaints made by a particular person that are no longer under investigation.

In this regard, I offer the following comments, and copies will be sent to Oneida County officials.

First, when the Freedom of Information Law 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.

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.

Second, insofar as a request reasonably describes the 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.

In the context of your request, it appears that §87(2)(b) is most pertinent. That provision permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." If, for example, the person in question made a complaint pertaining to a particular individual and the complaint was found to be without merit, I believe that those portions of the complaint identifying the person who is the subject of the complaint could be deleted to protect that person's privacy. The remainder, however, i.e., the portion identifying the person who made the complaint, as well as the substance of the complaint, would in my opinion typically be available.

An additional possibility would involve a situation in which a person is charged with a crime and the charge is later dismissed in favor of the accused. In that event, records pertaining to the incident, including the record of the complaint, would generally be sealed pursuant to the provisions of §160.50 of the Criminal Procedure Law and, therefore, exempt from disclosure under §87(2)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Laura Lyndaker
Sgt. Jetta Utesch

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10136

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

Mr. Ronald G. Brown, Jr.
95-B-2233
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open 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 12. You have sought assistance in your efforts in obtaining records from the Woodhull Fire Department relating to an investigation of a fire.

In this regard, one of the records that you requested is a "DD5." Please note that that term is used by the New York City Police Department. I do not believe that it is used by other agencies. Nevertheless, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the record in which you are interested or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

The last relevant ground for denial is §87(2)(g). The cited provision permits an agency to withhold records that:

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

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

for denial applies. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

Records prepared by employees of an agency and communicated within the agency or to another agency would in my view fall within the scope of §87(2)(g). Those records might include opinions or recommendations, for example, that could be withheld.

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: Records Access Officer, Town of Woodhull

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10137

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

Mr. Carlos Davila
88-A-0096
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Davila:

I have received your letter of May 12. You have sought assistance concerning your efforts in obtaining records under the Freedom of Information Law from the Chief Clerk of the Bronx County Supreme Court.

In this regard, I note 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."

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

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

Based on the foregoing, while the Freedom of Information Law generally includes entities of state and local government within its coverage, it excludes the courts. This is not to suggest, however, that court records are not public. On the contrary, other provisions of law often require that court records be disclosed

(see e.g., Judiciary Law § 255). It is suggested that you resubmit your request, citing an applicable provision of law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10138

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 2, 1997

Mr. Joseph Poole
94-A-3690
Fishkill Correctional Facility
P.O. 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. Poole:

I have received your letter of May 9. You have described a series of delays in your efforts in obtaining records from the Office of the New York County District Attorney, 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 and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Galperin
A. Turkel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10139

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 3, 1997

Mr. Rafael Robles
[redacted]

The staff of the Committee on Open 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 May 14. You wrote that your cousin, who testified against you in 1988, recently died of AIDS, and you asked whether you may obtain records pertaining to him from the New York State Department of Health.

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

Assuming that you are interested in obtaining medical information pertaining to your cousin, it is likely in my view that the Department could deny access. One of the grounds for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." Section 18 of the Public Health Law provides rights of access to patient information to "qualified persons", but prohibits disclosure to others. As I understand §18, you would not be a qualified person. Additionally, there are regulations that indicate that records pertaining to those who contracted AIDS are confidential, except under 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-10140

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 3, 1997

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:

I have received your letter of May 13. You have sought assistance in relation to a request made under the Freedom of Information Law on December 4 to the Office of the Kings County District Attorney. Although the receipt of the request was acknowledged on December 10 by the Records Access Officer, Yuriy Kogan, there was no estimate indicating when the request would be granted or 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..."

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.

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 note that one aspect of your request involves a "subject matter index listing of all records...relating to" you and your case. In my view, there is no requirement that such an index exist or be prepared. It appears that you alluded to §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, in my opinion, must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. There is no requirement that a subject matter list be prepared with respect to records pertaining to a single individual.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Yuriy Kogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10141

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 3, 1997

Mr. Mario Napolitano
[redacted]

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

Dear Mr. Napolitano:

I have received your letter of May 18. You have asked whether the Freedom of Information Law provides you with rights of access to records maintained by your attorney.

In this regard, 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 includes records maintained by entities of state and local government within its coverage. It does not include records of private companies or private attorneys within its scope.

If you continue to meet with resistance, it is suggested that you contact the Grievance Committee for the Appellate Division, Second Judicial Department, 45 Monroe Place, Brooklyn, NY 11201. That office can be reached by phone at 875-1300.

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10142

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 3, 1997

Mr. Darrell James
94-A-8579
3622 Wende Road
Alden, NY 14004

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

Dear Mr. James:

I have received your letter of May 13. You have sought guidance concerning a delay in response to your request for records sent to the New York City Civilian Complaint Review Board.

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-10143

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 4, 1997

Mr. Timothy G. Johnson
[redacted]

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

Dear Mr. Johnson:

I have received your letter of May 8, which reached this office on May 19. You have asked that I write to Charles A. Winters, the Records Appeals Officer for the Newburgh Enlarged City School District, concerning a denial of your request for certain records.

In this regard, although this response will be sent to you, a copy will be directed to Mr. Winters. I note that while advisory opinions rendered by the office are not binding, it is my hope that they are educational and persuasive.

By way of background, your son was allegedly assaulted by a teacher employed by the District more than a year ago. The teacher has been suspended pending the outcome of a disciplinary proceeding brought under §3020-a of the Education Law. In addition, the teacher was charged with assault, but you wrote that he was acquitted. Due to his acquittal, both the president of the teachers' union and the teacher's attorney addressed letters to the Board of Education asking that the 3020-a proceeding be dropped. Your request for those letters was denied because the proceeding has not yet resulted in a determination and disclosure, therefore, would constitute "an unwarranted invasion of personal privacy."

In more typical circumstances involving disciplinary proceedings, I would agree with the District's position. However, in view of the disclosures that have been made and the publicity that has been generated, a blanket denial of access to the letters in question appears to be inappropriate.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of

an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial, §87(2)(b), the provision to which District officials alluded, indicates that an agency may withhold records to the extent that 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, 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, as well as 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)].

Similarly, District records identifiable to your child ordinarily must be withheld from the public. 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 by an educational agency.

Nevertheless, the news articles forwarded with your letter identify your son and the teacher, as well as a variety of details

relating to the incident. In usual circumstances, neither of the names or the details of the event would be disclosed in relation to a 3020-a proceeding. Because of these special facts and the reality that a great deal of information pertaining to the situation has been disclosed to the public, I believe that the District's denial of access fails to consider the reality of the matter and that the letters must be disclosed, at least in part.

In view of prior disclosures regarding the event, to comply with the Freedom of Information Law, I believe that the District is required to review the records in question to determine which portions might, if disclosed, constitute an unwarranted invasion of personal privacy. If, for example, a letter suggests that the teacher has suffered enough and that charges should be dropped, that alone would not add anything new or intimate to the information that has already been publicly disclosed. That kind of commentary, in my view, must be made available. On the other hand, if, for instance, a portion of a letter indicates that the teacher has suffered a mental breakdown, is seeing a psychiatrist, and that his wife has left him, those kinds of details would, in my opinion, be intimate and could be withheld. However, from my perspective, the remainder of the record, the portions that are not intimate or which do not essentially reiterate information that is known to the public, must be disclosed.

I note that in a recent decision rendered by the State's highest court, although the records sought were different from those at issue here and the agency cited a different exception, the court rejected the agency's blanket use of an exception and determined that the agency was required to review the records sought, in their entirety, to determine which portions, if any, could justifiablity be withheld in accordance with the grounds for denial [see Gould v. New York City Police Department, 89 NY 2d 267 (1996)]. In view of the facts of the matter, I believe that the District is required to engage in the same kind of review.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles A. Winters

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10144

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 5, 1997

Mrs. John A. Henry
[redacted]

The staff of the Committee on 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. Henry:

I have received your letter of May 15 in which you sought assistance in obtaining records from the Manhasset Lakeville Water District.

You wrote that you have requested a variety of records on behalf of your husband concerning his employment with the District. However, you indicated that you have faced a series of delays, incomplete responses to requests, and errors in the contents of the records. You also asserted that the errors are resulting in ineligibility on the part of your husband for retirement benefits and that the District has refused access to most of the records, "claiming that [you] do not need them."

In this regard, I offer the following comments.

First, an applicant's need for records is generally irrelevant. It has been held that when records are accessible under the Freedom of Information Law, they must be made available, irrespective of one's need, status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY2d 75 (1984)].

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 records in which you are interested include time sheets, those indicating his earnings and use of personal and sick leave, as well as the accrual of overtime. In addition, you are interested in obtaining correspondence relating to your husband's entitlement to retirement benefits between the District and the State Retirement System.

From my perspective, based upon the language of the Freedom of Information Law and its judicial interpretation, the kinds of records to which you referred must be disclosed.

With respect to time and attendance records, as well as payroll records, pertinent is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In brief, the courts have found that those kinds of records are relevant to the performance of one's official duties and that, therefore, disclosure would constitute a permissible, rather than an unwarranted invasion of personal privacy. Consequently, such records have been found to available to any person. In the context

of your requests, privacy is not an issue, for your husband is essentially requesting records pertaining to himself, or you are requesting records on his behalf. In short, an individual cannot engage in an unwarranted invasion of his or her own privacy.

Also significant to an analysis of rights of access is §87(2)(g), which permits an agency to withhold records that:

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

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

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

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In that case, the Appellate Division found that:

> "One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for

> work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

Based on the foregoing, it is clear that time and attendance records, including references to the use or accrual of personal, sick or vacation leave must be disclosed.

With regard to payroll information, one of the few instances in the Freedom of Information Law in which an agency is required to maintain a particular record involves §87(3)(b), which states that "Each agency shall maintain...a records setting forth the name, public office address, title and salary of every officer or employee of the agency..." As such, salary records pertaining to public employees are clearly available. Further, it has been determined that those aspects of employee records indicating gross wages, as on a W-2 form, must be disclosed (Day v. Town Board of Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

In short, the statistical and factual information at issue, based on the language of the Freedom of Information Law and its judicial interpretation, must be disclosed.

The only area in which the District might have the ability to deny access would involve correspondence between the District and the Employees Retirement System. Those kinds of records would consist of inter-agency materials. As stated earlier, those portions of such records reflective of opinion, advice, recommendation and the like could be withheld by the District.

Nevertheless, I believe that the same records would be available from the Retirement System pursuant to a different provision of law that does not apply to the District or other entities of local government but which requires certain disclosures by state agencies. The Personal Privacy Protection Law deals with the disclosure of records or personal information maintained 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 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, with certain exceptions, a data subject has rights of access to records about himself or herself that are maintained by a state agency. As I understand the matter, insofar as the Retirement System maintains records pertaining to your husband, they would be available to him from the Retirement System, for none of the exceptions would apply.

As you requested, copies of this opinion will be forwarded to the officials identified in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Elvira Klupt
Francis Gould
Dana S. Riell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10145

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 5, 1997

Mr. John W. Kane
[redacted]

Dear Mr. Kane:

I have received your letter of May 16 and the correspondence attached to it. Having reviewed the materials, I am not sure that I understand why you are seeking an opinion.

The matter pertains to your request for "County Ethics Board records as to how many meetings were held by the ethics board, for the years of 1996 and 1997. Also how many of these meetings had a quorum." You were apparently advised by the Fulton County Records Access and Appeals Officers that the County does not have the records sought, and it was suggested that you contact the Ethics Board directly.

In this regard, 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. I would conjecture that there is no particular record that indicates how many meetings the Ethics Board held or were attended by a quorum. If that is so, the Board would not be required to prepare tabulations or a new record containing the information sought on your behalf.

Rather than seeking the information in the form in which it was requested, it is suggested that you ask to review minutes of the meetings of the Ethics Board. Such a review will enable you to know the number of meetings held within a certain period and when a quorum was present.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Joseph Salamack
Jon Stead

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10146

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 9, 1997

Mr. Philip Christe
[redacted]

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

Dear Mr. Christe:

I have received your letter of May 21 and related materials. You have sought assistance in obtaining copies of "handouts" provided to students "by various outside groups" at the Fox Lane High School on "Respect Day." You asked that the Principal set aside one copy of each handout made available to students, and he indicated that he would forward "any materials left over after the day." You have asked whether "this [is] a fair response..."

From my perspective, the response appears to be "fair." If I understand the situation accurately, people from organizations that are in no way affiliated with the High School or the Bedford Central School District are given an opportunity to distribute informational materials to students during Respect Day. The materials likely never come into the custody of District officials and are intended to be distributed to students at that event, not to the community at large. If that is so, it is questionable whether the handouts would constitute agency records that fall within the coverage of the Freedom of Information Law.

I would conjecture that there may be other events or opportunities during which the general public could acquire the materials from those organizations, or that the materials could be obtained on request directly from them. Further, having participated in many gatherings in which handouts are available, it is my experience that they are distributed on a "first come, first served" basis. It is possible that some organizations might have run out of the materials brought for Respect Day. In that case, some students might not have had the opportunity to obtain them. Again, it is likely nonetheless that the same materials may be obtained following the event from an organization.

In short, in my view, the Principal's response does not appear to be unreasonable.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Deborah Timberlake
Richard M. Kraemer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1014?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 9, 1997

Mr. Kevin Kulesa
[redacted]

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

Dear Mr. Kulesa:

I have received your letter of May 18, as well as the materials attached to it. You have sought guidance concerning the denial of series of requests directed to Oneida County focusing on the Sheriff's Department. You expressed the belief that the records have been withheld "due to [your] pending litigation with the County of Oneida."

From my perspective, the pendency of litigation has no effect upon your rights under the Freedom of Information Law. Further, insofar as the records sought exist, I believe that they must be made available in great measure, if not in their entirety. 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, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency, except in specified circumstances, is not required to create record in response to a request.

Third, when a request is made for 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.

Except in unusual circumstances, accident reports prepared by law enforcement agencies are in my opinion available under both the Freedom of Information Law and §66-a of the Public Officers Law. Section 66-a states that:

> "Notwithstanding any inconsistent provisions of law, general, special of local or any limitation contained in the provision of any city charter, all reports and records of any accident, kept or maintained by the state police or by the police department or force of

> any county, city, town, village or other district of the state, shall be open to the inspection of any person having an interest therein, or of such person's attorney or agent, even though the state or a municipal corporation or other subdivision thereof may have been involved in the accident; except that the authorities having custody of such reports or records may prescribe reasonable rules and regulations in regard to the time and manner of such inspection, and may withhold from inspection any reports or records the disclosure of which would interfere with the investigation or involved in or connected with the accident."

The Freedom of Information Law is consistent with the language quoted above, for while accident reports are generally available, §87(2)(e)(i) of that statute provides that records compiled for law enforcement purposes may be withheld to the extent that disclosure would "interfere with law enforcement investigations or judicial proceedings." Further, the Court of Appeals has held that a right of access to accident reports "is not contingent upon the showing of some cognizable interest other than that inhering in being a member of the public" [Scott, Sardano & Pomeranz v. Records Access Officer, 65 NY 2d 294, 491 NYS 2d 289, 291 (1985)]. Therefore, unless disclosure would interfere with a criminal investigation, an accident report would be available to any person, including one who had no involvement in an accident.

Many of the remaining records sought involve budget appropriations, sales of vehicles, expenditures, transfers of funds and similar documentation concerning fiscal matters of the Sheriff's Department. Although one of the grounds for denial is pertinent, due to its structure, it often requires broad 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. Since the documentation at issue would consist of statistical or factual information, I believe that it would be available, unless some other basis for denial could justifiably be asserted.

The remaining documentation relates to employees of the Sheriff's Department, including their names and salaries, as well as the identities of those who are assigned vehicles that can be taken home daily. Of relevance with respect to those items 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.

If a vehicle is assigned to an individual, presumably the assignment is made in order to enable that person to carry out his or her official duties. Further, if the employee is authorized to take the vehicle to his or her residence, in my opinion, disclosure of records reflective of the assignment of vehicles would not represent personal information or information which would in any way jeopardize the safety of the employee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: A. Sandra Caruso, County Clerk
Oneida County Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10148

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 10, 1997

Mr. Aramis Fournier, Jr.
96-B-0805
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. Fournier:

I have received your recent letter, which reached this office on May 21. You referred an opinion prepared at your request on May 13 but complained that agencies have ignored 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)].

I note that the Freedom of Information Law excludes the courts and court records from its coverage. Nevertheless, court records are frequently available under other provisions of law (see e.g., Judiciary Law, §255). Therefore, when seeking records from a court, it is suggested that you do so by 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-10149

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 10, 1997

Mr. George M. Walsh
The Daily Gazette
2345 Maxon Road
Schenectady, NY 12308

The staff of the Committee 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 recent letter, as well as a variety of related materials. You have sought an advisory opinion concerning a denial of access by the City of Schenectady to records identifying City police officers involved in what is characterized by Mayor Albert P. Jurczynski as "an off-duty egg-throwing incident."

By way of background, a news article by a member of your staff indicates that a "late-night altercation between a busload of bachelor-partying police and two people in a car has resulted in seven officers being suspended without pay and 11 more receiving less-severe punishments." The article specifies that there was no violence and that no complaints were made against the officers involved. In response to an appeal by both the Gazette and the Albany Times-Union, the Mayor wrote that "[a]ll of the discipline was agreed to by the officers, and was conditioned upon their making restitution to the parties involved." He added that the "men involved claim a statutory right to confidentiality under the Civil Rights Law (section 50-a)", and that "[t]here is also a claim by them that disclosure would be an unwarranted invasion of privacy, and further that the requested material is intra-agency and therefore not subject to mandatory disclosure." Additionally, one of the articles states that the Chief of Police "agreed not to reveal" the names of the officers "if everyone involved came forward."

From my perspective, the names of the eighteen officers involved in the incident, all of whom came forward and agreed to accept a penalty, as well as the nature of the penalties imposed

upon them individually, must be disclosed. I am mindful of §50-a of the Civil Rights Law. However, there is no judicial decision of which I am aware in which records identifying public employees who have been disciplined have been found to be confidential. On the contrary, there are several decisions that have required public disclosure. In this regard, I offer the following comments.

It is noted initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial, each of which was referenced in response to your appeal, is 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)].

As I understand the matter, your request is not connected in any way to litigation and you do not intend to you use the records sought in any litigation context. Rather, in view of the functions of the Gazette, the purpose of the request appears to involve an effort to inform the public concerning an issue that has attracted substantial public attention. Moreover, the records at issue do not deal with unsubstantiated allegations or complaints, for each of the eighteen officers has come forward, admitted his role in the incident and accepted a punishment. The facts surrounding the incident have been widely publicized and, in my opinion, particularly in view of the nature of the incident and the disclosures that have already been made, records identifying the officers and the penalties imposed could not be characterized as "sensitive" or in any way intimate. In short, §50-a of the Civil Rights Law, according to its legislative history and judicial interpretation, does not apper to apply to the kind of request that you have made.

Also relevant to an analysis of the ability to withhold the information sought 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 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 and to which the Mayor alluded, §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, it is emphasized 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 the decisions cited above, Powhida, Farrell and Scaccia involved police officers, and in each case, the names of the officers were determined to be public.

With respect to the agreement by the Chief of Police with the eighteen officers to withhold their names, 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 more recent 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).

In the context of the situation at issue, I believe that the outcome, the admission by the officers of their role in the incident and their acceptance of discipline, is essentially reflective of a settlement between the City and certain employees. It is my understanding that disciplinary action can be imposed only

after charges have been made, a hearing held and a determination indicating a finding of misconduct has been rendered, i.e., as in a proceeding conducted pursuant to §75 of the Civil Service, or, as in this case, when in lieu of the initiation of charges and a formal disciplinary proceeding, a public employee agrees to some sort of sanction, penalty or punishment. As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding.

The same decision 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 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).

In contrast, 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. As stated earlier, the records in this instance do not involve mere

allegations. The facts of the matter are undisputed, admissions have been made, and disciplinary action has been or will be taken.

Pertinent in view of the number of officers involved, eighteen, is one of the first decisions rendered under the Freedom of Information Law, a case cited earlier, which dealt specifically with reprimands of three police officers. In that holding, the Court concluded that:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant—to the ordinary work of the—municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured" (Farrell, supra, 908-909).

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, it is my opinion that those portions of records indicating the names of the officers involved in the incident and the nature of disciplinary action or sanction imposed against them must be disclosed.

In an effort to encourage disclosure in a manner consistent with judicial decisions and an attempt to obviate the need for litigation, a copy of this opinion will be forwarded to Mayor Jurczynski.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Albert P. Jurczynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10150

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 11, 1997

Ms. Eve Burton
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.

Dear Ms. Burton:

I have received your letter of May 23, as well as the correspondence related to it. You have sought an advisory opinion in your capacity as Assistant General Counsel to the Daily News concerning a denial of access to "certain information about gun license holders."

By way of background, you indicated that your client several months ago requested and obtained a "hard copy" of license information that included licensees' names, addresses, zip codes, and type of gun held. In response to a recent request, however, you were informed that the New York City Police Department had "reconsidered" its position "in light of the exemptions contained in the Freedom of Information Law" and would not disclose the street addresses of licensees. Susan Petito, Special Counsel to the Department, wrote that "[t]here is a potentially profound danger to the life or safety of pistol license holders, and their families and associates, where their street addresses become known, placing this information well within the exemption provided in Freedom of Information Law section 87(2)(f)." She also contended that disclosure of street addresses would constitute "an unwarranted invasion of personal privacy as exempted by Section 87(2)(b)." When you questioned the change in the Department's practice concerning disclosure, you were informed by Deputy Police Commissioner George Grasso that it is the Department's belief that §400.00(5) of the Penal Law, which requires the disclosure of a licensee's address, is, in your words, "satisfied by the production of the licensee's town and zip code only."

From my perspective, the Department's position is contrary to law, it represents a failure to recognize a decision rendered by the Court of Appeals in which it was involved, and it evidences a refusal to give effect to clear and unequivocal statutory language. In this regard, I offer the following comments.

First, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity of any party to records."

Stated differently, when records are available as of right under some other provision of law or by means of judicial interpretation, they remain available, notwithstanding the provisions of the Freedom of Information Law. In the context of your inquiry, a statute other than the Freedom of Information Law clearly requires that the addresses of licensees must be disclosed. Specifically, subdivision (5) of §400.00 of the Penal Law, entitled "Filing of Approved Applications", was, as you are aware, recently amended. Until November 1 of 1994, §400.00(5) stated in part that: "The application for any license, if granted, shall be a public record." 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." Because the statute quoted above requires the disclosure of the names and addresses of licensees, nothing in the Freedom of Information Law may be cited to withhold that information.

I point out that the argument offered by Ms. Petito that certain exceptions to rights of access, notably paragraph (f) of §87(2) of the Freedom of Information Law, was raised by the Police Department years ago and was rejected by the Court of Appeals. In the dissent in Kwitny v. McGuire [53 NY2d 968 (1981)], it was suggested that §87(2)(f) might properly be asserted to enable agencies to withhold certain aspects of approved pistol license applications. In fact, the dissent referred to an advisory opinion that I prepared in which the potential danger to gun license holders was recognized but in which it was advised that the information must nonetheless be disclosed, absent "amendatory legislation" (id. at 970). The majority, however, construed the statute as I did then and continue to view it, stating that the information in question is available, and "[w]hether as a matter of sound policy, disclosure of the contents of applications should be restricted is a matter of consideration or resolution by the Legislature (id. at 969).

As indicated above, the State Legislature did indeed amend §400.00(5). However, it did not in any way limit the disclosure of the names and addresses of the holders of gun licenses. In short, the Police Department made the same argument sixteen years ago that it is making now, and that argument must, in my view, fail for the same reason that it was rejected then by the State's highest court.

Second, with respect to the issue of the "address", the Court of Appeals has held that "statutory language should be interpreted consistent with 'its natural and most obvious' meaning" [Russo v. Nassau Community College, 81 NY2d 690, 698 (1993); see also Westchester Rockland Newspapers v. Kimball, 50 NY2d 575, 581 (1980)]. According to Black's Law Dictionary, an address is "the place where mail or other communications will reach person." In Webster's Seventh New Collegiate Dictionary, an address is "a place where a person or organization may be communicated with." In New York City, an attempt to reach an individual by means of a zip code will not serve to accomplish the goal of delivery. In short, an "address" must, according to the natural and obvious meaning of that term, mean a street address and not only a zip code.

In an effort to enhance compliance with law, copies of this opinion will be forwarded to Ms. Petito and Mr. Grasso.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito, Special Counsel
George Grasso, Deputy Police Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2765
FOIL-AO-10151

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 11, 1997

Mr. Robert Algmin
[redacted]

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

Dear Mr. Algmin:

I have received your letter of May 21 and the materials attached to it. You have asked that I review them due to your "desire for open government."

The documentation focuses on the possibility that the Rockland Community College Board of Trustees would vote to buy out the contract of its president. Although the Board eventually determined not to do so, as it considered the matter, a newspaper reported that a clause in a buyout agreement would prohibit the president from discussing College matters. Similarly, neither College officials or the president would indicate why his contract would not be renewed. Another news article stated that an assistant County attorney asserted that "he could not say who in the County Attorney's Office had handled the matter."

In this regard, I offer the following comments.

First, I know of no law that would require any of the parties involved to discuss the matter openly or in detail. In short, there is no requirement that present or former government officials talk to the news media or others. Nevertheless, an agreement not to speak to the public or the news media in no way limits public rights of access to records under the Freedom of Information Law. If there had been a buyout agreement, I believe that it would clearly have been available under that statute, notwithstanding an agreement not to discuss its contents [see e.g., Paul Smith's College of Arts and Science v. Cuomo, 186 AD2d 888 (1992)].

Second, assuming that a County record identifies who in the County Attorney's Office handled the matter, that portion of such a record would in my view be available. Again, there would be no

requirement that any official must speak; nevertheless, there would be an obligation to disclose under the Freedom of Information Law. Insofar as any such record includes legal advice, opinions or other kinds of communications that would fall within the scope of the attorney-client privilege, I believe that it may be withheld. However, it has been held that records reflective of descriptions of legal services rendered, as opposed to "the content of the communications", must ordinarily be disclosed [Orange County Publications v. County of Orange, 637 NYS 2d 596 (1995)]. From my perspective, while legal advice or opinions offered by persons in the County Attorney's Office could clearly be withheld, the identity of those who offered the advice, who "handled the matter", would be public.

Lastly, it appears that the Board of Trustees had the ability to discuss the issues pertaining to the president in private. Section 105(1)(f) of the Open Meetings Law permits a public body to conduct an executive session to discuss:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10152

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 12, 1997

Mr. Alan Kassebaum
95-A-4619
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733

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

Dear Mr. Kassebaum:

I have received your letter of May 20 in which you referred to a request directed to the Office of the New York County District Attorney. You were informed almost a year ago that the request was assigned to a new records access officer but that, to date, your request has neither been granted nor denied. You have asked whether:

> "...the exhaustion requirement [has] been met for judicial review, or must I first appeal to the designated appeals officer (construed denied, 21 NYCRR §1401.5[d]), or alternatively, to the agency head (failure to respond, FOIL-AO-4179 [1986])?"

In this regard, §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.

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 an agency fails to acknowledge the receipt of the request within five business days, acknowledges the receipt of the request but fails to include an estimate indicating when it would grant or deny the request, or if the estimate is unreasonable in view of the facts and circumstances, I believe that the request may be considered to have been constructively denied. When that is so, a person may appeal the denial in accordance with §89(4)(a), which states that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10153

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 12, 1997

Mr. Peter Lacella
96-A-0884
Bare Hill Correctional Facility
Box 20, Cady Road
Malone, NY 12953

Dear Mr. Lacella:

I have received your letter of June 6, in which you appear to have appealed to the Committee on Open Government regarding a request for records of the Department of Correctional Services. The appeal involves your ability to inspect the records and the fees that may be charged.

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 pertaining to the right to appeal a denial of access to records is §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

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

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

You referred to provisions of 5 U.S.C. §552 in your letter. That statute is the federal Freedom of Information Act, which has no application in your circumstance. The federal Act pertains only

to records maintained by federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

Under the Freedom of Information Law, when a record is accessible to the public, an applicant may inspect the record free of charge. However, if portions of a record may be withheld in accordance with one or more of the grounds for denial appearing in §87(2), I believe that an agency could provide a copy from which deletions would be made and charge a fee for the photocopy.

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-10154

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 12, 1997

Mr. Kevin Smith
87-A-9373
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. Smith:

I have received your letter of May 21 in which you complained that the Office of the Kings County District Attorney and the New York City Police Department have failed to respond to your requests 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Virginia Modest
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10155

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 13, 1997

Mr. George O'Donnell
[redacted]

The staff of the Committee on Open 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'Donnell:

I have received your letters of May 24, May 28, and the materials attached to them. In brief, the issues involve the limitations within which a New York City agency must respond to requests and appeals under the Freedom of Information Law. You indicated that the New York City Police Department informed you that this office "has consented or agreed to [a] 120 response period that the Police Department considers reasonable after an acknowledgement of a request."

In this regard, I offer the following comments.

First, as you are aware, §89(3) of the Freedom of Information Law requires that an agency respond to a request within five business days of the receipt of a request. If more than five business days is needed to locate or review records, the agency must acknowledge the receipt of the request and provide "a statement of the approximate date when such request will be granted or denied..." The Committee on Open Government, by means of regulations promulgated in 1978 pursuant to §89(1)(b)(iii) of the Public Officers Law, sought to insure timeliness of response by requiring agencies to grant or deny access to records within ten business days of the acknowledgement of the receipt of a request [21 NYCRR 1401.5(d)]. However, the court in Lecker 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 respect to New York City agencies, the "Uniform Rules and Regulations Pertaining to the Administration of the Freedom of Information Law" promulgated by Mayor Koch that became effective in 1979, and which were 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 has been acknowledged.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request

> and a statement of the approximate date when such request will be granted or denied..."

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

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

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

Second, in 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 120 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, 120 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 so long a time. In a case in which it was found that a New York City 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, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito
Sgt. Louis Lombardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10156

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 13, 1997

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 May 22 and the correspondence attached to it. The matter involves the Akron Central School District, and you questioned whether a letter prepared by the Superintendent and addressed to District employees "is illegal because he has obviously determined which of his employees have and have not voted" on a recent budget proposal.

In short, I believe that school district voting records that indicate those who voted during a given election are public. Consequently, any person could determine which School District employees who are residents of the District voted or refrained from voting during a given election. Therefore, in my view, there would be nothing "illegal" about the letter.

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-10157

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 13, 1997

Mr. Jose Aramis Fournier
[redacted]

The staff of the Committee on Open 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 May 6, which reached this office on May 27. Your letter consists of a complaint concerning your request for records pertaining to your son maintained by the Lakeside Group Home "for violations of Freedom of Information Law improprieties."

The correspondence attached to your letter refers to the facility in connection with "DFY." Assuming that Lakeside Group Home is a facility of the Division for Youth, it would appear that the records in question would be confidential. Section 501-c of the Executive Law governs access to and the confidentiality of records maintained by the Division for Youth pertaining to youths. That provision states in relevant part that:

> "Records or files of youths kept by the division for youth shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination by any person other than one authorized to receive such knowledge or to make such inspection or examination: (i) by the division pursuant to its regulations; (ii) or by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court; or (iii) by a federal court judge or magistrate, a justice of the supreme court, a judge of the county court or family court, or a grand jury. No person shall divulge the information thus obtained without authorization to do so by the

division, or by such justice, judge or grand jury."

To seek additional information on the matter, it is suggested that you contact the records access officer for the Division for Youth at Capital View Office Park, 52 Washington Street, Rensselaer, NY 12144-2735.

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-1015 8

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Mr. Damion Saulters
96-B-0879
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. Saulters:

I have received your letters of May 21 and May 22. You have sought advice concerning how you might obtain the "sealed file" of your co-defendant.

In this regard, I believe that records are generally sealed in conjunction with a statutory provision that authorizes or requires that they be sealed. In the context of your inquiry, it would appear that the records in question were sealed pursuant to §160.50 of the Criminal Procedure Law. In brief, when charges against an accused are dismissed in that person's favor, the charges and other records relating to the matter typically are sealed in accordance with that statute.

When records are sealed pursuant to §160.50 of the Criminal Procedure or some other statute, the Freedom of Information Law would not serve as a means of gaining access. The first ground for denial in that law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." Further, I know of no law that would provide an individual with the right to gain access to the sealed records of a co-defendant.

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-10159

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Mr. James Edwards
87-T-1630
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. Edwards:

I have received your letter of May 19, as well as the correspondence attached to it. You asked that I treat your letter as your "appeal from a determination of the District Attorney of Nassau County", and that I "rule accordingly." In brief, you requested certain trial exhibits, and following a series of communications, you were informed that "all efforts to locate the file pertaining to your case were unsuccessful."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee can neither render determinations as an appellate body nor is it empowered to issue rulings. 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, although the Freedom of Information Law excludes the courts from its coverage, court records are frequently available pursuant to other statutes (see e.g., Judiciary Law, §255). If the Office of the District Attorney is indeed unable to locate the records in question, an alternative source of the records would likely be the court in which the proceeding was conducted. As such, it is suggested that you seek the records from the clerk of the appropriate court, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lawrence J. Schwartz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10160

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Mr. Carlos Davila
88-A-0096
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

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

Dear Mr. Davila:

I have received your letter of May 21 and the correspondence attached to it. You have sought information concerning your request for an "investigation report" maintained by the Division of Parole.

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 record in which you are interested or the effects of its disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the record in question.

Of potential significance is §87(2)(b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source, a witness or a victim, 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

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10161

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Ms. Karen Piazza
Piazza Brothers, Inc.
8 Legion Drive
Valhalla, NY 10595

The staff of the Committee on 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. Piazza:

I have received your letter of May 27, as well as a variety of correspondence involving the efforts of your company to obtain information from the City of Beacon. Having reviewed the materials, I offer the following comments.

First, it appears that the function of the Freedom of Information Law may be misunderstood, and I note that the title of that statute may be somewhat misleading. It is not an access to information law per se or a vehicle that requires government officials to provide information in response to questions. Rather, 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 for information. Therefore, if, for example, there is no "certified accounting of all funds" pertaining to a particular project, the City would not be required to prepare an accounting on your behalf in response to a request. In the future, it is suggested that you request existing records, rather than responses to questions or records that likely do not exist.

Second, that you are a litigant or potential litigant is, in my view, irrelevant to your rights or an agency's obligations under the Freedom of Information Law. 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)]. 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.

Third, 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)].

Lastly, insofar as records exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all

records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, if the kinds of records in which you are interested are maintained by or for the City, they would be accessible under the Law, for none of the grounds for denial would apparently be relevant.

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: Joseph H. Braun, City Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1016 2

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 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 letter of May 27 and appreciate your words of support.

You raised what you characterized as a "hypothetical question", and that is whether the "appeal process" under the Freedom of Information Law is "an elective option" or whether "the applicant [can] skip the appeal attempt and proceed directly to a judicial solution of the matter."

In this regard, in order to seek judicial review of a denial of access to records, in general, an applicant must exhaust his or her administrative remedies. Therefore, when an initial request is denied, the person denied access must appeal and be denied access pursuant to the appeal in order to commence a judicial proceeding.

An exception to that rule would involve a situation in which an agency denies a request for records but fails to inform the applicant of the right to appeal the denial. By way of background, the provision dealing with the right to appeal a denial of access to records 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 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).

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)].

Lastly, the Committee on Open Government is a statutory body that was created by the enactment of the Freedom of Information Law and which functions, by statute, within the Department of State.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1016 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Mr. Silvio Reynoso
82-A-4739
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. Reynoso:

I have received your letter of May 17, as well as the materials attached to it. Please note that your correspondence did not reach this office until May 29.

The primary issue that you raised involves your efforts to obtain a copy of a tape recorded conversation. Although the existence of the tape recording was denied at your trial, your pre-sentence report makes reference to a taped conversation in which you were allegedly involved. Although a tape recording was made available to you, none of the voices was yours. As such, you are attempting to obtain a different tape that you believe is maintained at the Office of the Bronx County District Attorney.

In this regard, first, as you may be aware, the Freedom of Information Law pertains to existing records. If the tape recording in question does not exist or is no longer maintained by the Office of the District Attorney, the Freedom of Information Law would not apply.

Assuming that the tape recording does exist, at this juncture, it would appear to be available to you. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since the tape recording allegedly involves a conversation in which you were involved and since any investigation of the matter to which it relates has long since passed, it is doubtful in my

view that any of the grounds for withholding the record could justifiably be asserted.

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)].

Lastly, in the materials that you forwarded, reference was made to a denial of access to a complaint follow up report, which is also known as a "DD5." Here I point out that a recent decision rendered by the State's highest court indicated that a denial of access to those kinds of records 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

As you requested, copies of the materials that you forwarded will be sent to Mr. Coddington at the Office of the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter D. Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10164

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 16, 1997

Mr. Jim Michaels
Times-Union
Box 15000, News Plaza
Albany, NY 12212

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

Dear Mr. Michaels:

I have received your recent letter in which you sought an advisory opinion concerning the denial of access by the City of Schenectady to records identifying City police officers involved in "an off-duty egg-throwing incident."

By way of background, a news article sent to this office indicates that a "late-night altercation between a busload of bachelor-partying police and two people in a car has resulted in seven officers being suspended without pay and 11 more receiving less-severe punishments." The article specifies that there was no violence and that no complaints were made against the officers involved. In response to an appeal by both the Times-Union and the Schenectady Gazette, the Mayor wrote that "[a]ll of the discipline was agreed to by the officers, and was conditioned upon their making restitution to the parties involved." He added that the "men involved claim a statutory right to confidentiality under the Civil Rights Law (section 50-a)", and that "[t]here is also a claim by them that disclosure would be an unwarranted invasion of privacy, and further that the requested material is intra-agency and therefore not subject to mandatory disclosure." Additionally, one of the articles states that the Chief of Police "agreed not to reveal" the names of the officers "if everyone involved came forward."

From my perspective, the names of the eighteen officers involved in the incident, all of whom came forward and agreed to accept a penalty, as well as the nature of the penalties imposed upon them individually, must be disclosed. I am mindful of §50-a of the Civil Rights Law. However, there is no judicial decision of which I am aware in which records identifying public employees who

have been disciplined have been found to be confidential. On the contrary, there are several decisions that have required public disclosure. In this regard, I offer the following comments.

It is noted initially that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial, each of which was referenced in response to your appeal, is 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 the Capital Newspapers, 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)].

As I understand the matter, your request is not connected in any way to litigation and you do not intend to you use the records sought in any litigation context. Rather, in view of the functions of the Times-Union, the purpose of the request appears to involve an effort to inform the public concerning an issue that has attracted substantial public attention. Moreover, the records at issue do not deal with unsubstantiated allegations or complaints, for each of the eighteen officers has come forward, admitted his role in the incident and accepted a punishment. The facts surrounding the incident have been widely publicized and, in my opinion, particularly in view of the nature of the incident and the disclosures that have already been made, records identifying the officers and the penalties imposed could not be characterized as "sensitive" or in any way intimate. In short, §50-a of the Civil Rights Law, according to its legislative history and judicial interpretation, does not apper to apply to the kind of request that you have made.

Also relevant to an analysis of the ability to withhold the information sought 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 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 and to which the Mayor alluded, §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, it is emphasized 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 the decisions cited above, Powhida, Farrell and Scaccia involved police officers, and in each case, the names of the officers were determined to be public.

With respect to the agreement by the Chief of Police with the eighteen officers to withhold their names, 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 more recent 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).

In the context of the situation at issue, I believe that the outcome, the admission by the officers of their role in the incident and their acceptance of discipline, is essentially reflective of a settlement between the City and certain employees. It is my understanding that disciplinary action can be imposed only after charges have been made, a hearing held and a determination indicating a finding of misconduct has been rendered, i.e., as in a proceeding conducted pursuant to §75 of the Civil Service, or, as in this case, when in lieu of the initiation of charges and a

formal disciplinary proceeding, a public employee agrees to some sort of sanction, penalty or punishment. As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding.

The same decision 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 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).

In contrast, 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. As stated earlier, the records in this instance do not involve mere allegations. The facts of the matter are undisputed, admissions have been made, and disciplinary action has been or will be taken.

Pertinent in view of the number of officers involved, eighteen, is one of the first decisions rendered under the Freedom

of Information Law, a case cited earlier, which dealt specifically with reprimands of three police officers. In that holding, the Court concluded that:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant—to the ordinary work of the—municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured" (Farrell, supra, 908-909).

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, it is my opinion that those portions of records indicating the names of the officers involved in the incident and the nature of disciplinary action or sanction imposed against them must be disclosed.

In an effort to encourage disclosure in a manner consistent with judicial decisions and an attempt to obviate the need for litigation, a copy of this opinion will be forwarded to Mayor Jurczynski.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Albert P. Jurczynski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10165

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Mr. Wallace S. Nolen
94-A-6723
Eastern Correctional Facility
P.O. Box 338
Napanoch, NY 12455-0338

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. Nolen:

I have received your letter of May 22, which reached this office on May 29.

You have asked for an advisory opinion dealing with a situation in which you directed a request to the person designated by the facility Superintendent to respond to requests made under the Freedom of Information Law. In response to your request, the Superintendent's designee directed you to write to various personnel within the facility for particular records. You have asked whether such a requirement "exceed[s] a requestor's duties." In my view, it does.

As you may be aware, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate general rules and regulations in order to implement the procedural aspects of the Law. In turn, §87(1) requires each agency to adopt its own rules and regulations consistent with those promulgated by the Committee and the Law. One element of the Committee's regulations involves a requirement that each agency designate one or more persons as "records access officer." The regulations [21 NYCRR §1401.2(a)] specify that the records access officer has the duty of "coordinating agency response to public requests for access to records." In addition, §1401.2(b) states in relevant part that:

> "The records access officer is responsible for assuring that agency personnel...
>
> (3) Upon locating the records, take one of the following actions:

> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor."

As such, while the records access officer is not required to respond directly to a request, I believe that he or she has the responsibility of ensuring that other staff people carry out their duties in relation to requests for records appropriately and in a manner consistent with law.

In the context of the situation that you described, I believe that the records access officer has the duty of contacting the staff people in possession of the records and directing them to either forward the records sought to the records access officer, or to disclose the records in their custody to the applicant to the extent required by the Freedom of Information Law; to require you, after having made a request to the Superintendent or his designee, to contact various staff people within a facility for the purpose of making additional requests for the same records originally sought is, in my opinion, inappropriate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10166

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Mr. Jose Garcia
93-A-1301
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. Garcia:

I have received your letter of May 13 in which you requested general information concerning the Freedom of Information Law. In addition, you asked "if there is any statutory law or decisional that may authorize [you] to give permission to a member of [your] family to act in [your] behalf in going personally to a state agency and review and acquire copies of records pertaining to [you] under the provision of the Freedom of Information Law."

In this regard, first, enclosed are copies of the Freedom of Information Law and "Your Right to Know", which describes that statute and includes a sample letter of request.

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

Section 87(2)(b) permits an agency to withhold records or portions thereof when disclosure would result in "an unwarranted invasion of personal privacy." Assuming that no other ground for denial is applicable, I do not believe that a request made by the subject of a request for records pertaining to him, or by his representative who has obtained a written release authorizing disclosure to the representative, could be denied on the basis of §87(2)(b). As stated in §89(2)(c) of the Freedom of Information Law:

> "Unless otherwise provided by this article, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy pursuant to paragraphs (a) and (b) of this subdivision...
>
> ii. when the person to whom a record pertains consents in writing to disclosure..."

To the extent that persons other than the applicant for records are identified in the records, there may be privacy considerations that arise relative to those individuals. In such situations, perhaps identifying details or certain portions of records might be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy with respect to those third parties.

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-10167

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Mr. Rocco Panetta
96-R-9062
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. Panetta:

I have received your letter of May 27. You wrote that you "would like to obtain the rule or law governing the publication of criminal incidents or reports that are printed by the local newspapers on the daily and weekly basis, usually under the headings of Crime Watch or Police Beat."

In this regard, I offer the following comments.

First, there is no law that requires a newspaper to publish information concerning the occurrence of criminal activity.

Second, once in receipt of information, the news media generally has the authority to do with the information as it sees fit.

Third, the information to which you referred is frequently made available to members of the news media by means of rights of access conferred by 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, irrespective of the manner in which its characterized or whether it is maintained on paper or electronically, I believe that a police blotter or similar record would constitute 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. 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 records 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 blotters are prepared by employees of an agency, 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, 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, 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.

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-1016 8

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Mr. Darryl Wright
89-A-0971
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. Wright:

I have received your letter of May 26. You have asked whether the Freedom of Information Law can be used to obtain records from the office of a district attorney or a county clerk, or those involving grand jury proceedings.

In this regard, the Freedom of Information Law 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).

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...".

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.

Without knowledge of the contents of the records in which you are interested, I cannot offer specific guidance. However, I point out that the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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, records regarding grand jury proceedings 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10169

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Mr. Jack Maddaloni
93-A-2418
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. Maddaloni:

I have received your letter of May 29, as well as the materials attached to it. You have complained with respect to delays on the part of the Office of the Bronx County District Attorney in responding to your requests.

In this regard, I offer the following comments.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Second, 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, although I am unfamiliar with the contents of the records in which you are interested, it appears that one aspect of your request could clearly be denied. The first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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, records regarding grand jury proceedings 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cristina A. Baiata

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10170

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Ms. Sheri S. Sohn
[redacted]

The staff of the Committee on 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. Sohn:

As indicated during our recent conversation, the State Commission of Investigation forwarded to this office your letter of March 10 and April 7. To reiterate, the Committee on Open Government, a unit of the Department of State, is authorized to provide advice concerning public access to government information, primarily under 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.

In your letter, you described a series of events relating to a business relationship and the treatment of what appears to have been criminal activities by local law enforcement agencies. One of the issues that you raised involves rights of access to police reports.

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 a request should generally be directed to the records access officer at the agency or agencies that you believe maintain the records of your interest.

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 Freedom of Information Law pertains to existing records. Therefore, if records were not prepared, the Freedom of Information Law would not apply. 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)].

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.

Of potential relevance to the matter is a recent decision rendered by the State's highest court indicating that a blanket denial of access to records 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Town of Clarkstown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10171

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 17, 1997

Ms. Shellie Boucher
[redacted]

The staff of the Committee on 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. Boucher:

I have received your letter of May 20 and the materials attached to it. Please note that your correspondence did not reach this office until June 3.

In brief, the matter involves rights of access to a report pertaining to the department in which your husband is employed by the Hartford Central School District. The District initially denied access to the report in its entirety; later it indicated that it would disclose those portions consisting of "statistical or factual tabulations or data." A critical issue, in my view, is whether the report in question is an audit, as one of the attachments to your letter suggests. In a memorandum of September 20 addressed to your husband and another employee by the Superintendent, reference is made to the approval by the Board of Education of "the use of a consultant to do an audit of the department."

From my perspective, if the document in question can be characterized as an audit, it must be disclosed, including the auditor's recommendations that may pertain to your husband. If it cannot be so characterized, I believe that the recommendations may be withheld. 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.

Although the provision cited by the District, §87(2)(g), is one of the grounds for denial of access, due to its structure, it

often requires broad disclosure. The cited provision authorizes an agency to withhold records that:

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

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

Subparagraph (iv) of specifies that "external audits" cannot be withheld under §87(2)(g). If the record sought is the audit to which reference was made in the memorandum of September 20, it must, in my view, be made available, except to the extent that a ground for denial other that §87(2)(g) may be asserted [i.e., if disclosure would constitute "an unwarranted invasion of personal privacy" regarding persons other than your husband pursuant to §87(2)(b); he cannot engage in an invasion of his own privacy].

If the record is not the audit prepared in accordance with the memorandum of September 20, but rather a report of a consultant that cannot be characterized as an audit, only those portions consisting of statistical or factual information would be required to be disclosed. In a discussion of the status of consultant reports by the State's highest court, it was found that:

> "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, 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, other than an audit, 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: Thomas W. Abraham, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10172

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 19, 1997

Mr. Mike Carmody
[redacted]

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

Dear Mr. Carmody:

I have received your letter of June 4. In short, you have questioned the propriety of a denial of access to complaints pertaining to your property that were transmitted to the Village of Babylon.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. When a complaint is made to an agency, §87(2)(b) of the Freedom of Information Law is often relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to such complaints, it has generally been advised that the substance of a complaint is available, but that those portions of the complaint which identify complainants may be deleted on the ground that disclosure would result in an unwarranted invasion of personal privacy. I point out that §89(2)(b) states that an "agency may delete identifying details when it makes records available." Further, the same provision contains five examples of unwarranted invasions of personal privacy, the last two of which include:

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

> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted. However, again, I believe that the remainder of the records must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Stephen Fellman, Building Inspector
Mr. Sikowitz, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2769
FOIL-AO-10173

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 19, 1997

Ms. Helen M. Lafferty
[redacted]

The staff of the Committee on 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. Lafferty:

I have received your letter of May 30, as well as the materials attached to it. As an outgoing or perhaps former member of the Board of Education of the Hicksville School District, you raised a series questions relating to events that occurred involving your conduct as a Board member.

Having reviewed the correspondence, it is emphasized that the advisory jurisdiction of the Committee on Open Government is limited. As such, I have neither the expertise nor the authority to respond to each of the issues that your raised, and the following comments will pertain primarily to the Open Meetings Law.

An initial question is whether you are "bound to silence" concerning executive sessions "as instructed by the Board president." In this regard, in a situation in which the issue was "whether discussions had at an executive session of a school board are privileged and exempt from disclosure", it was held that "there is no statutory provision that describes the matter dealt with at such a session as confidential or which in any way restricts the participant from disclosing what took place" (Runyon v. Board of Education, West Hempstead Union Free School District No. 27, Supreme Court, Nassau County, January 29, 1987). Unless a statute specifically prohibits disclosure of certain information or records, I do not believe that statements made during an executive session or information derived from an executive session could be characterized as "confidential" or that there would be a valid basis for sustaining a claim of confidentiality.

To offer an example of a case in which there would be confidentiality, if a discussion by a board of education concerns a record pertaining to a particular student (i.e., in the case of

consideration of disciplinary action, an educational program, an award, etc.), the discussion would have to occur in private and the record would have to be withheld insofar as a public discussion or disclosure would identify the student. As you may be aware, the Family Educational Rights and Privacy Act (20 USC §1232g) generally prohibits an agency from disclosing education records or information derived from those records that are identifiable to a student, unless the parents of the student consent to disclosure. In the context of the Open Meetings Law, a discussion concerning a student would constitute a matter made confidential by federal law and would be exempted from the coverage of that statute [see Open Meetings Law, §108(3)]. In the context of the Freedom of Information Law, an education record would be specifically exempted from disclosure by statute in accordance with §87(2)(a). In both contexts, I believe that a board of education, its members and school district employees would be prohibited from disclosing, absent the consent of the parents of a student, because a statute requires confidentiality. However, no statute of which I am aware would generally confer or require confidentiality with respect to the matters described in your correspondence.

You also asked whether minutes of an executive session should have been taken with respect to a certain action. 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 is 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.

Lastly, you asked whether Board policy pertaining to public participation at meetings applies " only to regular monthly Board meetings or to any meeting as defined by the Sunshine Laws." Having read the policy, reference is made to "regular Board meetings." I am unaware of whether there is a Board rule or additional statement that distinguishes "regular" meetings from others. I note, too, that 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. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon 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(1)], 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 rules prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

I note that there is no legal distinction between a "workshop" 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)].

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. The court 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Stuart Opdahl, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10174

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 20, 1997

Mr. John J. Callahan
[redacted]

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

Dear Mr. Callahan:

I have received the correspondence that you forwarded to this office regarding an investigation of your complaint in which you alleged that the New York Telephone Company falsified reports transmitted to the Public Service Commission. The materials were prepared between 1990 and 1992 and relate to events that allegedly occurred in 1985 through 1988.

The nature of the guidance that you are seeking is not clear. It appears that both the Department of Law and the Department of Public Service provided access to records years ago to the extent required by the Freedom of Information Law or indicated that they do not have the records in which you are interested. That being so, again, I am not sure of what kind of service I might offer.

I note that agencies are not required to maintain records interminably. Records can be disposed of in accordance with schedules regarding their retention. It is possible that, at this juncture, records that might have existed have been legally destroyed.

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-10175

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 20, 1997

Mr. Paul Kamboorian
[redacted]

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

Dear Mr. Kamboorian:

I have received your letter of May 26 and the materials attached to it. You have sought assistance in obtaining a "Housing Court Inspector's false inspection report" in possession of the Department of Investigation (DOI), as well as any records maintained by DOI "relating to [your] request for the investigation of this report", and "the results of that investigation."

Without familiarity with the contents of the records in question, I cannot offer specific guidance. However, 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."

In turn, §86(1) defines "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.

One of the issues is whether an inspection report prepared by a housing court inspector constitutes an "agency" record. It has been held that the Office of Court Administration is an "agency", for it performs administrative rather than judicial functions [see Babigian v. Evans, 427 NYS 2d 669, aff'd 97 AD2d 992 (1983)]. If the functions of a housing court inspector could not be characterized as "judicial", it is possible that the inspection report prepared by an inspector would constitute an agency record. In that event, such a record would 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.

Several grounds for denial may be pertinent with respect to the records in which you are interested. If a housing inspector's report is an agency record, I believe that it could be characterized as "intra-agency material." Similarly, records prepared by the DOI for its internal use or those communicated with another agency would constitute inter-agency or intra-agency materials. Those kinds of records fall within the scope of §87(2)(g). Although that provision serves as a potential basis for a denial of access, due to its structure, it 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.

Also pertinent may be §87(2)(b), which permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." That provision might be relevant with respect to records that identify witnesses, tenants, etc.

Again, I am unaware of the nature of the investigation or the events involved in the matter. However, §87(2)(e) may also be relevant. That provision 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."

I note that a recent judicial decision involved access to a variety of records maintained by the Department of Investigation that were requested by the New York Daily News. To provide you with information regarding the courts analysis of rights of access to those records, enclosed are copies of the decision and an opinion that I prepared at the request of the Daily News.

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-10176

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 24, 1997

Mr. Richard Brooks
93-A-0142
354 Hunter Street
Ossining, NY 10652

The staff of the Committee on Open 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 May 27 in which you sought assistance in obtaining records pertaining to your case from the New York City Police Department. Attached to your letter is a request dated November 19 that has not yet been answered.

In this regard, I offer the following comments.

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

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

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

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

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

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

Also relevant 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, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Lastly, 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1017

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 24, 1997

Ms. Irma A. Snyder
[redacted]

The staff of the Committee on 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. Snyder:

I have received your recent letter and the materials attached to it. As I understand the matter, you have questioned the propriety of the assessment of a search fee by the Evans-Brant Central School District.

Having reviewed the District's regulations, I note that they are out of date. The regulations that you forwarded were adopted pursuant to the Freedom of Information Law as originally enacted in 1974. That statute was repealed and replaced with the current version of the Freedom of Information Law in 1978. Consequently, several aspects of the District's regulations should, in my view, be amended.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §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..."

Second, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, 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. In this instance, I know of no statute that would authorize the Agency to do so.

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 personnel time, 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, 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 (§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" [§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 processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that 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 the Freedom of Information Law, copies of that statute, the regulations promulgated by the Committee on Open Government, and model regulations are enclosed and will be forwarded to the District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: K. Connolly, Superintendent

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1078

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 24, 1997

Mr. Theodore Feuerstein
[redacted]

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

Dear Mr. Feuerstein:

I have received your letter of June 4 and accompanying materials. You have asked for assistance concerning the ability to know of the votes by members of the Board of Trustees of the Village of Atlantic Beach on a particular matter.

In this regard, I direct your attention to §87(3)(a) of the Freedom of Information Law, which 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 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)].

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-10179

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 24, 1997

Ms. Sandra Potter
[redacted]

The staff of the Committee on 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. Potter:

I have received your letter of June 5 and the correspondence attached to it. You have complained with respect to delays that you have encountered in your efforts to obtain records from the City of Kingston.

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..."

Based on the foregoing, 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, although there is no precise time period within which an agency must grant or deny access to records, the Law requires that an agency must provide an approximate date indicating when the request will be granted or denied. The time needed 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, it must provide an approximate date indicating when the request will be granted or denied, and if that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

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)].

Second, if 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)].

As you requested, in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Mayor Gallo and to Robert Cook, Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. T.R. Gallo, Mayor
Robert Cook, Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10180

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 25, 1997

Ms. Mary Caroline Powers
City Editor
The Saratogian & Community News
20 Lake Avenue
Saratoga Springs, NY 12866

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

Dear Ms. Powers:

I have received your letter of June 3 in which you sought an advisory opinion concerning a propriety of a denial of access to a record by Leon Reed, Superintendent of the Schuylerville Central School District.

By way of background, the materials appended to your letter indicate that disciplinary charges were initiated by the Superintendent against Michael LeBeau, a tenured teacher, pursuant to §3020-a of the Education Law. In lieu of engaging in the procedures and eventual determination of charges under §3020-a, Mr. LeBeau and the District entered into an agreement, "thereby dispensing with the need for further litigation or hearings." Part of the agreement involves the acceptance of a suspension of twenty-six teaching days without pay, plus a forfeiture of four days pay, as well as the acceptance of a "letter of reprimand" that is referenced as "Attachment A." Your request for the letter of reprimand was denied and is the subject of your inquiry. Further, a portion of the agreement provides that "No statements to anyone or press releases concerning any aspect of this stipulation (including its attachments)...shall be made by any party..."

From my perspective, while neither of the parties may be required to discuss or disclose information pertaining to the settlement on their own initiative, the District is required nonetheless to disclose the letter of reprimand in response to a request made pursuant to the Freedom of Information Law [see Paul Smith's College v. Cuomo, 186 AD 2d 888 (1992)]. In this regard, I offer the following comments.

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

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).

In the context of your inquiry, I believe that the letter of reprimand is part of "the agreed penalty." In my view it is clearly part of the District's final determination of the matter,

and just as clearly, it bears upon the performance of the teacher's official duties.

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [220 AD 2d 424, 632 NYS 2d 576 (1995)], 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 records analogous to that in question, I believe that the reprimand must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law and its judicial interpretation, 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: Leon J. Reed, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1018

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 27, 1997

Mr. Terrence X. Tracy
Counsel
NYS Division of Parole
97 Central Avenue
Albany, NY 12206

Dear Mr. Tracy:

I appreciate receipt of your determination of May 19 rendered pursuant to §89(4)(a) of the Freedom of Information Law following an appeal by John O'Brien of the Syracuse Herald-Journal. In short, while I concur with some elements of the determination, I disagree with others.

By way of background, as you are aware, in February Mr. O'Brien requested "monthly calendars of Parole Board appearances" at several correctional facilities that he identified. He also sought a monthly list of prisoners being released on parole, or as a result of completing their sentences" at each of those facilities. Mr. Thomas P. Grant, Special Assistant to the Executive Director of the Division of Parole, responded on April 25 by denying the request on several grounds, and you affirmed the denial on May 19.

You referred to Mr. Grant's statement that no "final" calendar is prepared prior to actual interviews of inmates and indicated that "some inmates...are tentatively scheduled", but may not be interviewed. Consequently, it was determined that, because "there is no final agency document", that aspect of the request was justifiably denied under §87(2)(g) of the Freedom of Information Law.

Names of inmates who were interviewed by the Board were also withheld pursuant to paragraphs (a) and (b) of §87(2) of the Freedom of Information Law in conjunction with §259-a of the Executive Law and §8000.5 of the regulations promulgated by the Board of Parole. Those regulations describe the circumstances under with the Division is permitted to release information from its "case records." You wrote that because the information is "confidential under the Board's regulations, it necessarily follows that to release such information would constitute an unwarranted

invasion of the inmates' or releasee's personal privacy." The portion of the request involving the names of inmates who were released from State facilities to parole supervision was also denied for the same reasons.

You also confirmed Mr. Grant's assertion that the Freedom of Information Law does not require that an agency disclose records on an ongoing basis in response to a single request.

In this regard, I offer the following comments.

First, I agree that an agency is not required to disclose records pursuant to a request for records that are sought prospectively. In a technical sense, since the Freedom of Information Law pertains to existing records, an agency can neither grant nor deny access to records that do not yet exist. However, as you inferred, an applicant could seek records on a periodic basis, and an agency would be obliged to respond to each such request in accordance with the Freedom of Information Law.

Second, I must respectfully disagree with the substance of the grounds for denial offered in response to Mr. O'Brien's request.

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 exceptions to rights of access appearing in §87(2)(a) through (i) of the Law.

Section 87(2)(g) was cited as the basis for withholding the calendar on the ground that there is no "final" calendar. Here I point out that the Court of Appeals recently dealt with a similar contention and held that whether a document or the event to which it relates is final is not determinative; on the contrary, the specific content of records falling within the scope of §87(2)(g) determines rights of access under that provision.

The argument offered by New York City in that case was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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 v. New York City Police Department, 89 NY2d 267, 276-277 (1996)].

From my perspective, a calendar, whether it is final or subject to change, would not involve expressions of "opinions, ideas or advice exchanged as part of the consultative or deliberative process of government decision making." On the contrary, as characterized in other decisions, the calendar could in my view be characterized as "objective" information that must be disclosed. As stated in a decision cited by the Court of Appeals in Gould, Ingram v. Axelrod, certain records consisting of "a collection of statements of objective information logically arranged and reflecting objective reality" were found to be available. The Court in that decision

also held that "the mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion" [90 AD 2d 568, 569].

In my view, while a calendar may not be final and may be revised, it would not contain the kind of information, i.e., opinion or advice, according to the State's highest court, that could be withheld under §87(2)(g).

Similarly, I do not believe that the information sought is exempted from disclosure by statute in accordance with §87(2)(a) or that disclosure would constitute an unwarranted invasion of personal privacy in accordance with §87(2)(b).

As you are aware, §87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, there is no statute that would exempt the records in question from disclosure. As you indicated, §259-a of the Executive Law requires that the Division of Parole maintain certain kinds of records. Section 259-k provides in subdivision (2) that the Board of Parole "shall make rules for the purpose of maintaining the confidentiality of records, information contained therein and information obtained in an official capacity by officers, employees or members of the division of parole." The Division's regulations, 9 NYCRR §8000.5(c), pertain to disclosure of case records maintained by the Division. That provision confers limited rights of access to case records and states in paragraph (2)(ii) that "any record of the division of parole not made available pursuant to this section shall not be released, except by the chairman upon good cause shown." Section 8008.2(a) of the regulations defines the phrase "case record" to include: "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

The statutes and regulations that preceded those cited above and which pertained to the Board of Parole when it was part of the Deaprtment of Correctional Services included essentially the same direction. However, insofar as the regulations conflicted with the Freedom of Information Law, they were found more than twenty years ago to be invalid. Specifically, in Zuckerman v. Board of Parole, the court found that:

> "Section 221 of the Correction Law, entitled 'Records', requires the commissioner to keep complete records 'of every person released on parole or conditional release'. The statute also requires the commissioner to make rules as to the privacy of these records. Under the authority of these two statutory mandates (7 NYCRR 5.1 [a], the following regulation was promulgated: 'Department records. Any department record not otherwise made available

> by rule or regulation of the department shall be confidential for the sole use of the department.' (7 NYCRR 5.10). The minutes of board meetings are *not* 'made available by rule or regulation' and, therefore, Special Term held that the minutes are private.
>
> "It would seem clear that section 29 of the Correction Law exempts from disclosure those specifically enumerated statistics and, further, that section 221 exempts those records dealing with parolees. Minutes of Parole Board meetings are not *specifically* exempted by either of these statutes. Applying the rule of *ejusdem generis* (McKinney's Cons Laws of NY, Book 1, Statutes, §239, subd b), the nonexclusive list contained in subdivision 1 of section 29 of the Correction Law could not be construed to include those minutes.
>
> "It would therefore appear that this regulation, as applied to the minutes of Parole Board meetings, is invalid on two grounds. As shown above, the regulation makes *all* records private initially and is not limited solely to those categories of information specifically set forth or included by reasonable implication in the statutes. Furthermore, by making *all* records initially confidential in a broad and sweeping manner, the regulation violates the clear intention of the Freedom of Information Law (see Public Officers Law, §85). It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see e.g. *Matter of Broadacres Skilled Nursing Facility v. Ingraham*, 51 AD2d 243, 245-246)...This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed..." [53 AD 2d 405, 407(1976); emphasis supplied by the court; see also Morris v. Martin, 440 NYS 2d 1026 (1982)].

In sum, based upon the direction provided judicially, I do not believe that the records in question can be characterized as being exempted from disclosure by statute or that the regulations serve to enable the Department to withhold records that would otherwise be available under the Freedom of Information Law.

Lastly, in my view, the minimal information that is sought would not constitute an unwarranted invasion of personal privacy if disclosed. The information sought does not include personal

details of inmates' or potential parolees' lives; it simply identifies those who are or may be the subjects of appearances or determinations to grant or deny parole. Those kinds of details are accessible under other provisions of law. For instance, the regulations promulgated by the Department of Correctional Services, 7 NYCRR §5.21(a), provide in relevant part that:

> "Upon request by the news media, the following information from an inmate record shall be made available: name, age, birthdate, birthplace, city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release, and when related to a newsworthy event, institutional work assignments, general state of health, nature of injury or critical illness and cause of death."

Similarly, §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 any 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."

In both of the provisions quoted above, "commitment" information is required to be disclosed. In my view, the kinds of records sought are analogous to that referenced in the provisions quoted above and are not so intimate or personal that disclosure would constitute an unwarranted invasion of personal privacy. Moreover, in an Appellate Division decision concerning inmates that appears to be consistent with my contention, information found to be available was, in my opinion, more intimate or intrusive that sought by Mr. O'Brien. In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found that:

> "...an inmate in a State correctional facility has no legitimate expectation of privacy from any and all public portrayal of his person in the facility...As Supreme Court noted, inmates are well aware that their movements are monitored by video recording in the institution. Moreover, respondents'

> regulations require disclosure to news media of an inmate's 'name *** city of previous residence, physical description, commitment information, present facility in which housed, departmental actions regarding confinement and release' (7 NYCRR 5.21 [a]). Visual depiction, alone, of an inmate's person in a correctional facility hardly adds to such disclosure" [Buffalo Broadcasting Company, Inc. v. NYS Department of Correctional Services, 155 AD 2d 106, 111-112 (1990)].

For the reasons described in the preceding commentary, I believe that the information sought must be disclosed in accordance with requests made appropriately under the Freedom of Information Law. If you would like to discuss the matter, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John O'Brien

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10182

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 27, 1997

Mr. Paul Bouros
94-A-2268
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. Bouros:

I have received your letter of June 3. You wrote that you are having difficulty acquiring a copy of your contact lens prescription from Sterling Optical. You have asked whether that company is obliged to provide a copy of the prescription 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 would not apply to a private company.

It is possible, however, that you may be able to obtain a copy of the prescription and other medical records pertaining to yourself pursuant to §18 of the Public Health Law. In brief, that statute generally requires that a health care practitioner or a hospital furnish medical records to a qualified person, such as the subject of those records. To obtain additional information on the matter, it is suggested that you write to the New York State

Department of Health, Access to Patient Information Program, Hedley Park Place, Suite 303, 430 River Street, Troy, NY 12180.

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-2771
FOIL-AO-10183

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

June 27, 1997

Hon. Frank Karl, Supervisor
Hon. John Martino, Councilman
Town of Franklin
P.O. Box 73
Vermontville, NY 12989

The staff of the Committee on 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 Karl and Councilman Martino:

I have received your letters which are respectively dated June 11 and June 9, concerning issues relating to meetings of the Town Board of the Town Franklin. In brief, as I view the matter, the issues involve the propriety of executive sessions held to discuss "Town Board conduct" and a resolution adopted by the Town Board expressing its policy that "the conversation and/or correspondence that is part of Executive Sessions, except that which results in Board action at the Executive Session, shall be deemed confidential and not otherwise disclosed."

I would conjecture that the Board's policy is based upon §805-a of the General Municipal Law, which states in subdivision (1)(b) that "no municipal officer or employee shall...disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests." The problem in my view involves the meaning of the term "confidential." From my perspective, "confidential" 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. Stated differently, an act of Congress of the State Legislature must forbid disclosure in order to characterize information as confidential.

While a variety of subjects may properly to discussed during executive sessions and numerous records or portions thereof may validly be withheld under the Freedom of Information Law, the ability to exclude the public from a meeting or withhold records does not necessarily represent or signify a requirement of

confidentiality. I note that both the Open Meetings Law and the Freedom of Information Law are permissive. Under §105 of the former, a public body, such as a town board, may enter into executive session to discuss one or more of the subjects appearing in paragraphs (a) through (h) of subdivision (1); there is no requirement that those subjects be discussed in executive session. Moreover, as you are aware, in order to conduct an executive session, a motion to do so must be made and carried by a majority vote of the total membership of a public body. If such a motion does not carry, even though a public body might have the authority to discuss an issue in executive session, it would not have the obligation to do so. Similarly, under the Freedom of Information Law, §87(2) provides that an agency may withhold records in accordance with the grounds for denial of access that follow. The State's highest court has found that an agency may choose to disclose records even though it has the ability to deny access [see Capital Newspapers v. Burns, 67 NY 2d 562 (1986)].

In sum, as a general rule, even though discussions by a public body may be conducted in private and certain records may justifiably be withheld, the matters considered might not be "confidential", but rather beyond the scope of public rights of access. 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 §805-a of the General Municipal Law may be useful for providing guidance, for the reasons described above, I do not believe that the use of the term "confidential" is entirely clear.

Second, §63 of the Town Law provides in part that a town board "may determine the rules of its procedure." I believe that so long as a rule is reasonable, it is valid. From my perspective, the policy expressed in the resolution concerning confidentiality is essentially a rule. Whether it is fully enforceable or valid is questionable. I point out that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session under the Open Meetings Law are not necessarily consistent. There may be situations in which a record could justifiably be withheld under the Freedom of Information Law, but a discussion of the record would have to occur in public because there is no basis for entry into executive session, and vice versa. For example, if a town employee transmits a memorandum in which he or she offers an opinion or recommendation concerning a change in policy (i.e., that business hours at Town Hall should be changed), that person's written opinion could be withheld as intra-agency material under §87(2)(g) of the Freedom of Information Law. However, discussions regarding the policy must be conducted in public, for there would be no basis for entry into executive

session. In that situation, while the record could properly be withheld, the meeting about the content of the record would be required to be open to the public. Again, for that reason, the use of the term "confidential" may be misleading, difficult to interpret and lead to unforeseen results.

Notwithstanding the foregoing, it appears that the intent of the policy is to ensure that the best interests of the Town's taxpayers are served. While there may be no legal prohibition against disclosure of the information acquired during executive sessions or records that could be withheld, that is not intended to suggest that 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.

Third, with respect to the ability to conduct an executive session to discuss the conduct of the Board, I direct your attention to §105(1)(f). That provision permits a public body to enter into executive session to discuss:

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

If, for example, a discussion pertains to the possible "removal" of a particular person, i.e., a member of the Town Board, to that extent, I believe that an executive session could properly be withheld.

Lastly, I note that an executive session cannot be held in advance of a meeting and that, in a technical sense, an executive session cannot be scheduled prior to a meeting. As you are likely aware, 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 subject or subjects to be considered during the executive session.

Based on the foregoing, 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.

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-10184

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 8, 1997

Mr. Carlos Latorre
97-A-2471
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Latorre:

I have received your letter of June 27 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. It is not empowered to determine appeals or compel an agency to grant or deny access to records. The provision pertaining to right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

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

For your information, the person designated by the New York City Police Department to determine appeals is Ms. Susan Petito, Special Counsel.

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-1018S

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 9, 1997

Mr. Christopher Daniel Alberici
97-A-3154
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. Alberici:

I have received your letter of June 6 and the materials attached to it. In brief, you have complained that the Division of Criminal Justice Services has "ignored" your request under the Freedom of Information Law. As such, you have sought the "intervention" of this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records. It is not empowered to "intervene" or compel an agency to grant or deny access to records. Nevertheless, in an effort to resolve the matter, a copy of this response will be forwarded to Mr. Ross at the Division.

With respect to your complaint, 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

cc: Richard A. Ross, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10186

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 9, 1997

Mr. Francis J. Roche
Attorney at Law
P.O. Box 321
Hudson, NY 12534

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

Dear Mr. Roche:

I have received your letter of June 9, as well as the correspondence attached to it. Please accept my apologies for the delay in response.

According to the materials, on February 4, you wrote to the Chatham Village Clerk and requested various records concerning the implementation of the Village's assessment practices. You were provided with some of the information sought by means of a letter sent to you by the Clerk on February 6. Since she did not forward records, i.e., resolutions, notices, etc., you asked for copies of those kinds of records on February 10. Having received no further response, you wrote to the Clerk again on March 10 and March 21, and in the latter communication, you also sought any rules and regulations of the Village pertaining to the Freedom of Information Law. On March 24, the Clerk indicated that your requests had been forwarded to the Village Attorney and advised that you "contact him for any further information." You wrote, however, that a telephone call to the Village Attorney "produced nothing."

From my perspective, the Village has failed to comply with the 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 board of a public corporation, the Village of Chatham, is the Village Board of Trustees, and I believe that the Board is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

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 Village Board has the obligation 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."

Assuming that the Clerk is the Village's designated records access officer, she has the duty of coordinating the Village's response to requests for records.

Second, in my view, a response indicating that you should contact the Village Attorney, without more, is inadequate. 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)].

Lastly, the kinds of records that you requested, insofar as they exist, would, in my opinion, clearly 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. I do not believe that any of the grounds for denial could properly be asserted to withhold the records of your interest.

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
Carol M. Simmons, Clerk/Treasurer
Nelson R. Alford, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10187

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 9, 1997

Mr. Jim Parker
[redacted]

The staff of the Committee on Open 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 your letter of May 28, which reached this office on June 9.

By way of background, you wrote that a few years ago, a member of the Herkimer Police Department was indicted, and that several individuals were charged and prosecuted. Following the proceedings, the judge determined that the grand jury report should be made public. However, your requests for information pertaining to the report have been denied on the basis of §190.90(4) of the Criminal Procedure Law. It is your understanding that the cited provision requires that the report remain sealed until appeals have been decided. You have questioned your right to obtain the information.

In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, specifically excludes the courts and court records from its coverage. As such, I do not believe that the Freedom of Information Law would serve as a basis for seeking the report or records relating to it.

Second, the ability to gain access to materials at issue appears to be governed by provisions of the Criminal Procedure Law. While a grand jury report may be made public, that would be so only after certain conditions are met. Section 190.85(3) states in relevant part that:

> "The order accepting a report pursuant to paragraph (a) of subdivision one, and the

> report itself, must be sealed by the court and may not be filed as a public record, or be subject to subpoena or otherwise be made public until at least thirty-one days after a copy of the order and the report are served upon each public servant named therein, or if an appeal is taken pursuant to section 190.90, until the affirmance of the order accepting the report, or until reversal of the order sealing the report, or until dismissal of the appeal of the named public servant by the appellate division, whichever occurs later."

Further, the provision to which you referred, §190.90(4), states that:

> "The record and all other presentations on appeal shall remain sealed, except that upon reversal of the order sealing the report or dismissal of the appeal of the named public servant by the appellate division, the report of the grand jury, with the appendix, if any, shall be filed as a public record as provided in subdivision three of section 190.85."

To enable you to become more familiar with the issues relating to disclosure, enclosed are copies of §§190.85 and 190.90 in their entirety.

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-10188

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 9, 1997

Mr. Allen Robertson
95-A-6332
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. Robertson:

I have received your letter and related correspondence, which reached this office on June 11. Having reviewed the materials, the facts are unclear. However, as I understand the matter, you have requested records from the Office of the Saratoga County District Attorney relating to a forfeiture, but you have received no response. You asked that this office "step in and take over."

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. However, in an effort to resolve the matter, I offer the following comments.

First, based on the correspondence, it appears that the focus of your request involves a stipulation and agreement for a forfeiture that you presumably signed in September of 1996 and forwarded to the District Attorney's office. If that is so, I believe that a copy of that document 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. From my perspective, none of the grounds for denial could properly be asserted to withhold that record.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to

requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

In an effort to assist you, copies 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: Hon. David A. Wait, District Attorney
James A. Murphy, III

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10189

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 9, 1997

Mr. Ward E. Swart Jr.
97-B-0671
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

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

Dear Mr. Swart:

I have received your letter, which reached this office on June 11. You have sought guidance in obtaining court records and your rap sheet in order to correct any mistakes in that record.

In this regard, 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."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The foregoing is not intended to suggest that the court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally

available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that any request for court records be made to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law.

Lastly, the regulations promulgated by the Division of Criminal Justice Services include provisions authorizing an individual to obtain a copy of his or her own criminal history record and to "challenge the accuracy or completeness" of that record. Enclosed for your review are copies of the pertinent regulations.

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-1090

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Allan Marshall
95-R-6268 E2-47B
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. Marshall:

As you are aware, I have received your letter of June 15. You have asked how you may "compel" the courts to make available certain transcripts.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, 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."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The preceding remarks are not intended to suggest that a transcript cannot be obtained. Although the courts are not subject

to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request the transcript from the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for your request. Additionally, since you indicated that the records in question are needed in conjunction with an appeal, it is recommended that you discuss the matter with your attorney.

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-1019

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Salvatore Dagnone
89-A-9751
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. Dagnone:

As you are aware, I have received your recent undated letter, which reached this office on June 18.

You have asked where you might write to request records pertaining to your criminal case, other than One Police Plaza.

In this regard, by way of background, 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 directed to that person.

I believe that all requests for records of the New York City Police Department are forwarded and should be made to the records access officer at One Police Plaza. As such, it would not likely be fruitful or to your advantage to request records directly from the precinct.

There may be other sources of the records of your interest. For instance, a request might be made to the records access officer at the office of the district attorney who prosecuted. In addition, although the courts are not subject to the Freedom of Information Law, court records are often available under other provisions of law (see e.g., Judiciary Law, §255). To seek court records, it is suggested that a request be made to the clerk of the appropriate court, citing an appropriate statute as the basis for the request.

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-10192

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Mark Streb
Assistant to Mayor
City of Troy
Office of the Mayor
City Hall
Monument Square
Troy, NY 12180

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

Dear Mr. Streb:

As you are aware, I have received your letter of June 10. 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 for "disciplinary records" involving employees of the City of Troy Department of Public Works "pertaining to trash pick up and removal during the year of 1997." In response to the request, you disclosed the records without the names of those who were disciplined. The materials attached to your letter indicate that three employees of the Department of Public Works "were suspended without pay" for one day "for failure to follow departmental rules concerning trash removal", that the suspensions "were the result of a negotiated settlement between the workers, their union (CSEA) and the city", and that as part of the settlement, "the city agreed not to release the names of the individuals to the public."

You added that you informed the applicant that you requested an opinion from the Committee, and that upon its receipt, you "will comply."

From my perspective, the identities of the employees who were disciplined must be disclosed. However, I note that while your reliance on the Committee on Open Government is gratifying, opinions rendered by this office are not binding. With regard to the substance of the matter, I offer the following comments.

It is emphasized at the outset that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, two of the grounds for denial are relevant in consideration of rights of access to the records in question.

Perhaps most significant to an analysis of the ability to withhold the information sought 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 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 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. 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, 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].

With respect to the agreement to withhold the names of the employees, 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 more recent 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).

In the context of the situation at issue, I believe that the outcome, the settlement, represents an acceptance of discipline on the part of the employees in question. It is my understanding that disciplinary action can be imposed only after charges have been made, a hearing held and a determination indicating a finding of misconduct has been rendered, i.e., as in a proceeding conducted pursuant to §75 of the Civil Service Law, or, as in this case, when in lieu of the initiation of charges and a formal disciplinary proceeding, a public employee agrees to some sort of sanction, penalty or punishment. As suggested by the Court in Anonymous, there is no distinction in substance between a finding of guilt after a hearing and an admission of guilt as a means of avoiding such a proceeding.

The same decision 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 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).

In contrast, 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. As stated earlier, the records in this instance do not involve mere allegations; admissions have been made, and disciplinary action has been or will be taken.

Pertinent is one of the first decisions rendered under the Freedom of Information Law, a case cited earlier, which dealt specifically with reprimands of three police officers. In that holding, the Court concluded that:

> "To disclose these will not result in an unwarranted invasion of personal privacy; they are 'relevant—to the ordinary work of the—municipality'. In effect, they are 'final opinions' and 'final determinations' which the Legislature directed be made available for public inspection. Disclosure, of course, will reveal the names of the police officers who were reprimanded but also let it be known, by implication, which others were not censured" (Farrell, supra, 908-909).

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, it is my opinion that the names of the employees 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-1093

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Kenneth W. Lovett
President
Virtual Information Systems
609 Main Street
Stroudsburg, PA 18360

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

Dear Mr. Lovett:

I have received your letter of June 12, as well as the materials attached to it. You have asked whether, in my view, a response to your request directed to Suffolk County "is in compliance with the Freedom of Information Act" [sic].

One element of the response indicates that requests for records "must be original correspondence and will not be accepted via facsimile."

In this regard, §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 opinion is whether the policy of an agency is inconsistent with the Freedom of Information Law or the Committee's regulations or is otherwise unreasonable.

In general, it is my view that an agency must accept requests made via a fax machine, unless the use of the machine adversely impacts on the agency's capacity to carry out its duties. For example, if a law enforcement agency uses a fax machine to carry out essential law enforcement functions, interference with the use of the machine could hamper its ability to perform its duties effectively. In short, in a circumstance in which public use of a fax machine would interfere with an agency's functions, its use for making requests under the Freedom of Information Law might be restricted, so long as requests traditionally made are accepted,

i.e., requests made in writing by mail or by personal delivery. In that event, such a policy would likely be valid, for it would not unreasonably inhibit the public's ability to seek records under the Freedom of Information Law.

With respect to the remaining issues, I believe that they were considered in detail in an advisory opinion addressed to you on May 7 and need not be reiterated here.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ann Marie Carbonetto

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10194

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Wallace S. Nolen
94-A-6723
Eastern Correctional Facility
P.O. 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. Nolen:

As you are aware, I have received your letter of June 11. You have sought an advisory opinion concerning "the receipt of certified copies of financial disclosure statements" prepared under the Ethics in Government Act and filed with the New York State Ethics Commission, and the "refusal" of the Ethics Commission "to furnish certified copies" of those records.

In this regard, the Ethics in Government Act states that the provisions of the Freedom of Information Law do not apply to records maintained by the entities created by the Act. Rather, the Act specifies and limits the records that those entities must disclose and states that those records "shall be available for public inspection" [see Executive Law, §94(17)]. The language concerning public inspection has been construed literally, and in John v. New York State Ethics Commission, 581 NYS 2d 882, 178 AD 2d 51 (1992), it was concluded that, under the Act, photocopies of financial disclosure statements that may be inspected need not be made.

I note that the Committee on Open Government has recommended that the provisions of the Ethics in Government Act be amended to require that the entities created by the Act prepare photocopies of records available under the Act.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter A. Sennett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10195

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Harold T. Shell, Jr.
96-A-3942
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. Shell:

As you are aware, I have received your letter of June 9 concerning requests for records of the Poughkeepsie Police Department and the Division of State Police relating to your case.

Having reviewed the opinion addressed to you on May 30, I do not believe that I can add to the substance of the commentary offered in that opinion.

I note that in your requests, reference was made to 5 U.S.C. §§552 and 552a. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts. Those statutes pertain only to records maintained by federal agencies; they do not apply to state or municipal agencies. Further, while those federal acts include provisions concerning the waiver of fees, there are no such provisions in the applicable statute, the New York Freedom of Information Law. I point out, too, that it has been held that an agency is permitted to charge its established fees for copying, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Poughkeepsie Police Department
Lt. Col. Bruce M. Arnold, Records Access Officer,
Division of State Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1196

Committee Members

William I. Bookman, Chairman
Alan Jay Gerson
Walter W. Grunfeld
Elizabeth McCaughey Ross
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Alexander F. Treadwell
Patricia Woodworth

Executive Director

Robert J. Freeman

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Humberto Fernandez
96-A-4554
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. Fernandez:

As you are aware, I have received your letter of June 15.

You have alleged that the detective who arrested you "had no real witnesses and fabricated the whole case," and that he was seen on television while under investigation concerning the same kind of contention. Your family members could not recall which program aired the story, however, you have asked how you might obtain information relating to the matter involving the detective.

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."

Based on the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government. It would not apply to a television station or broadcasting company, for example.

Second, pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), each agency subject to the Freedom of Information Law is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records, and a request should ordinarily be directed to that person at the agency that maintains the records of interest. In this instance, it is suggested that a request be made to the records access officer at the agency that employs or employed the detective in question.

I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should be sufficiently detailed to enable agency staff to locate and identify the records.

Third, 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.

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)]. I believe that the same conclusion would be reached with respect to similar records regarding a police officer.

If the person in question is no longer employed as a police officer, in view of the decisions concerning its intent, I do not believe that § 50-a would continue to apply or serve as basis for a denial of access of records. On the other hand, if the person in question continues to be employed as a police officer, it is likely that §50-a would be pertinent in determining rights of access.

Aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are relevant in 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10197

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Eric Joyner
95-R-7339
Midstate Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Joyner:

As your are aware, I have received your recent undated letter, which reached this office on June 18. You have questioned why the office of a district attorney has denied your request for transcripts of grand jury proceedings.

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."

Since the provision quoted above pertains not only to transcripts, but "any matter attending a grand jury proceeding", I believe that the records in question would be exempted from 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2774
FOIL-AO-1098

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Richard L. Nash
[redacted]

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

Dear Mr. Nash:

As you are aware, I have received your letter of June 15 concerning certain practices of the Auburn Industrial Development Agency (the "IDA") and the Auburn Local Development Corporation (the "LDC").

Your first area of inquiry pertains to the IDA, and you have questioned the propriety of an executive session held "to discuss a pilot for a local shop."

While the nature of that discussion is not entirely clear, I note that the Open Meetings Law is based on a presumption of openness. Stated differently, all meetings of public bodies, such as the IDA, must be conducted in public, unless there is a basis for entry into executive session. Paragraphs (a) through (h) of §105(1) of the Open Meetings Law specify and limit the topics that may appropriately be considered in an executive session.

One of the grounds for entry into executive session that is frequently pertinent to the work of an industrial development agency is §105(1)(f). That provision permits a public body to conduct an executive session to discuss:

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

Based on the foregoing, to the extent that the discussion involved the financial or credit history of a particular person or

corporation, for example, I believe that §105(1)(f) would have justified the holding of an executive session.

Secondly, you wrote that when you attend a meeting of the IDA, you "receive no material and the discussion is largely about facts on a certain page that are not yet available to any one but members." You wrote that you have requested the records during meetings, but that they have been available only after the meetings.

Here I direct your attention to the Freedom of Information Law. Although an agency may respond to an oral request made under the Freedom of Information Law, §89(3) of that statute authorizes an agency to require that a request be made in writing. Further, while a public body may choose to furnish information or records during a meeting, it may require that a request be made in accordance with its rules and regulations adopted under the Freedom of Information Law.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation, i.e., a board of trustees, 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.
>
> (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."

In sum, although the IDA could disclose records during a meeting, I do not believe that it would be obliged to do so. Rather, the IDA could, in my opinion, require that an applicant request the records in writing during the time set forth in its rules and regulations. Alternatively, you could request records under the Freedom of Information Law prior to a meeting.

I note that the Committee on Open Government has recognized that members of the public have at times been frustrated at meetings due to their inability to gain access to records discussed at meetings. Consequently, for several years the Committee has recommended legislation on the subject. If enacted, the legislation would amend §103 of the Open Meetings Law as follows:

> "A record which is available pursuant to article six of this chapter, including any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be presented and discussed by a public body at an open meeting shall be made available for review to the public upon request at lease seventy-two hours prior to such meeting, or as soon as practicable. Copies of such record shall be made available for a reasonable fee as determined in the same manner as provided in article six of this chapter."

Lastly, you asked whether meetings of the LDC must be conducted in public. You indicated that the LDC is a not-for-profit corporation consisting of nine members, and that among the nine, five permanent members are the Mayor, the City Manager, the Corporation Counsel, the Comptroller, and the Chairman of the IDA. In my opinion, in view of the membership of the LDC's governing body, it is likely subject to both the Open Meetings Law and the Freedom of Information Law.

While I know of no judicial decision concerning the status of a local development corporation under the Open Meetings Law, the State's highest court has considered the matter under the Freedom of Information Law.

The Freedom of Information Law pertains 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 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)].

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 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 LDC and the City of Auburn is similar to that of the BEDC and the City of Buffalo, the LDC would constitute an "agency" required to comply with the Freedom of Information Law.

Because the five City officials serve as permanent members of the LDC, it is clear that the City of Auburn exercises substantial control over the LDC. If that is so, I believe that the LDC would constitute an "agency" required to comply with the Freedom of Information Law.

If the LDC is an agency that falls within the scope of the Freedom of Information Law, I believe that its board would also 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 the LDC 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 Auburn, I believe that it conducts public business and performs a governmental function for a public corporation, in this instance, the City of Auburn.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City of Auburn Industrial Development Agency
Auburn Local Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1199

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 11, 1997

Mr. Thomas B. Hayner
Moynihan, Hayner and Moynihan
704 Union Street
Schenectady, NY 12305

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

Dear Mr. Hayner:

As you are aware, I have received your letter of June 12 and the materials attached to it. Please accept my apologies for the delay in response.

You have sought an advisory opinion concerning a denial of request by the Niskayuna Consolidated Fire District #1 for copies of "all applications of membership request to become a member of the Volunteer Firefighter/Paramedic program of Fire District #1 from 1985 to date."

From my perspective, some aspects of the records must be disclosed, while others could justifiably be withheld. Further, I believe that a distinction may be made between those who were accepted for membership and those whose applications were rejected. In this regard, I offer my following comments.

First, as you may be aware, even though most volunteer fire companies are not-for-profit corporations, it has been held that they perform an essentially governmental function and, therefore, are "agencies" subject to the Freedom of Information Law [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575 (1980); also, S.W. Pitts Hose Company v. Capital Newspapers, Sup. Ct., Albany Cty., January 25, 1988]. While volunteer firefighters and paramedics may not be paid public employees, in a variety of contexts, they are treated in terms of responsibilities and benefits in a manner analogous to the treatment of public employees. For purposes of an analysis under the Freedom of Information Law, it is my view that records identifiable to those

persons should be considered in much the same manner as records pertaining to public employees.

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)(b) through (i) of the Law. In my opinion, the only ground for denial of significance is §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

With respect to those whose applications for membership was rejected or are pending a determination, I believe that names and other identifying details may be withheld. It is noted that §89(7) of the Freedom of Information Law provides in part that nothing in that statute requires an agency to disclose the name of an applicant for appointment to public employment. In my view, that provision is intended to protect the privacy of those who applied for public employment and were or have not yet been selected. Disclosure of the identity of an applicant in those circumstances could result in embarrassment of personal hardship. However, if for example, a member of the public seeks to analyze the applications in terms of the characteristics or qualifications of applicants, I believe that the remainder of the applications, following the deletion of identifying details, must be disclosed.

With respect to those applicants who were selected, a different kind of analysis would in my opinion be appropriate. In the case of those records, the names and perhaps additional information pertaining to those who were selected should 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 those persons enjoy a lesser degree of privacy than others, for it has been found in various contexts that they are required to be more accountable than others. 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).

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 entity or officers. In a different context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my opinion, to the extent that the records sought contain information pertaining to the requirements that must have been met to hold a position, they should be disclosed. Again, I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]. However, information included in a document that is irrelevant to criteria required for

holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure hobbies, marital status to protect against an unwarranted invasion of personal privacy.

I note too that in a recent decision rendered by the Appellate Division, Third Department, it was found that one's educational background is public, for that kind of information is not so intimate that disclosure would be offensive to a person of ordinary sensibilities [Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d 411, ___ AD 2d ___ (1986).

In an effort to resolve the matter, a copy of this opinion will be forwarded to Chief Joseph Battiste.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief Joseph Battiste

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10200

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 14, 1997

Mr. Humberto Fernandez
96-A-4554
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. Fernandez:

As you are aware, I have received your letter of June 9, which reached this office of June 16. Please accept my apologies for the delay in response.

You sought guidance concerning situations in which records have been requested from the office of the Bronx County District Attorney and you are informed that the agency cannot locate the records. You also referred to a "policy" of the New York City Police Department indicating that it will respond to a request in ninety days but "do[es] not get to at all."

In this regard, 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, 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" 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 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).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Pat Bonanno
Louis Lombardi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1020

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 16, 1997

Mr. Peter McEniry
95-R-4805
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. McEniry:

I have received your letter of July 6, which reached this office on July 11. You have requested any information or records maintained by this office concerning your case.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records under the Freedom of Information Law. The Committee does not maintain custody or control of records generally, and it does not possess any records pertaining to your case. In short, I cannot provide the records of your interest, because this office does not maintain them.

To seek records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency or agencies (i.e., the Nassau County Police Department or the Office of the District Attorney) that might maintain the records sought. The records access officer has the duty of coordinating the agency's response to requests.

It is possible, too, that some of the records in which you are interested may be 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, other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255). If you seek court records, it is suggested that any such request be made to the clerk of the court pursuant to 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-1020

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 16, 1997

Mr. Tom Lisborg
[redacted]

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

Dear Mr. Lisborg:

As you are aware, I have received your letter of June 15.

You have complained regarding a delay in responding to requests on the part of the New York Department of Health. Although a request was forwarded to that agency in March, as of the date of your letter to this office, you have received no response.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: Patricia Caruso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1023

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 16, 1997

Mr. Walter Raynor
96-A-4061
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. Raynor:

As you are aware, I have received your letter of May 9. For reasons unknown, it did not reach this office until June 20.

You described a series of unsuccessful attempts to obtain records pertaining to your trial from your attorney. Since your case involves an arrest that occurred in Dutchess County, you have asked how you may use the Freedom of Information Law to obtain records pertaining to the matter and how you can find an attorney to represent you.

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."

Based on the foregoing, in general, the Freedom of Information Law pertains to records maintained by entities of state and local government in New York. It would not apply to records maintained by a private attorney or law firm, for example. As such, your

attorney would not be obliged to comply with a request under the Freedom of Information Law.

Second, however, there are likely other sources of the records in which you are interested. To seek records under the Freedom of Information Law, a request should be directed to the "records access officer" at the agency or agencies that might maintain the records. Since you indicated that the arrest was made by the Dutchess County Drug Task Force, I would assume that the Task Force is part of the County Sheriff's Department. If that is so, a request might be made to the records access officer at that agency. Similarly, if the Office of the Dutchess County District Attorney prosecuted, a request might be made to that office as well.

It is possible, too, that some of the records in which you are interested may be 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, other provisions of law often require the disclosure of court records (see e.g., Judiciary Law, §255). If you seek court records, it is suggested that any such request be made to the clerk of the court pursuant to an applicable provision of law.

In a related vein, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable the staff of an agency to locate and identify the records of your interest.

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

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

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

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

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

Lastly, the Committee on Open Government does not serve as an attorney referral service. It is suggested that you confer with a representative of Prisoners' Legal Services.

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-1080⁴

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 16, 1997

Mr. Gregory Pought
85-A-3215
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. Pought:

As you are aware, I have received your letter of June 17.

You referred to a request for records directed to the New York City Police Department and a denial of access on the basis of §87(2)(a) of the Freedom of Information Law and §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."

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10205

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 16, 1997

Mr. J.D. Struchen
[redacted]

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

Dear Mr. Struchen:

As you are aware, I have received your letter of June 18, as well as a variety of related materials. As in the case of previous correspondence, you have raised issues concerning your requests made under the Freedom of Information Law to the Village of Portville.

You referred to an appeal directed to the Village and asked whether it forwarded a copy to this office. Having searched our files, I do not believe that the Village sent either an appeal or any determination thereon to the Committee as required by §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal 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 govrnment a copy of such appeal when received by the agency and the ensuing determination thereon."

I note, too, 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)].

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)].

Lastly, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or otherwise compel an agency to grant or deny access to records. It is my hope, however, that opinions rendered by this office are educational and persuasive. 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
Jeanne E. Stives

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10206

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Mr. Craig J. Albert
[redacted]

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

Dear Mr. Albert:

Your letter of July 1 addressed to Secretary of State Treadwell has been forwarded to the Committee on Open Government. Please note that your letter did not reach the Department of State until July 9. As indicated above, the staff of the Committee is authorized to prepare advisory opinions in response to inquiries.

You referred to provisions of the Rules of the City of New York under which the Municipal Archives assesses certain fees in relation to public access to vital records. It is your view that "[a]s a condition of access to those records...the City requires payment of a $5.00 per day fee", and that the fee is inconsistent with the Freedom of Information Law. Having obtained a copy of the provision to which you referred, Title 49, §2-01 indicates that a fee of $5.00 is charged for "use of microfilm reader machine, per day, or part thereof, for consultation of birth, death or marriage records or indexes." You wrote that employees of the City perform no research function relative to that fee and that all searches relating to the fee are performed by members of the public. Further, you contend that a different fee referenced in the Public Health Law, §4174(3), "applies only to searches undertaken by State Commissioner of Health, and not by any local government employee."

In conjunction with the foregoing, you asked that the Committee:

> "(1) render an advisory opinion on this matter; (2) instruct the City of New York as to its obligations under the law; and (3) to the extent consistent with its jurisdiction, direct the City of make the aforementioned records available to all persons without charge."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to "instruct" an agency to follow a course of action or otherwise compel an agency to grant or deny access to records. However, as the matter pertains to the propriety of the fee, I offer the following comments.

From my perspective, the fee at issue is of questionable validity. 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 on the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation, for instance, establishing a search fee, an administrative 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. 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, and that an agency's rules, regulations, or local laws do not constitute statutes [see Sheehan v. City of Syracuse [521 NYS 2d 207 (1987); Gandin, Schotsky & Rappaport v. Suffolk County, 64 NYS 2d 214, ___ AD 2d ___ (1996)].

Further, the specific language of the Freedom of Information Law and the regulations promulgated by the Committee on Open Government indicate that, absent statutory authority, an agency may

charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

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

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

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

Lastly, I respectfully disagree with your statement that the fees chargeable under the Public Health Law are intended to apply only to searches conducted by the State Department of Health. Section 4173 refers to fees to which a registrar is entitled and states in part that "if such registrar is a city clerk, town clerk or village clerk, he shall collect such fees for and on behalf of the city, town or village in which he serves..."

A copy of this response will be sent to the Commissioner of Records and Information Services, for the Municipal Archives functions within his department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. George J. Rios, Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1027

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Mr. Ted Pagan
96-R-6297
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Pagan:

As you are aware, I have received your letter of June 18. You have contended that the Nassau County Police Department "has stonewalled" your request for records under the Freedom of Information Law. Specific reference is made to a denial of access to "E911 tapes", as well as a delay in responding to the remainder of the request.

In this regard, I offer the following comments.

First, 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 with respect to E911 tapes 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."

Based on the foregoing, E911 tapes would be exempted from disclosure by statute.

Second, §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..."

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, it must include an approximate date indicating when it believes that a request will be granted or denied. When such an approximate date is given, 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 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-1028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

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 June 19, as well as the correspondence attached to it. You have complained that the Valley Central School District has restricted your time for inspection to certain limited hours on particular days and you have sought an advisory opinion on the matter.

In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee 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."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division. 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].

In an effort to resolve the matter, a copy of this opinion will be forwarded to District's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan P. Reichardt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1029

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Ms. Phyllis T. Chen
[redacted]

The staff of the Committee on 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. Chen:

As you are aware, I have received your letter of June 20. Once again, you have raised questions and sought an opinion in relation to events pertaining to a contract between the Oyster Bay-East Norwich School District and its superintendent.

As I understand the matter, the District's attorney has contended that the "'collective negotiations' exception under FOIL would include the salary of someone outside the bargaining unit" and that the information was properly withheld "on the basis of a perceived 'effect on' collective negotiations."

In short, I disagree. Records identifying public employees and their salaries have long been available to the public and are specifically referenced in the Freedom of Information Law [see §87(3)(b)]. Further, in a case determined by the State's highest court nearly twenty years ago, a database consisting of the contents of a number of school districts' collective bargaining agreements, including salary and fringe benefit data, was found to be available. In that controversy, the record was sought by a union, and the Court of Appeals found that there was no merit to the claim that disclosure would, under the language of §87(2)(c) of the Freedom of Information Law, "impair present or imminent...collective bargaining negotiations" [see Doolan v. BOCES, 48 NY2d 341 1979)]. From my perspective, because salary information is clearly public, and because the relationship between a superintendent's contract and negotiations between a school district and a union is more likely less significant than that considered in Doolan, I do not believe that a claim that the Superintendent's salary may be withheld can be justified.

Second, you referred to a document addressed to the Board President by the Superintendent and dated January 31 in which the Superintendent accepted a contract offer, and you asked whether it would be "confidential from the public."

If your description of the facts is accurate, and if an offer was validly made and thereafter validly accepted, the document in question would, in my opinion, 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. Communications between the Board and the Superintendent could be characterized as "intra-agency material" that falls within the scope of §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.

Again, if a valid offer was made and validly accepted, the record in question would appear to represent what essentially would be a final agency determination available under §87(2)(g)(iii). Further, the record does not appear to be the kind of document envisioned by the exception. As stated recently by the Court of Appeals, the exception concerning inter-agency and intra-agency materials involves a "limited aim to safeguard internal government consultations and deliberations", and is intended to permit an agency to withhold "opinions, ideas, or advice exchanged as part of

the consultative or deliberative process of government decision making" [Gould v. New York City Police Department, 89 NY2d 267, 276-277 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1021O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Mr. Darrel Isaac
96-A-4523
Clinton Correctional Facility Annex
P.O. Box 2002
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. Isaac:

As you are aware, I have received your letter of June 20. You wrote that the Office of the New York County District Attorney has denied your request for certain records on the grounds that the records are not in its possession or were provided to you or your attorney during your trial. You have sought my views concerning the propriety of the denial.

In this regard, 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 <u>Key v. Hynes</u> [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" [<u>Thomas v. Records Access Officer</u>, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Second, 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. However, 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary J. Galperin, Chief, Special Projects Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1021

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Ms. Lesley Weber
[redacted]

The staff of the Committee on 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. Weber:

As you know, I have received your letter of June 22. Please accept my apologies for the delay in response.

In your letter and the attached materials, you described a series of issues relating to your requests for records of the Oyster Bay-East Norwich Central School District pertaining to what you characterized as the "Bermingham property." In one of your letters, you highlighted "five topics" that are the subject of your request for records.

In this regard, I offer the following comments.

First, 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..."

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

opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

With respect to the topics upon which you focused, the first area involves legal fees paid to the attorney for the purchaser of a certain parcel. Unless I am misunderstanding the situation, there would appear to be no reason for the School District to maintain records of payment to an attorney retained by a private party. If indeed the District does not maintain those records, the Freedom of Information Law would not apply.

With respect to the remaining documentation, a contract of sale would in my view clearly be available, as would "EPA documentation", for none of the grounds for denial would appear to apply. Other records, however, might be withheld, perhaps in part, depending on their contents.

For instance, with regard to records pertaining to a marketing program or those "supporting the Board's claim that the existing school on the cite could not be renovated, but would have to be rebuilt under the state's 'new construction' guidelines", it is likely 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis Banta, Superintendent
George Chesterton, Assistant Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2777
FOIL-AO-1021?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 17, 1997

Ms. Marjorie O. Collins
Ripley Taxpayers' Alliance
10558 Erie Road
Ripley, NY 14775

The staff of the Committee on 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. Collins:

I have received your letter of June 20 in which you described difficulty pertaining to a request for records made under the Freedom of Information Law in the Town of Ripley, as well as limitations on the ability to speak at meetings. As you requested, I will raise the issues before the Committee. However, I would like to offer the following comments at this time.

First, it has been held that when records are accessible under the Freedom of Information Law, they must be made equally available to any person, regardless of one's status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976) and M. Farbman & Sons v. NYC Health & Hospitals Corp., 62 NY 2d 75 (1984)]. Therefore, whether a person or group is a supporter or opponent of a public official is of no relevance in terms of rights conferred by the Freedom of Information Law.

Second, while it is true that an agency may charge up to twenty-five cents when a photocopy of a record is requested, I note that no fee may be charged for the inspection of records available under the Law.

Third, 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*." As the Court of Appeals, the State's highest court, has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Lastly, with respect to the ability of the public to speak at meetings, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, as you pointed out, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon reasonable rules that treat members of the public equally.

While public bodies have the right to adopt rules to govern their own proceedings (see e.g., Town Law, §63), the courts have found in a variety of contexts that such rules must be reasonable. For example, although a board of education may "adopt by laws and rules for its government and operations", in a case in which a board's rule prohibited the use of tape recorders at its meetings, the Appellate Division found that the rule was unreasonable, stating that the authority to adopt rules "is not unbridled" and that "unreasonable rules will not be sanctioned" [see Mitchell v. Garden City Union Free School District, 113 AD 2d 924, 925 (1985)]. Similarly, if by rule, a public body chose to permit certain citizens to address it for ten minutes while permitting others to address it for three, or not at all, such a rule, in my view, would be unreasonable.

In an effort to encourage compliance with and understanding of open government laws, a copy of this response 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-1023

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 18, 1997

Mr. Roger Clegg
General Counsel
Center for Equal Opportunity
815 Fifteenth Street, NW
Suite 928
Washington, DC 20005

The staff of the Committee 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. Clegg:

I have received your letter of July 2, as well as the materials attached to it. In addition, I have obtained a variety of correspondence from Assemblyman John Faso concerning your efforts in gaining access to certain data from the SUNY system.

Having reviewed the materials, 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 is a statute that may require agencies to disclose existing records. Similarly, as you are aware, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request.

In several elements of your requests, you sought information by asking questions, i.e., "[w]hat are the math and verbal scores" achieved on the SATs by ethnic group; "[w]hat percentage of certain ethnic groups" are admitted solely on the basis of standardized test scores, etc. In short, an agency is not required to answer questions. Again, an agency's obligation is to disclose existing records.

Second, due to your familiarity with the Committee's views expressed in its "Primer on Electronic Information, Fees, and Responses to Requests", I believe that clarification may be in order. It is clear that the Freedom of Information Law includes

electronic information maintained in the form of a record within its scope. It is also clear that an agency is obliged to extract and disclose available data when it has the ability to do so based upon its existing computer programs. Based upon judicial decisions, however, it is equally clear that an agency is not required to develop new computer programs in order to generate data that it cannot extract by means of its existing program [see Guerrier v. Hernandez Cuebas, 165 AD 2d 218 (1991)].

The correspondence acquired from Assemblyman Faso indicates that in some instances, the information in which you are interested simply is not prepared. In others, it appears that the information sought may be stored in some manner electronically by entities with the SUNY system, but that those entities do not have the ability, based upon their computer programs, to generate the data in the combination of elements that you have requested. If that is so, from my perspective, those entities would not be required to engage in reprogramming or the development of new programs in an effort to accommodate you.

In the copy of the "Primer" that you attached to your letter, you highlighted a paragraph in which it was suggested that:

> "If electronic information can be extracted or generated with reasonable effort, if that effort involves less time and cost to the agency than engaging in manual deletions, it would seem that an agency should follow the more reasonable and less costly and labor intensive court of action."

It appears that your interpretation of the preceding remarks may be that it is the Committee's view that an agency is required to engage in new programming if that effort involves less time or cost than engaging in manual deletions from paper records that may be printed out. As specified in the passage following the quoted commentary, such a position has not been established by any court, and it is not currently the opinion of the Committee. The commentary merely is intended to suggest that it may be more sensible, depending upon the circumstances, to engage in reprogramming than the laborious task of manually deleting items from paper records.

I believe that an applicant could ask for a printout from which appropriate deletions could be made as a means of acquiring data, preparing analyses, or otherwise and using it as he or she sees fit. However, in that circumstance, since an agency would be obliged to prepare a copy of a printout, i.e., a photocopy, I believe that the applicant could be charged for the duplication of those records. 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 up to nine by fourteen inches.

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: Martin T. Reid
Carolyn Pasley
William F. Messner

IS NO FOIL 1024

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1021

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 18, 1997

Mr. Damon Holmes
95-A-1809
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. Holmes:

As you are aware, I have received your letter of June 22 in which you referred to a series of delays encountered in your efforts in obtaining records pertaining to your case from 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 Susan Petito, Special Counsel.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

Also relevant 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, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Lastly, 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10216

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

Joseph R. Gonzalez
86-A-7623
Arthur Kill State Prison
Staten Island, NY 10309

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

Dear Mr. Gonzalez:

As you are aware, I have received your letter of June 23. You referred to a failure on the part of the New York City Police Department to respond to your requests for records, and you asked whether that agency is "exempt from complying" with the Freedom of Information Law and what can be done "to prompt an answer."

In this regard, the Freedom of Information Law is applicable to agencies of state and local government in New York. As such, the New York City Police Department is clearly subject to that statute.

I point out that, 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. While I believe that the person in receipt of your request should either have responded to the request in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, it is suggested that you resubmit the request to the records access officer at Room 110C in One Police Plaza and that you include reference to your earlier requests.

It is also 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)].

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Susan Petito, Special Counsel
Sgt. Louis Lombardi, Records Access Officer

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2776
FOIL-AO-1021?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

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 21. Please accept my apologies for the delay in response.

Your initial area of inquiry involves the application of rules promulgated by the New York City Board of Education concerning the ability of the public to address the Board at meetings. Based on its contents, you have asked whether, in my view, you should have been permitted to read your statement.

From my perspective, the issue does not involve an interpretation of the Open Meetings Law and, therefore, is beyond the jurisdiction of this office. As you are aware, while that statute confers a right upon the public to attend meetings of public bodies, it is silent with respect to public participation or the ability to speak at meetings. It has been advised, however, that when a public body chooses to permit public participation, that it should do so based upon reasonable rules that treat members of the public equally.

In the context of your inquiry, the matter does not pertain to the reasonableness of the rule, but rather the means by which the rule was carried out relative to the subject matter of your commentary. Whether the subject matter of your speech would run afoul of Board's rule, in my opinion, represents an issue separate from the Open Meetings Law or the reasonableness of the rules. Consequently, again, I do not believe that I can validly offer commentary on the subject.

Second, you referred to "Ed Stancik's investigative reports and statements of finding" and asked whether they should be considered in the same manner as closing memoranda prepared by the New York City Department of Investigation that are the subject of a recent decision (Lewis v. Giuliani, Supreme Court, New York County, NYLJ, May 1, 1997). The Department of Investigation is an entity created by the City Charter, and its powers and duties, which were discussed in Lewis, are described in the Charter. I am unaware of the specific powers or duties of Mr. Stancik in his capacity as Special Commissioner of Investigation for the New York City School District. I would conjecture, however, that many of the principles enunciated in the Lewis decision would apply to the Special Commissioner and other agencies performing duties analogous to the Department of Investigation or an office of an inspector general.

Next, with regard to agencies' failures to respond to requests in a timely manner, 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, 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.

With respect to my views concerning sanctions for failures, especially intentional failures to comply with the Freedom of Information Law, the Committee has supported several measures to strengthen that statute, particularly through legislation that would give a court broader discretion to award attorneys' fees to successful petitioners. Proving that public employees intentionally violate or subvert the implementation of the Freedom of Information Law would be difficult, and in my opinion, it would be rare that a district attorney would employ the resources needed to prosecute.

Lastly, I will be on vacation during the last week of August and expect to be extremely busy during the week prior thereto.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Ron LeDonni
Michael Valenti

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1021B

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

Ms. Peggy Jenkins
Town of Moreau
Town Office Building
P.O. Box 1349
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 Ms. Jenkins:

As you are aware, I have received your letter, which reached this office on June 30.

Your inquiry pertains to a request by an attorney for decisions rendered by the Town of Moreau Board of Assessment Board of Review and "[c]omplaints regarding tentative assessments filed by property tax payers in the Town of Moreau in May 1997."

From my perspective, the identities of the complainants, i.e., their names and addresses, could likely be withheld. In this regard, I offer the following comments.

It is noted at the outset 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.

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)].

The only exception to the principles 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)].

In a case involving a list of names and addresses in which the agency inquired as to the purpose for which the list was requested, it was found that an agency could make such an inquiry. Specifically, in Golbert v. Suffolk County Department of Consumer Affairs (Supreme Court, Suffolk County, September 5, 1980), the Court cited and apparently relied upon an opinion rendered by this office in which it was advised that an agency may appropriately require that an applicant for a list of names and addresses provide an assurance that a list of names and addresses will not be used for commercial or fund-raising purposes. 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.).

While the request does not involve a list *per se*, it has been held, in essence, that a request for records that would be used to develop a list of names and addresses to be used for a commercial purpose may be denied [see Scott, Sardano & Pomeranz, supra, 65 NY 2d 294 (1985)]. That decision dealt with a request by a law firm for copies of motor vehicle accident reports to be used for the purpose of direct mail solicitation of accident victims. Although the Court of Appeals found that accident reports are available, in view of the intended use of the reports, i.e., to create a mailing list for a commercial purpose, it was determined that names and addresses of accident victims could be withheld based on considerations of privacy. Therefore, if records are requested in order to develop a mailing list or its equivalent to be used for commercial or fund-raising purposes, §89(2)(b)(iii) may be pertinent to the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10219

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

Ms. Laurie A. Dziedzic
[redacted]

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

Dear Ms. Dziedzic:

As you are aware, I have received your letter of June 22. Please accept my apologies for the delay in response.

You described a situation in which a parole officer disclosed information concerning your fiance's arrest, "with charges dismissed 14 years ago", in a manner harmful to him, to you and your children. Having read "Your Right to Know", you asked whether a disclosure of that nature would constitute "an unwarranted invasion of personal privacy."

From my perspective, it is likely that the information in question is confidential and should not have been disclosed.

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 general, even when a record falls within one or more of the grounds for denial of access, an agency may choose to disclose the record. The only situation in my view in which an agency or an agency employee would not have the ability to disclose would involve a case in which a statute other than the Freedom of Information Law forbids disclosure. In that kind of situation, the first ground for denial is applicable. That provision, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §160.50 of the Criminal Procedure Law, which ordinarily requires that records relating to charges that have been dismissed in favor of an accused be sealed. When that

statute applies, the records that have been sealed may be disclosed only upon order of a court.

If the records in question were indeed sealed, it does not appear that the parole officer would have had the authority to disclose them. Further, if you believe that the records were subject to §160.50 of the Criminal Procedure Law and were inappropriately disclosed, it is suggested that you contact the Division of Parole, which is located at 97 Central Avenue, Albany, NY 12206. The Executive Director of the Division is Joseph Gawloski.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Joseph Gawloski

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1022O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

Mr. Ricardo A. DiRose
85-C-0773
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:

As you are aware, I have received your letter of June 15. I note that the letter did not reach this office until June 26.

You referred to a request for a contract between the State and MCI. Following a constructive denial of access and the initiation of an Article 78 proceeding, the State offered to disclose a copy of the document at issue for a fee of sixty-eight dollars, and the court dismissed the proceeding as moot. You wrote that you then requested the document again, but that you sought to inspect it rather than have a copy. When you were informed by the Department of Correctional Services that it was not obliged to send the record to your facility for your inspection, you appealed. In response to the appeal, it was determined that "[t]here is no requirement under FOIL to make any document available for review at any location other than the place where the document exists." You have sought my opinion on the matter.

In this regard, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci
Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1022

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 22, 1997

Mr. Mark Smith
97-A-3146
Clinton Correctional Facility
P.O. Box 2002
Dannemore, NY 12929

Dear Mr. Smith:

As you are aware, I have received your letter of June 25. You have sought a list of the records maintained by county jails and the United States Postal Service that identifies the records to which you are entitled.

In short, there is no such list, and from my perspective, no such list could be prepared. In this regard, I offer the following comments.

First, the United States Postal Service is a federal agency. Therefore, it would be subject to the federal Freedom of Information Act. County jails fall within the coverage of the New York Freedom of Information Law.

Second, due to the structure and specific language of the Freedom of Information Law, it would impossible to devise a list that identifies every record as either accessible or deniable. 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. Most of the grounds for denial are written in terms of potentially harmful effects of disclosure, and there are many instances in which records might justifiably be withheld today but become available at some point in the future.

For example, if a crime is committed and disclosure of police department records would interfere with an investigation, those records could be withheld under §87(2)(e)(i). That provision states that records compiled for law enforcement purposes may be withheld insofar as disclosure would interfere with an investigation. However, if an arrest is made and the perpetrator

has been convicted, it is possible that the same records may become public. The investigation would likely have been completed and, therefore, disclosure would no longer interfere with the investigation. In that instance, the harmful effect of disclosure would have disappeared.

Enclosed is a copy of the New York Freedom of Information Law. It is suggested that §87(2) contains the most important provisions concerning the extent to which records must be disclosed or, conversely, may 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:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10222

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 21, 1997

Mr. Peter Henner, Esq.
P.O. Box 326
Clarksville, NY 12041-0326

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

Dear Mr. Henner:

As you are aware, I have received your letter of June 26. Please accept my apologies for the delay in response.

According to your correspondence, on June 17, you addressed a request for records to the records access officer at the Albany County Department of Public Works for certain records maintained by the Department. In response, you were informed that "all Freedom of Information requests must be filed through the Albany County Clerk's Office", and you were advised to send your request to the County Clerk. You have questioned whether a response of that nature is appropriate.

From my perspective, the response that you received from the Department of Public Works was not consistent with either the letter or the spirit of the law.

By way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §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."

As stated above, the records access officer must "coordinate" an agency's response to requests. Therefore, I believe that requests may be made to County officials generally. In my opinion, when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the request to the records access officer.

Further, I believe that the Department's response unnecessarily delayed the issuance of a determination to grant or deny your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Hon. Thomas G. Clingan, County Clerk
Michael V. Franchini, Deputy Commissioner

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10223

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 22, 1997

Mr. Richard Watts
G-25-97
Auburn Correctional Facility
135 State Street Box 618
Auburn, Ny 13024

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

Dear Mr. Watts:

As you are aware, I have received your letter of June 30. You have complained with respect to alleged failures on the part of employees at your facility to comply with the Freedom of Information Law, and you sought to initiate a "formal complaint" pursuant to §75 of the Civil Service Law. In addition, you asked that this office compel Department of Correctional Services employees to comply with the Freedom of Information Law.

With respect to your claims against Department employees, I do not believe that you can initiate charges against a public employee under §75 of the Civil Service Law. As I understand that statute, only an agency as an employer can bring charges under that provision.

It is also noted that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that law or compel an agency to grant or deny access to records.

As I interpret your comments, it appears that, in some instances, Department staff did not respond or did not respond fully to your requests for records, thereby, in your view, denying access to certain 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 Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent, Auburn Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1022

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 22, 1997

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:

As you are aware, I have received your letter of June 22, which reached this office on June 30. You have sought an advisory opinion concerning your ability to gain access to a "work evaluation" pertaining to you.

According to your letter, a determination to deny your request for the evaluation was based upon §95(6)(c) of the Personal Privacy Protection Law. It is your view that the citation of that section represents a "misunderstanding" of that provision. Further, it is your view that since the record pertains to you, it should be available under the Freedom of Information Law. You added that work evaluations are supposed to be signed by both an evaluator and an inmate.

In this regard, I offer the following comments.

First, in my opinion the Personal Privacy Protection Law does not apply. In general, §95(1) of that statute provides an individual, a "data subject", with rights of access to records about himself or herself that are maintained by a state agency. However, those rights do not apply with respect to certain kinds of records. One area in which rights of access do not apply involves the citation referenced by the Department. That provision states that rights of access conferred by §95(1) of the Personal Privacy Protection Law do not apply to:

> "personal information pertaining to the incarceration of an inmate at a state correctional facility which is evaluative in

> nature or which, if such access was provided, could endanger the life or safety of any person, unless such access is otherwise permitted by law or by court order..."

Further, §95(7) indicates 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, 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 short, the Personal Privacy Protection Law in my view would not represent a source of rights of access. Nevertheless, separate from that 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.

It is true that if an evaluation pertains solely to you that you could not invade your own privacy and that disclosure would not constitute "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) or 89(2)(b). However, an evaluation would consist of "intra-agency material" that falls within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Therefore, insofar as "evaluative material" consists of an opinion, and it is my assumption that evaluative material by its nature is reflective of opinion, I believe that it may be withheld.

Notwithstanding the foregoing, if indeed an evaluation is disclosed to and signed by an inmate, it would appear that the Department would essentially have waived its ability to deny access. In that circumstance, I believe that the record should be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward McSweeney
Leslie Becher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10225

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 24, 1997

Mr. John Culkin
[redacted]

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

Dear Mr. Culkin:

As you are aware, I have reviewed your letter of June 30. This also acknowledges the receipt of your correspondence transmitted on July 19.

As I understand your commentary, an agency of the State claims that it "functions as an insurance company...in competition with other carriers licensed in the State." The question involves rights of access to a marketing plan considered by its governing body.

Having been contacted by the agency that appears to be the subject of your inquiry, the State Insurance Fund, it is likely in my view that the record in question may be withheld in part or perhaps in its entirety, depending upon its contents and the effects of the disclosure.

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, it appears that two of the grounds for denial, paragraphs (d) and (g), are pertinent to an analysis of rights of access. Section 87(2)(d) permits and agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

While the State Insurance Fund as a state agency is not typical of commercial enterprises, my understanding is that, in many respects, it carries out many of its duties as an entity in competition with private firms in the insurance industry. I note that there is case law indicating that when a governmental entity performs functions essentially commercial in nature in competition with private, profit making entities, it may withhold records pursuant to §87(2)(d) in appropriate circumstances (Syracuse & Oswego Motor Lines, Inc. v. Frank, Sup. Ct., Onondaga Cty., October 15, 1985). In this instance, assuming that the agency in possession of the record sought is engaged in competition with private firms engaged in the same area of commercial activity, I believe that §87(2)(d) would serve as a potential bases for a denial of access.

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. 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 record, 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 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., 419-420).

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.

A marketing plan developed by an agency would, in my view, constitute "intra-agency material." Again the content of such material represents the basis for determining the extent to which that exception would apply.

In sum, I believe that the State Insurance Fund could in the context of the preceding remarks be characterized as a commercial entity and therefore, assert §87(2)(d). To the extent that either that provision or §87(2)(g) may justifiably be asserted in accordance with the preceding commentary, the record sought could, in my opinion, be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jacob Weintraub

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1022

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 24, 1997

Mrs. Maureen 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 Mrs. Powell:

As you are aware, I have received your correspondence of June 30.

Having requested records from the Roosevelt Union Free School District on June 16, the District responded on June 18 indicating that the records sought, insofar as they are maintained by the District and subject to certain deletions, would be "available within ten(10) working days of this date." You wrote that it was your assumption that the District was required to disclose the records within five working days, and you asked whether the law had been amended.

The Freedom of Information Law has not been amended, and I believe that the District's response was consistent with law.

As you suggested, 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.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Will Singleton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1029

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 24, 1997

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:

As you are aware, I have received your letter of June 24, which reached this office on June 30.

You made reference to earlier correspondence in which you sought an advisory opinion concerning limitations imposed by the Valley Central School District on the amount of time on a given day during which you could inspect records. In response to your inquiry, based on the regulations promulgated by the Committee on Open Government and an unanimous decision rendered by the Appellate Division, it was advised that the District is required to make records available during the entirety of its regular business hours on a day in which it authorizes inspection of records.

You also referred in your recent letter to "an additional restriction", for the District has informed you that "although a date and time may be available, someone to assist you may not be." In this regard, there is nothing in the Freedom of Information Law that requires that an agency employee be present while a member of the public inspects records. Similarly, I know of no provision that requires the presence of a public employee as a condition precedent to the review of records.

This is not to suggest that you have the right to inspect records instantly following a request or that you may inspect records during the entirety of the District's regular business hours on the day or days of your choosing. I am suggesting, however, that when you are informed that you can review records on a given day, I believe that you may do so during regular business, with or without the presence of a District employee. The extent to

which the District opts to have an employee present while you review records is, in my view, a matter of its discretion.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan P. Reichardt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 25, 1997

Mr. Dwayne Chapman
92-A-5516 C9-20
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Chapman:

I have received your recent letter, which reached this office on July 24. You have requested a variety of records relating to your case from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make available the records of your interest, because this agency does not possess them.

I note that pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), each agency subject to the Freedom of Information Law 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 records access officers at the agencies that you believe maintain the records of your interest.

It is also noted that the courts and court records are not subject to the Freedom of Information Law. While many court records must be made public, when seeking them, it is suggested that you request them under an applicable provision of law (see e.g., Judiciary Law, §255).

Lastly, as suggested in the correspondence attached to your letter, there is no provision in the New York Freedom of Information Law that requires an agency to waive fees for copies. It has been held that an agency may charge its established fee, even if the applicant for records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that the foregoing clarifies 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-1029

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 25, 1997

Mr. Dan Lynch
Times-Union
News Plaza
Box 15000
Albany, NY 12212

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

Dear Mr. Lynch:

As you are aware, I have received your letter of July 1 in which you sought an advisory opinion concerning "the refusal" by the Division of State Police to disclose records relating to "the bombing incident at the Clifton Park home of Jude and Mary Reardon on Christmas Eve, 1996", and those pertaining to "the investigation of the late Christopher Gilson in connection with this incident." In addition, you requested records "relating to the finding suicide" in Gilson's death.

In response to the request, a "redacted copy of the Investigation Report" was disclosed, but all other documentation was withheld. Since the receipt of your letter, I have also received the Division's determination of your appeal. In sustaining the initial denial, Chief Inspector James A. Fitzgerald wrote that:

> "The records you seek were compiled for law enforcement purposes and which if disclosed, would reveal non-routine criminal investigative techniques or procedures. Additionally, disclosure of other portions of the investigative report would endanger the life or safety of those concerned and/or redactions were made to prevent an unwarranted invasion of personal privacy of those concerned."

As I understand the matter, which received substantial publicity, the investigation of incident was lengthy and detailed. It appears, however, that the Division of State Police disclosed only one report, and that was made available only after having been redacted; all other records falling within the scope of your request were withheld in their entirety. If that is so, the Division denied access to numerous records in blanket fashion in a manner inconsistent with the Freedom of Information Law and its judicial interpretation. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals expressed its general view of the intent of the Freedom of Information Law in a recent decision to which you referred in your appeal, Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that

they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, it appears that a variety of records have been withheld in their entirety. Rather than citing §87(2)(g) as a basis for a blanket denial of access to the records at issue as in Gould, the Division has engaged in a blanket denial citing different provisions in a manner which, in my view, is equally inappropriate. I am not suggesting that the records sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the Division for the purpose of identifying those portions of the records that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "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" (id., 277; emphasis added).

Second, the specific grounds for denial referenced by the Department indicate that an agency may withhold records or portions thereof that:

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

The leading decision concerning the provision quoted above 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)."

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).

From my perspective, as the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)], a denial of access would be appropriate. I would conjecture, however, that not all of the investigative techniques or procedures employed in relation to the incident and the ensuing investigation could be characterized as "non-routine", and that it is unlikely that disclosure of each aspect of the records would result in the harmful effects of disclosure described above.

Another provision to which the Division alluded as a basis for denial is §87(2)(f). As inferred earlier, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." It was advised above that if, for example, disclosure of non-routine criminal investigative

techniques or procedures would endanger the life or safety of law enforcement personnel or others, §87(2)(f) might justifiably be asserted. Nevertheless, in the Division's determination to deny access, it was stated that disclosure "would endanger the life or safety of those concerned." Based upon news media accounts of the matter, it appears to have been established that Gilson was the perpetrator. Since he committed suicide, it is difficult to envision how disclosure, at this juncture, would endanger the life or safety "of those concerned."

The remaining provision upon which the Division relied is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Again, a blanket denial would in my opinion be inappropriate. While it is likely that names or other identifying details regarding those questioned during or involved in the investigation might justifiably be withheld, identifying details could be deleted, and the remainder of the records disclosed.

In sum, in view of the nature of the incident and the volume of the records that were likely produced that fall within the scope of your request, I believe that the wholesale denial of access by the Division is inconsistent with the Freedom of Information Law and its judicial interpretation. In an effort to encourage the Division of State Police to review the records and to avoid the necessity of engaging in litigation, a copy of this opinion will be forwarded to the Division of State Police.

Lastly, since an aspect of your request involved records relating to Gilson's suicide, I note that autopsy reports and related records prepared by a coroner or medical examiner are beyond the scope of rights conferred by the Freedom of Information Law. Under §677 of the County Law, those kinds of records would be exempt from disclosure and would be available to the public only by means of a court order authorizing disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colonel James A. Fitzgerald
Lieutenant Colonel Bruce M. Arnold

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1023O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 25, 1997

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:

As you are aware, I have received your letter of June 30 and the materials attached to it. You complained with respect to a failure on the part of Fulton County to respond to an appeal made under the Freedom of Information Law, and in relation to a denial of access to records that appear to pertain to a criminal matter.

In this regard, I offer the following comments.

First, the provision dealing with the right to appeal a denial of a request for 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, who shall within ten business days of the receipt of 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 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)].

Second, with respect to requests for records involving a criminal incidents, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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.

In considering the records that might fall within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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][iii]). 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. Axelrod, 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,89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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 might fall within the scope of your request.

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 also might apply if a complaint was found to be without merit. In that situation many if not all records pertaining to the complaint might properly be withheld as a unwarranted invasion of personal property.

Often the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub-paragraphs (i) through (iv) of §87(2)(e).

Another possible ground for denial is §87(2)(f), which permits withholding to the extent that disclosure "would endanger the life or safety of any person". The capacity to withhold on that basis is dependent upon the facts and circumstances concerning an event.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Freedom of Information Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1023

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 28, 1997

Mr. William Secrest
95-A-6527
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. Secrest:

As you are aware, I have received your letter of June 30. You described a series of difficulties relating to requests for records pertaining to your case from the Office of the Erie County District Attorney.

You wrote that you recently sought a "subject matter list" and that the request was denied. In my view, such a record must be maintained and made available. 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. For purposes of clarity, I point out that there is no requirement that an agency prepare a subject matter with respect to records pertaining to a particular person or case. 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.

Second, with respect to the timeliness of responses, 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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

Also relevant 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, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 related records would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Lastly, 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: John DeFranks
J. Michael Marion

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10232

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 28, 1997

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:

As you are aware, I have received your letter of June 28. As in the case of previous correspondence, the matter involves requests for records of the Division of State Police. Based on statements appearing in your letter, it is unclear whether your understanding of the Freedom of Information Law is accurate.

You referred to a judicial decision as a basis for stating that "[d]ocuments constituting the final determination of disciplinary action against State Police investigator were not immune from agency policy of determination under Public Officers Law § 87 (2)(g)(iii) [Scaccia, supra]." I would agree that the decision rendered in Scaccia v. Division of State Police,[138 AD2d 50 (1988)], as well as others, indicate that determinations reflective of findings of misconduct must be disclosed [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Powhida v. City of Albany, 147 AD 2d 236 (1989)]. However, if an allegation, complaint or charge has not yet resulted in a determination, or if the determination is that the allegation, complaint or charge was without merit and is dismissed, I believe that the records relating to the matter may be withheld [see e.g., Prisoners' Legal Services of New York v. NYS Department of Correctional Services, 73 NY 2d 26 (1988) and Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. In short, if your contention is that a determination relative to a disciplinary matter is always public, irrespective of the outcome, I disagree. The determination in my view would be public only if there is a final determination reflective of a finding of wrongdoing or misconduct.

You also referred to §240.65 of the Penal Law, which states that:

> "A person is guilty of unlawful prevention of public access to records when, with intent to prevent the public inspection of a record pursuant to article six of the public officers law, he willfully conceals or destroys any such record."

From my perspective, the preceding may be applicable in two circumstances: first, when an agency employee receives a request for a record and indicates that the agency does not maintain the record even though he or she knows that the agency does maintain the record; or second, when an agency employee destroys a record following a request for that record in order to prevent public disclosure of the record. I do not believe that §240.65 applies when an agency denies access to a record, even though the basis for the denial may be inappropriate or erroneous.

Lastly, you made reference to Colonel James A. Fitzgerald, the person designated to determine appeals at the Division of State Police. You suggested that since, according to your letter, he has been accused of wrongdoing in a federal lawsuit, that fact should "send up a red flag in [this] office." In this regard, whether Colonel Fitzgerald has been named in a lawsuit is, in my view, largely irrelevant to the performance of his duties in relation to the Freedom of Information Law. This office has no control over the means by which other agencies carry out their duties, and it is not the business of the Committee on Open Government to question or second guess the designation of one of its staff in carrying out the agency's functions under the Freedom of Information Law. In short, the appearance of Colonel Fitzgerald's name does not "send up a red flag."

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Colonel James A. Fitzgerald

No Foil #3 10233

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10234

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 28, 1997

Mr. Gerard P. Brady
Welby & Brady, LLP
Westchester Financial Center
50 Main street
White Plains, NY 10606

The staff of the Committee 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. Brady:

As you are aware, I have received your communication of July 2. Although you received the records that you requested from the New York City Department of Parks and Recreation, you wrote that you are "still concerned over the 'timing' issue, and the City's stated policy of not producing copies of the bid documents until after award of the contract." As such, you have sought my views on the matter.

From my perspective, the practice of New York City agencies may be inconsistent with the requirements of the Freedom of Information Law. In this regard, I offer the following comments.

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. The provision upon which the City has typically relied states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." From my perspective, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding contracts.

Section 87(2)(c) often applies in situations in which agencies seek bids or requests for proposals ("RFP's"). While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. As I understand the

matter, prior to the purchase of goods or services, 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, after the receipt of the proposals, 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 identities of the bidders and in most instances bids themselves would, in my opinion, be available, for any impairment that might have occurred due to premature disclosure would essentially have disappeared. Moreover, bids are often opened publicly, before a contract is awarded.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations with or evaluations of the submitters resulting in alterations in proposals or costs. Whether disclosure of the proposals or ancillary materials would at that juncture "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. Nevertheless, as in the case of bids, when the deadline for the submission of proposals has been reached, I cannot envision how disclosure of the identities of the submitters and, in accordance with the facts and circumstances, perhaps nothing more, could impair or adversely affect an agency's ability to engage in an optimal contractual agreement.

In short, while there may be a valid basis for withholding various information contained in or related to proposals, I do not believe that the policy of withholding the names of submitters of proposals, or bids, until a contract is awarded is consistent with the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jeffrey K. Goldsmith

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1035

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 28, 1997

Mr. Rocco Panetta
96-R-9062
P.O. Box 311
Gowanda, NY 14070

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

Dear Mr. Panetta:

As you are aware, I have received your letter of June 26. You referred to an advisory opinion rendered at your request on June 17, and you questioned how newspapers acquire information from police departments concerning arrests and similar incidents. You wrote that you have been denied access to those kinds of records "based on the premise that disclosure would constitute 'an invasion of personal privacy'."

If indeed records regarding arrests are being withheld on the basis that you cited, I do not believe that an agency would be acting in a manner consistent with the Freedom of Information Law. Members of the news media have the same rights as any member of the public, and as indicated in the opinion addressed to your, police blotters and booking records are generally available under the Freedom of Information Law to any person. It is reiterated that a booking record is the record of the arrest made by the arresting agency, and it has been held that records of an arresting agency identifying those arrested must be disclosed [Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

It is suggested that you review the earlier opinion, for I believe that it deals expansively with the issue that you raised.

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-10236

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 31, 1997

Mr. Edgar Quinones
93-A-8664
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. Quinones:

As you are aware, I have received your letter of June 30. You have sought assistance with respect to your requests for records pertaining to your case that you have directed to the Office of the New York County District Attorney.

In this regard, I offer the following comments.

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

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

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

accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 I am unaware of the contents of all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carmen A. Morales

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10237

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 31, 1997

Mr. and Mrs. George McCarthy
[redacted]

The staff of the Committee 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. and Mrs. McCarthy:

As you are aware, I have received your letter of June 28. Please accept my apologies for the delay in response.

In brief, you described your attempts to acquire records from the Office of Mental Retardation and Developmental Disabilities (OMRDD) concerning programs conducted by the Rockland County Association for Retarded Citizens, and the difficulty apparently is that the agency in question does not maintain records at this juncture in addition to those that have been made available to you.

In this regard, I point out that the Freedom of Information Law pertains to existing records [see §89(3)]. Consequently, an agency is not required to create a record in response to a request. Similarly, if records have been disposed of otherwise destroyed, the Freedom of Information Law would not be applicable. In the context of your inquiry, I have contacted OMRDD's representative and was informed that the agency has forwarded all records that it maintains that fall within the scope of your request. I was also told that records prepared prior to 1990 have been destroyed.

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 regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Johnson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10238

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

July 31, 1997

Mr. Freddie Simmons
96-A-5349
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821

Dear Mr. Simmons:

I have received your letter of u requested various records concerning your criminal case, which involved an incident occurring in the Bronx.

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 it does not possess or have control of the records in which you are interested.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating an agency's response to requests. In addition, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records being requested. As such, you should provide as much detail as possible when seeking records.

Since the records in question would appear to be maintained by the New York City Police Department, I note that Sgt. Louis Lombardi is the records access officer, and that his office is located in Room 110C, One Police Plaza, New York, NY 10038.

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-1039

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 1, 1997

Mr. Barry Pittman
Attorney and Counselor at Law
26 Saxon Avenue
P.O. Box 5647
Bay Shore, NY 11706-0455

The staff of the Committee 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. Pittman:

I have received your letter of July 1, as well as a variety of related materials sent by your client, Dennis W. Cahill, DDS.

By way of background, your client was the subject of a complaint and a hearing conducted by the New York State Division of Human Rights before James Wilcox as hearing officer. Following the proceeding, Mr. Wilcox rendered a determination that you "believe to have been the result of outright bias." In a request made on May 7, you sought, in brief, the personnel file pertaining to Mr. Wilcox, records of written or oral complaints filed against him, his employment history, performance evaluations prepared during his employment with the Division, and any "statistical or factual tabulations that reflect the total number of hearings held by James Wilcox that involve claims of discrimination based on HIV, AIDS, or sexual preference status and the number of times he ruled in favor of the complainant on these cases."

In the initial response to the request, you were informed that the statistical information referenced above "is not on existing computer generated reports and the Division is not obligated to prepare special reports in response to FOIL requests." A subject matter list of the Division's records was disclosed, but the remainder of the request was denied on the ground that disclosure would result in "an unwarranted invasion of personal privacy." Following an appeal, Commissioner Edward Mercado disclosed Mr. Wilcox's dates of hire and admission to the bar, his grade, title, salary and business address, and his ratings on three performance

evaluations. In all other respects, the denial of access was affirmed.

In this regard, I offer the following comments.

I refer at the outset to a letter addressed to this office on July 8 by your client in which he alluded to your request for assistance and wrote that he was "heartened that [his] appeal to [this office] in this matter will result in the release of information that Government must not keep secret if it is to adhere to our LAWS AND CONSTITUTION" (emphasis provided by Dr. Cahill). Please note that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. While it is our hope that advisory opinions rendered by this office are educational and persuasive, they are not binding, and the Committee is not empowered to compel an agency to grant or deny access to records.

With respect to the substance of the matter, 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 or prepare a record in response to a request. However, the Law 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 upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another

storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since section 89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

If the statistical or factual tabulations that you requested do not exist or cannot be generated based on the Division's existing computer programs, I do not believe that the Division would be required to prepare new statistics on your behalf or develop new computer programs in order to generate the data.

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.

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, as suggested in the responses to your request and appeal, 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].

The other ground for denial significant to an analysis of rights of access 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 conjunction with the preceding remarks, it is likely that some elements of performance evaluations in addition to those disclosed to you should be accessible. While the contents of evaluations may differ, I believe that a typical evaluation contains three components.

One component involves a description of the duties to be performed by a person holding a particular position, or perhaps a

series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the reviewer's or supervisor'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 view, that aspect of an evaluation could be withheld, both as an unwarranted invasion of personal privacy and under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component, as in this instance, 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). 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. The Commissioner appears to have disclosed Mr. Wilcox's final ratings in his evaluations in a manner consistent with law.

Lastly, 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. Therefore, any final determination concerning Mr. Wilcox reflective of a finding of misconduct of disciplinary action would, in my view, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edward Mercado, Commissioner
Dennis W. Cahill, DDS

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1024

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 1, 1997

Mr. Francis Read
89-C-1510
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. Read:

As you are aware, I have received your letter of June 26. Since your request for records of the Onondaga County Office of the District Attorney had not been answered, you asked whether that office is obliged to respond to the request, and if so, to whom you may appeal a denial of access.

In this regard, I offer the following comments.

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

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

Based upon the language quoted above, and since an office of a district attorney is a "governmental entity" that performs a "governmental function" for the state and a public corporation (i.e., a county), it is, in my opinion, an "agency" required to comply with the Freedom of Information Law. It is noted that one of the first decision rendered under the Freedom of Information Law

indicated that certain records of a district attorney are available [see Dillon v. Cahn, 79 Misc. 2d 300, 259 NYS 2d 981 (1974)], and that several later decisions confirm that records of district attorneys are subject to rights granted by the Freedom of Information Law in the same manner as records of agencies generally [see e.g., Barrett v. Morgenthau, 74 NY 2d 907; Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989); New York Public Interest Research Group, Inc. v. Greenberg, Sup. Ct., Albany Cty., April 27, 1979; Westchester Rockland Newspapers v. Vergari, Sup. Ct., Westchester Cty., June 24, 1982; Hawkins V. Kurlander, 98 AD 2d 12 (1983)].

Second, 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)].

With respect to the appeal, the practice varies from county to county with respect to the person designated to determine appeals. It is suggested that you appeal to the District Attorney and ask that the appeal be forwarded to the appropriate person if he does not determine appeals under the Freedom of Information Law. It is also suggested that a copy of the appeal be sent to the County Executive.

Lastly, since you sought a waiver of fees, I note that it has been held that an agency may charge its established fees for copying, even when an applicant for records is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Office of the District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1024

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 1, 1997

Mr. Benjamin Caro
94-A-5351
Mid State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Caro:

As you are aware, I have received your letter of June 30. You have sought assistance in obtaining your medical records from St. Luke's Memorial Hospital Center in Utica, which you characterized as a "public hospital."

In this regard, if the facility is a governmental entity, its records would be subject to the Freedom of Information Law. I would conjecture, however, that in consideration of its name, the facility is not governmental.

Assuming that the Freedom of Information applies, in in terms of rights granted by that statute, it is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 Hospital 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 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 send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking 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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1042

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 1, 1997

Mr. Jamal S. Fowler
91-A-5610
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. Fowler:

As you are aware, I have received your letter of June 27. Having reviewed your correspondence, I offer the following comments.

First, if an agency denies an appeal or fails to respond to an appeal within the statutory time period, I believe that the applicant for records would have exhausted his or her administrative remedies and could initiate a proceeding to review the denial of access under Article 78 of the Civil Practice Law and Rules. I note that §89(4)(b) of the Freedom of Information Law specifies that, in such a proceeding, the agency has the burden of proving that the records withheld fall within the scope of the grounds for denial of access appearing in §87(2).

Second, since an area of your requests involves court records, I point out that those records are not subject to the Freedom of Information Law. That statute 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:

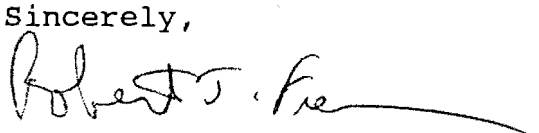
> "the courts of the state, including any municipal or district court, whether or not of record."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The foregoing is not intended to suggest that court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that you request court records from the clerk of the court in which the proceeding was conducted, 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:tt

cc: Hon. Juanita Bing Newton
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 4, 1997

Mr. Bryant K.O. White
Mohawk Correctional Facility
6100 School Road
P.O. Box 8451
Rome, NY 13442

Dear Mr. White:

I have received your letter of June 28, which reached this office on July 7. It is unclear whether you have requested records from this office or from the Monroe County Family Court.

In this regard, first, 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 does not maintain records generally, and it is not empowered to compel an entity to grant or deny access to records. In short, I cannot make the records sought available, because this office does not possess them.

Second, in your request, you cited both the New York Freedom of Information Law and the federal Freedom of Information Act 5 USC §552. The federal Act pertains only to federal agencies and, therefore, would not apply to records of a family court. Further, 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."

If the records in which you are interested are maintained by a court and can be characterized as court records, the Freedom of Information Law in my opinion would not apply.

Third, while many kinds of court records are public, I note that §166 of the Family Court Act states in relevant part that "[t]he records of any proceeding in the family court shall not be open to indiscriminate public inspection." As such, when seeking records from the Family Court, it is suggested that you describe your relationship to the proceeding in an effort to demonstrate that your request is not "indiscriminate."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1024

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 1997

Ms. Elizabeth M. Vandemark
[redacted]

The staff of the Committee on 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. Vandemark:

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

You have sought assistance in obtaining dog license records concerning dogs at a certain address from the New York City Department of Health. The Department denied access on the ground that disclosure would result in "an unwarranted invasion of personal privacy" pursuant to §§87(2)(b) and 89(2)(b) of the Freedom of Information Law. Further, although you appealed the denial on May 8, as of the date of your letter to this office, you had not received a response to your appeal.

From my perspective, the records sought 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 §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 (or their dogs) are generally accessible to the public.

The only instance in which the kinds of records that you are seeking might properly be withheld would pertain to §89(2)(b)(iii), which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." It does not appear that your request involves commercial or fund-raising activity.

Lastly, with respect to your appeal, I note that §89(4)(a) if the Freedom of Information Law states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business daus of the receipt of 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Wilfredo Lopez
Patricia J. Caruso

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10245

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 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 of July 7, as well as the correspondence attached to it. You have sought an advisory opinion relating to denials of two requests for a draft "medical services evaluation" of the Tompkins County Jail by the State Commission of Correction. The requests were directed to the County and the Commission, and both denied access for essentially the same reason.

Following an appeal of the denial, the Commission's Special Counsel, Michael F. Donegan, wrote that the report in question "is non-final" and that, therefore, it is "exempt from disclosure" under "section 87.2 (g)iii" of the Freedom of Information Law. Similarly, Scott Heyman, the Tompkins County Administrator, referred to the report as a "draft" and denied access citing the same provision. In addition, he wrote that the report is "exempt under Section 87(2)(e)i" of the Freedom of Information Law.

While I am unfamiliar with the specific contents of the record at issue, it is likely in my view that portions of the report 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 §87(2)(a) through (i) of the Law.

I believe that the report clearly falls within the scope of the provision cited by both agencies as justification for a denial of your request. However, that provision, due to its structure,

often requires disclosure. Specifically, §87 (2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

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

One of the contentions offered by the New York City Police Department in a recent decision rendered by the State's highest court was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the report is in "draft" or is "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of its contents.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277)."

I would conjecture that at least some elements of the report, in accordance with the direction offered by the Court of Appeals, would consist of factual information that must be disclosed, irrespective of the status of the report as draft or non-final.

With respect to the other basis for denial, §87(2)(e)(i) permits an agency to withhold records "compiled for law enforcement purposes" insofar as disclosure would "interfere with law enforcement investigations or judicial proceedings." The report, as I understand it, is an evaluation of the functioning of a certain aspect of a county jail. If that is so, it is questionable in my opinion whether it could be characterized as having been "compiled for law enforcement purposes." If it was not prepared for those purposes, §87(2)(e) would not apply. Even if it was compiled for law enforcement purposes, subparagraph (i) could justifiably be asserted only to the extent that disclosure would result in the harm expressed in that provision, i.e. to the extent that disclosure would "interfere". Again, from my perspective, it is unlikely, if that provision applies at all, that it would justify a denial of access to the report in its entirety.

In conjunction with the foregoing, it is emphasized that the introductory language of §87(2) of the Freedom of Information Law refers to the authority to withhold "records or portions thereof" that fall within the scope of the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

The Court of Appeals reiterated its general view of the intent of the Freedom of Information Law in Gould, stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47

> N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law, for it was stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, stating that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink vl. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your requests, I am not suggesting that report sought must be disclosed in full. Rather, based on the direction given by the Court of Appeals in several decisions, I believe that this report must be reviewed by the Department for the purpose of identifying those portions that might fall within the scope of one or more of the grounds for denial of access. As the Court stated later in the decision: "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" (id., 277; emphasis added).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Michael F. Donegan
Scott Heyman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1026

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 1997

Mr. Danny Trammell
[redacted]

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

Dear Mr. Trammell:

I have received your recent letter, which reached this office on July 7. In short, you complained that several requests for records transmitted to the Department of Correctional Services have not been answered.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Anthony J. Annucci, Counsel to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10247

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 1997

Mr. Adrian J. Valle
88-A-5635
Cell Loc D-7-47
Auburn Correctional Facility
Box 618
Auburn, NY 13024

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

Dear Mr. Valle:

I have received your letter of July 2 in which you raised a variety of issues concerning your treatment at your facility.

In this regard, I note that the Committee on Open Government is authorized to provide advice concerning rights of access to government records. While this office does not have the jurisdiction or expertise to deal with most of the issues that you raised, I offer the following brief remarks relating to your reference to requests for records.

First, pursuant to regulations promulgated by the Department of Correctional Services, a request for records maintained at a correctional facility should be directed to the facility superintendent or his designee. Under §89(3) of the Freedom of Information Law, 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.

In addition, although I am unfamiliar with the records in which you are interested, it appears that they should be made

available. I note that §5.21(a) of the regulations promulgated by the Department of Correctional Services states that:

> "information from the personal history portion of an inmate record shall be made available to the inmate, a representative of his estate, his legal guardian or committee, or his attorney."

Further, §5.09(i) provides that:

> "Personal history means records consisting of inmate name, age, birth date, 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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: H. Walker, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1024

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 1997

Mr. Kenneth Rodrigues
97-A-0121
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

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

Dear Mr. Rodrigues:

I have received your letter of July 6 concerning access to grand jury minutes.

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.

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 deals with grand jury proceedings and provides 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 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.

It is suggested that you discuss the matter with your attorney or perhaps a representative of Prisoners' Legal Services.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1024 9

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 5, 1997

Mr. Polanco Bienvenido
97-A-2380
Mohawk Correctional Facility
6100 School Road
P.O. Box 8450
Rome, NY 13442

Dear Mr. Bienvenido:

I have received your letter of July 7, which reached this office today. You have 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 compel agencies to grant or deny access to records or to determine appeals following denials of access to records.

The provision pertaining to the right to appeal a denial of access, §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."

For your information, the person designated by the New York City Police Department to determine appeals under the Freedom of Information Law is Susan Petito, Special Counsel.

Lastly, you referred to 5 USC §552, which is the federal Freedom of Information Act. That statute pertains only to records maintained by federal agencies. The statute that generally governs access to records maintained by entities of state and local government in New York is the New York Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10250

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 6, 1997

Mr. Lester Fauntleroy
97-A-2532 A-8-9
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. Fauntleroy:

I have received your letter, which reached this office on July 9.

You have raised a variety of issues, the most serious of which involves the propriety of your sentence. Others pertain to the ability to obtain records concerning your case, particularly from the attorneys who represented you.

In this regard, I note that the Committee on Open Government is authorized to provide advice relating to public access to records, primarily under the Freedom of Information Law. Therefore, the Committee has neither the jurisdiction nor the expertise to offer guidance with respect to your sentence. Under the circumstances, it is suggested that you discuss the matter with a representative of Prisoners' Legal Services.

As the issues involve access to records, 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 applies to entities of state and local government in New York. As such, the office of a district attorney or a police department would clearly constitute an "agency" that falls within the scope of that statute. It does not apply, however, to private attorneys or the courts, for example.

If you are unsuccessful in obtaining records from your attorneys, you might be able to acquire many of them from either the arresting agency, i.e., the New York City Police Department, or the Office of the Queens County District Attorney. I point out that, pursuant to the 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. It is suggested, therefore, that you might seek the records in question by writing to the records access officers at the agencies that you believe maintain the records of your interest. It is noted that, when making a request, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records.

Lastly, even though the courts are not subject to the Freedom of Information Law, court records are frequently available under different provisions of law (see e.g., Judiciary Law, §255). Therefore, if a court maintains records of your interest, it is suggested that you seek them from the clerk of the court, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 6, 1997

Mr. Richard J. Roberts
[redacted]

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

Dear Mr. Roberts:

I have received your letter of July, as well as related correspondence. You have sought an opinion concerning your right to obtain in an electronic format "a RPS assessment file, which includes the building inventory and sales data, for the Town of Clarkstown." You expressed the belief that the Assessor's "main objection is that the building inventory and sales data will be used 'against' the town by firms representing individuals and corporations seeking to reduce their assessments." You added that the Town is willing to "release a disk or tape copy of what they term the 'tax roll' but refuse to provide copies of the full RPS file including inventory and sales data."

From my perspective, the Town is obliged to make the data in question available, assuming that it has the ability to do so. In this regard, I offer the following comments.

First, 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)]. Therefore, if the records are available by law, your intended use of the records would have no effect on your rights of access.

I note that §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 or its equivalent 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].

However, §89(6) of the Freedom of Information Law states that:

> "Nothing in this article shall be construed to limit or abridge any otherwise available right of access at law or in equity to any party to records."

Therefore, if records are available as of right under a different provision of law or by means of judicial determination, nothing in the Freedom of Information Law can serve to diminish rights of access. In Szikszay v. Buelow [436 NYS 2d 558, 583 (1981)], it was determined that an assessment roll maintained on computer tape must be disclosed, even though the applicant requested the tape for a commercial purpose, because that record is independently available under a different provision of law, Real Property Tax Law, §516. Since the assessment roll must be disclosed pursuant to the Real Property Tax Law, the restriction concerning lists of names and addresses in the Freedom of Information Law was found to be inapplicable.

In the context of a request for the data in question sought for a commercial purpose, if the Freedom of Information Law solely governs rights of access, an agency could in my view seek the kind of certification referenced earlier. If a different statute requires disclosure independent of the Freedom of Information Law, I believe that an agency would be required to disclose, notwithstanding the intended use of the data.

Also pertinent to your inquiry is §501 of the Real Property Tax Law, entitled "Examination of assessment inventory and valuation data." That statute requires the publication of a notice stating "that the assessor has available for review assessment inventory and valuation data, that an appointment may be made to review this information during certain times as specified in the notice..."

Additionally, as you pointed out in your letter, while sales records had been confidential in many instances, §574(5) of the Real Property Tax Law concerning access to real property transfer records was amended in 1993, and since July of 1994 has required that "Forms or reports filed pursuant to this section or section three hundred thirty-three of the real property law shall be made available for public inspection or copying..." As such, that kind

of data is also available independent of the Freedom of Information Law.

Second, 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, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

In a decision of apparent relevance 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 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.

Most recently, in a decision involving records analogous to those that are the subject of your inquiry that were requested by a person seeking the records in order challenge assessments, it was held that the records must be made available, in electronic form, for the actual cost of reproduction (see attached, Simpson v. Town of East Hampton, Supreme Court, Suffolk County, June 4, 1997).

As you requested, copies of this opinion will be forwarded to the Town Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Murray Jacobson, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10252

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 7, 1997

Mr. Rhamed Armstrong
95-A-4306
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. Armstrong:

I have received your letter of July 6 concerning a request for records maintained by the New York Telephone Company.

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

Based on the foregoing, as a general matter, the Freedom of Information Law applies to entities of state and local government in New York. A private company, such as New York Telephone, is not a governmental entity and, therefore, is not subject to the Freedom of Information Law. Further, I know of no provision of law that would generally require a private company to disclose its records to the public.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 8, 1997

Mr. Clarence Green
92-A-4009
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. Green:

I have received your letter of July 8 in which you referred to your unsuccessful efforts in obtaining records from the New York City Police Department, particularly DD5's. In addition, you criticized the Department's records access officer for failing to provide a Vaughn index. You have sought assistance in the matter and asked that I "at least reprimand the 'FOIL officers at NYCPD about following the law."

In this regard, first, 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 grant or deny access to records or "reprimand" agency employees or officials.

Second, I am unaware of any provision of the New York 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)].

Third, with respect to rights of access, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning DD5 's 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. Axelrod, 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,89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2782
FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 8, 1997

Ms. Grace Searby
[redacted]

The staff of the Committee on 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. Searby:

I have received your letter of July 4, as well as the materials attached to it, which reached this office on July 11.

In your capacity as a recently retired member of the Oyster Bay-East Norwich Central School District, you described a series of incidents relating to an increase in the Superintendent's salary. As you are aware, a variety of issues pertaining to the same subject have been considered in advisory opinions rendered on May 29 and July 17 at the request of Ms. Phyllis Chen, a resident of the District.

From my perspective, there is no need to reiterate points made those opinions. However, for purposes of attempting to enhance compliance with and understanding of both the Freedom of Information and Open Meetings Laws, I offer the following brief 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. Unless one or more of the grounds for denial applies, records must be disclosed.

You made reference to and attached copies of records that are stamped "confidential." In my view, marking a record "confidential", or engaging in 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 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.

Having reviewed the three records stamped "confidential", none would fall within the scope of any statute that would exempt them from disclosure. Two of the records could be characterized as "intra-agency material" falling within the coverage of §87(2)(g) of the Freedom of Information Law. That provision, due to its structure, may permit an agency to withhold some aspects of certain records, and concurrently require the disclosure of the remainder. The ability to withhold, however, could not be equated with a situation in which a statute separate from the Freedom of Information exempts records from disclosure, forbidding an agency from making the record available. An example of a statute that exempts records from disclosure and requires confidentiality is the Family Educational Rights and Privacy Act (20 USC §1232g). As you are likely aware, that statute generally prohibits a school district from publicly disclosing a record that is personally identifiable to a student without the consent of the parent of the student.

In a somewhat related vein, you referred to an executive session held to discuss Ms. Chen's inquiries. In my opinion, it is questionable whether an executive session could justifiably have been held. Like the Freedom of Information Law, the Open Meetings Law specifies and limits the subjects that may properly be considered during an executive session [see Open Meetings Law, §105(1)]. Only to the extent that a topic of discussion falls within the grounds for entry into executive session could a closed session appropriately be held.

I hope that the foregoing serves to offer clarification and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 8, 1997

Mr. Roy Castleberry
97-B-1310
Elmira Correctional Facility
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. Castleberry:

I have received your letter of July 6 in which you sought assistance in obtaining information about a person who allegedly escaped from a mental institution.

Insofar as the information sought involves an individual's mental health or treatment in a mental health facility, I believe that it would be exempt from public disclosure.

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. 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 information in question.

Under the circumstances, it is suggested that you discuss the matter with your legal representative.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-AO-1056

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 8, 1997

Mr. Steven W. Sbelgio
The Citizen
25 Dill 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. Sbelgio:

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

According to your letter, on June 12 you directed a request to the Auburn Enlarged City School District in which you sought a letter sent to the District by the Auburn Chamber of Commerce concerning a renovation project being undertaken by the District. The records access officer, Philip Grajko, Associate Superintendent, marked boxes on the District's form indicating that the record was "confidential", that disclosure would result in an unwarranted invasion of privacy, and that the record is "not maintained by the school district." Nevertheless, Mr. Grajko had earlier acknowledged the receipt of the letter, and upon questioning, said that it was not public because "it was addressed to him specifically", not to the Board of Education. When you appealed the denial, Mr. Grajko, acting as appeals officer due to the illness of the Superintendent, upheld the denial. You have sought an advisory opinion on the matter.

From my perspective, if the record at issue is maintained by the District or was addressed to Mr. Grajko due to his association with the District, it would fall within the coverage of the Freedom of Information Law. Further, if I understand its contents accurately, there would be no basis for denying access to it. 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 include:

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)].

In short, even though the letter might have been addressed to Mr. Grajko specifically, assuming that it was forwarded to him because of his position with the District, or if the letter is merely maintained by the District, it would constitute a "record" subject to rights conferred by the Freedom of Information Law.

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

I point out 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.

I know of no statute that would enable the District or Mr. Grajko to claim that the letter is exempted from disclosure or, therefore, "confidential."

The other provision to which he alluded is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." If

again, the likelihood of withholding any portion of the letter based on considerations of personal privacy would appear to be difficult to justify.

Third, 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, pursuant to the regulations promulgated by the Committee on Open Government, which govern the procedural aspects of the Freedom of Information Law and have the force and effect of the law, the records access officer and the appeals officer cannot be the same person [see 21 NYCRR §1401.7(b)]

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Education
William Miller
Philip Grajko

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 8, 1997

Mr. Michael Washington
86-A-8135
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. Washington:

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

The materials pertain to a request made under the Freedom of Information Law to the Office of the Kings County District Attorney. You asked, first, why the Records Access Officer did not provide a certification pursuant to §89(3) of that statute. In this regard, there is nothing in the correspondence indicating that you requested such a certification. The certification is not required to be made as a matter of course; rather, according to language of §89(3), a certification need be given only "if so requested."

Second, it is your view that the Appeals Officer "insinuated" that the records do indeed exist, "but not in [your] file." Having reviewed the responses sent to you by the Office of the District Attorney, it is difficult to understand the basis of your inference. The Records Access Officer wrote that the records sought are "not in the possession of the Kings County District Attorney's Office." The Appeals Officer, as I interpret her response, simply confirmed the Records Access Officer's finding. As both indicated, the Freedom of Information Law does not require that an agency create or prepare a record in response to a request. Similarly, even if it is known that records are maintained elsewhere, I do not believe that an agency is required to obtain records from a source outside that agency.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mary Faldich
Kathleen A. Kennedy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025B

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 7, 1997

Mr. Tyrone Prince
95-A-5080 - MH-2-13-7
Great Meadow Correctional Facility
Box 51
Comstock, NY 12821

Dear Mr. Prince:

I have received your letter of August 5 in which you appear to have requested your mental health records from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to records. The Committee does not maintain records generally, and it does not have possession or control of the records of your interest. Nevertheless, I offer the following comments.

First, 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.

Second, §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 a private facility maintains mental records pertaining to you, 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. Further, 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. 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1059

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 11, 1997

Mr. Stan Breite
[redacted]

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

Dear Mr. Breite:

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

According to your letter, the Town of Rochester has recently cited §87(2)(g) of the Freedom of Information Law as a means of denying requests for records. You asked whether the Town may properly withhold statements prepared by the Planning Board that include its recommendations concerning any proposed amendment to the Town's Zoning and Land Use Ordinance.

From my perspective, it is clear that portions of the kinds of records to which you referred may be withheld; it is possible that other aspects of those records 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 §87(2)(a) through (i) of the Law.

I believe that the records in question clearly fall within the scope of the provision cited by the Town as justification for denial of access. However, that provision, due to its structure, often requires disclosure. Specifically, §87 (2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

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

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

One of the contentions offered by the New York City Police Department in a recent decision rendered by the State's highest court was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that a report is predecisional or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the contents of a record.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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) 9id., 276-277).]

In sum, to reiterate, insofar as the records at issue consist of recommendations, advice or opinions, for example, I believe that they may be withheld; insofar as they consist of statistical or factual information, they must in my view be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Veronica L. Sommer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1020(00)

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 11, 1997

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 July 11 in which you sought an advisory opinion concerning the propriety of a denial of access to records by the Nyack School District.

According to your letter, a custodian employed by the District was convicted of arson set at a school and was later the subject of charges under §75 of the Civil Service Law. Following the hearing, it was determined that the employee would be terminated. Thereafter, you requested a transcript of the hearing leading to the determination. In response to your request, the District's attorney denied access pursuant to §87(2)(g) of the Freedom of Information Law, citing the decision rendered in Sinicropi v. County of Nassau [76 AD 2d 832 (1980)].

From my perspective, while Sinicropi represented the prevailing case law concerning the kind of record at issue for a time, a recent Court of Appeals decision in my view suggests that portions of the record should likely be made available; others could likely be withheld.

Sinicropi also involved records relating to a disciplinary proceeding, and the records at issue involved intra-agency memoranda concerning the investigation of a employee, "notes and communications made in preparation of [a] hearing and the transcript of the hearing" [id. 833]. The Court determined that those records consisted of "pre-decisional intra-agency memoranda that are not reflective of final agency policy or determination and, as such, are exempt from disclosure" [id.].

In Gould et al. v. New York City Police Department [89 NY 2d 267 (1996)], the Court of Appeals focused on so-called "complaint follow-up reports" prepared by New York City police officers who prepared records after arriving at the scene of a complaint. The Police Department contended that because the reports did not relate to any final agency determination or action, such as an arrest or a conviction, they could be withheld in their entirety. The Court, however, rejected the agency's blanket denial of access.

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

The provision at issue in Gould, §87(2)(g), enables an agency to withhold records that:

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

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

In 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

In short, the Court found that the agency could not claim that the records sought could be withheld in their entirety under §87(2)(g) because they might have been predecisional or because they relate to activities that could not yet be characterized as "final." In the context of your request, while a transcript of a hearing is not final, it is likely that it contains some factual information that must be disclosed, unless a different ground for denial applies.

I emphasize that the Court of Appeals was careful to point out that grounds for denial other than §87(2)(g) might apply in determining rights of access to records. With respect to the matter at issue, potentially relevant is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." That

provision might be relevant with respect to the subject of the hearing, depending upon the nature of the information. In addition, it may be pertinent with respect to others identified in the record, such as witnesses, fellow employees, and the like. Even though those persons might have offered factual information, disclosure might nonetheless result in an unwarranted invasion of personal privacy.

Finally, §87(2)(g) would apparently apply with respect to the portions of the materials in question that do not constitute factual information. For instance, the opinions and recommendations of a hearing officer that could have been accepted or rejected could in my view justifiably be withheld. Further, if, for example, employees of the District who testified at a hearing offered opinions, i.e., regarding the character, demeanor or activities of the person charged, they, too, would in my view fall within the scope of the exception.

In sum, it is likely that significant portions of the records sought could justifiably be withheld; it is also likely, however, that some portions of the records constitute factual information that should be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kevin Plunkett
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1002c1

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 11, 1997

Mr. Joseph Plater
95-B-2336
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. Plater:

I have received your letter of August 5. Once again, the matter involves access to information that may be maintained by Cortland Memorial Hospital. In short, you have contended that records merely indicating the time of the admittance and discharge of certain individuals does not constitute medical information and that, therefore, you are entitled to them. As such, you asked that I "get this information to [you] fairly soon."

In this regard, first, the Committee on Open Government is authorized to provide advice concerning public access to government information. The Committee is not empowered to compel an entity to grant or deny access to records or to "get...information" for an applicant for records.

Second, as indicated in an advisory opinion addressed to you on March 24, the Freedom of Information Law applies to governmental entities; it does not apply to a private facility or entity. Having contacted Cortland Memorial Hospital to learn of its status, I was informed that it is not a governmental entity, but rather is private. If that is so, its records would not be subject to the Freedom of Information Law. Further, I know of no other provision that would provide a right of access to you.

Lastly, even if Cortland Memorial Hospital was found to be a governmental entity, the information sought could in my view be withheld under the Freedom of Information Law. As stated in the earlier, opinion, §89(2)(b)(ii) provides that "disclosure of items involving the medical or personal records of a client or patient in

a medical facility" would constitute an unwarranted invasion of personal privacy.

It is suggested that you discuss the matter with your attorney.

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-10262

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Frank Solimine
82-A-4992
Woodbourne Correctional Facility
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. Solimine:

I have received your letter of July 14. You indicated that you sent requests for records to the New York City Police Department on May 22 and on June 26 but that you had received no response. You have sought assistance 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 by the Department to determine appeals is Susan Petito, Special 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-10263

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Wallace S. Nolen
94-A-6723
Eastern Correctional Facility
P.O. Box 338
Naponoch, 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. Nolen:

I have received your letter of July 9, as well as a handwritten copy of a determination of an appeal rendered under the Freedom of Information Law by Richard B. Golden, Orange County Attorney.

In short, you requested voter registration cards pertaining to a named individual that might be maintained by the Orange County Board of Elections. Following an initial response to the effect that you would be required to supply additional information and your appeal, Mr. Golden granted your request, to the extent that the documentation sought exists "and only to the extent" that the person named "does not have alternative grounds for non-disclosure." Mr. Golden also denied a portion of your appeal in which you requested that copies of records made available be certified by the Board of Elections.

In this regard, I offer the following comments.

First, I believe that the records sought are available pursuant to §3-220 of the Election 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.

I know of no provision of law that would provide the subject of a voter registration record with the right to restrict

disclosure of such record or provide conditions concerning disclosure.

Second, I believe that an agency is required, on request, to provide the kind of certification envisioned by §89(3) of the Freedom of Information Law. That provision states in relevant part that, in response to a request for a record, "the entity shall provide a copy of such record and certify to the correctness of such copy if so requested..." From my perspective, the certification required by the Freedom of Information Law does not involve an assertion that the contents of a record are accurate, but rather that a copy of a record made available in response to a request is a true copy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard B. Golden

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1020[illegible]

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Jose Aramis Fournier
[redacted]

The staff of the Committee on Open 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 three letters from you, each dated July 10. One involves a request for records maintained by the Lakeside Family and Children Services, a second in which you filed a complaint against the Holliswood Memorial Hospital for its failure to comply with the Freedom of Information Law, and a third in which you complained with respect to the New York City Transit Authority "for violation of the Freedom of Information of Law."

As indicated in the opinion sent to you recently, the Freedom of Information Law pertains to records maintained by governmental entities. It was stated in that opinion that if Lakeside Family and Children Services is not a governmental entity, its records would not be subject to the Freedom of Information Law. The same would be so with regard to Holliswood Memorial Hospital. If it is a private rather than a governmental entity, the Freedom of Information Law would not apply.

The New York City Transit Authority is, however, clearly an agency required to comply with the Freedom of Information Law. As I understand your letter, you made complaints to the Authority on several occasions in 1996 and you requested "disciplinary reports, to any/all incidents; reprimands and all other related documentation thereof" that might have been prepared as a result of those complaints. In conjunction with the foregoing, you asked that this office "keep you apprais[ed] [sic] of any/all inquiries, hearing or available formalities in processing the instant complaint." You also asked that this office forward to you "a copy of the formal complaint and discretionary review/decision thereto."

The Committee on Open Government does not "process" complaints in any formal sense. Similarly, the Committee has no authority to

compel an agency to grant or deny access to records or render a "decision" concerning the Freedom of Information Law. The authority of this office is purely advisory. Further, the Committee does not maintain records generally, and it does not possess any of the records that you might have requested from the Transit Authority.

Assuming that you are seeking an opinion concerning your right to obtain records involving discipline, 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.

Relevant with respect to the kinds of records at issue 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].

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

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

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

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

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: Appeals Officer, New York City Transit Authority

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10265

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Bernie Daniels
[redacted]

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

Dear Mr. Daniels:

I have received your letter of July 12 concerning a request made under the Freedom of Information Law to Monroe County. As I interpret your letter, the County acknowledged the receipt of your request and indicated that the request would be granted or denied "in approximately '36' business days." You wrote that it has been your "understanding that an agency had 10 business days to comply with F.O.I.A."

In this regard, §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.

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 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 Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1026

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Isidore Gerber
[redacted]

The staff of the Committee 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. Gerber:

I have received your letter of July 14 and a copy of a response to your appeal rendered pursuant to the Freedom of Information Law by the Supervisor of the Town of Liberty, Richard A. Martinkovic. The Supervisor also forwarded copies of other materials pertinent to the matter.

You wrote that the basis of your appeal involved an effort to obtain information concerning the reasons for the decision by the Board of Assessment Review relating to the assessment of your property. The Board, using a form, merely marked certain boxes indicating that the tentative assessed value had not been reduced and that "We [the Board] believe the Assessor's value to be correct." Following your initial request, the Chairman of the Board wrote that "This is the only documentation in which we have [sic] subject to your request." The Supervisor, in determining your appeal, reiterated that "all relevant records maintained by the Town responsive to your request have been reproduced and provided to you." He added that the documentation made available to you states that all of the members of Board concurred in the decision.

In this regard, 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 record in response to a request. Therefore, if no additional or more expansive reasons for the Board's determination exist in the form of a record or records, the Freedom of Information Law would not impose any requirement upon the Board or the Town to prepare a new record on your behalf containing additional detail concerning the determination.

From my perspective, the primary issue does not involve the Freedom of Information Law; rather, it appears to be whether the Board prepared documentation adequate to comply with other provisions of law, such as the Real Property Tax Law or perhaps the rules promulgated by the Office of Real Property Services, the successor agency to the Division of Equalization and Assessment. If you have not done so already, it is suggested that you contact that agency.

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-10207

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Ms. Corrine M. Wolfanger
[redacted]

The staff of the Committee on 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. Wolfanger:

I have received your letter of July 11, as well as a variety of related materials. You have sought a "review" of the correspondence, all of which pertains to your efforts in obtaining records from the Town of West Sparta.

Based on consideration of the materials, I offer the following comments.

First, the possibility that the records sought might be pertinent to or used in litigation is, in my view, largely irrelevant. 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, one of the contentions offered by an attorney representing the Town is that you did not request "specific documents." From my perspective, there is no requirement that you seek specific documents. By way of background, when the Freedom of Information Law 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 Town's recordkeeping systems, it seems unlikely that staff could not locate records pertaining to the matter at issue in conjunction with your 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.

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)].

Third, 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)].

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.

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, assuming that the records in question exist and can be located, I believe that they would be available in great measure, if not in their entirety. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As I understand the situation, the records at issue that had not been disclosed as of the date of your letter to this office involve reports prepared by one or more code enforcement officers regarding alleged leaks that were sent to the Department of Environmental Conservation. You added that the minutes of a certain meeting of the Town Board make specific reference to such a report or reports.

Relevant to the matter is §87(2)(g) of the Freedom of Information Law. That provision, although it serves as a potential ground for denial, often, due to its structure, requires disclosure, for it permits an agency to withhold records that:

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

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

In short, insofar as the records in question consist of statistical or factual information, I believe that they must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Michael Damia

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10268

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 11, 1997

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 letter of July 10 in which you raised a series of issues pertaining to the implementation of the Freedom of Information Law by the Village of Greenport.

One of the issues involves a charge by the Village of five dollars for copies of certificates of occupancy. 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)]. 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)].

You also referred to the absence of a "specific appeals procedure." In this regard, § 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 is the Village Board of Trustees. Consequently, 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."

When a request is denied, it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

The Village is required to include in its regulations reference to the right to appeal a denial of access analogous to that found in the Committee's regulations.

Lastly, with respect to the purpose for seeking records, 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)of the Freedom of Information Law, the use of the records, or the status of the applicant, is in my opinion irrelevant.

As you requested, copies of the Freedom of Information Law, the regulations promulgated by the Committee, the Open Meetings Law, and "Your Right to Know", which describes both statutes, will be forwarded to the Village.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10709

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Tom Lisborg
[redacted]

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

Dear Mr. Lisborg:

I have received your letter of July 14, as well as the materials attached to it. You complained that the Public Administrator of New York County failed to determine your appeal within the time limit specified in §89(4)(a) of the Freedom of Information Law. As such, you sought advice on the matter.

In this regard, a similar inquiry was made in June, and I responded to you by means of an opinion prepared on July 16. That opinion and your recent letter crossed in the mail. Nevertheless, I will reiterate some of the commentary expressed in that opinion and forward a copy of this response to the Public Administrator.

Specifically, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and an agency's obligations. That provision states in relevant part that:

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

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

administrative remedies and may initiate a challenge to a constructive denial 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, again, a copy of this response will be forwarded to the Public Administrator.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ethel J. Griffin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10270

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Charles B. Smith
[redacted]

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

Dear Mr. Smith:

I have received your letter of July 17 in which you sought an opinion concerning the propriety of denials of access to records by Rensselaer County.

The first area of inquiry involves long distance telephone bills made from the County Executive's office, as well as bills for cellular phone calls made by the County Executive. While the County disclosed the totals appearing on monthly bills, the details on the bills were withheld, and the County's public information officer wrote that the County Executive's office "makes many calls to individuals seeking information on matters ranging from tourism, to county programs and...economic development." He expressed the view that "[t]hose individuals have an absolute right to privacy."

From my perspective, it is likely that the bills in question, including the details to which you referred, must be made available. In this regard, I offer the following comments.

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

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 bills are generated by the County, I believe that they could be characterized as intra-agency materials. Nevertheless, in view of their content, they would apparently consist solely 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 bills were generated by a telephone company, an entity outside of government that is not an agency, §87(2)(g) would not apply.

The other 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 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. As indicated in the denial, the County Executive's office makes and receives calls involving an array of subjects. Therefore, 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 every 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 primary 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 case of calls made by a county executive or others in similar positions, phone calls are made to 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), as stated by the County's public information officer, the calls made by the county executive's office involve an assortment of issues and persons who do not fall within any special identifiable class or status. If that is so, disclosure of a phone number would not alone signify a personal detail involving the recipient of a call. Further, as suggested previously, disclosure of the number would not necessarily indicate who received the call, nor would it disclose anything about the nature of the call of a conversation.

In sum, subject to the unusual kinds of exceptions discussed earlier, it appears that phone bills should be disclosed under the Freedom of Information Law.

A related area of the request involved records "which reflect reimbursement to Rensselaer County by the county executive for any and all personal calls made on these phones, January 1, 1996 to date." In conjunction with the analysis regarding the application of paragraphs (b) and (g) of §87(2) of the Freedom of Information Law, I believe that those kinds of records, if they exist, would be available.

The next series of requests to which you referred involves correspondence between the County and the State Retirement System and other related records pertaining to the employment and retirement of Dirk Van Ort. Based on news articles, Mr. Van Ort is the subject of a controversy and an investigation involving payments that might have been made to him, even though he was absent from the workplace. According to your letter, the County denied access on the basis of an opinion that I prepared earlier this year concerning an unrelated matter (FOIL AO 10050). If my understanding of the records sought is accurate, a denial of access based on that opinion would reflect a misinterpretation or perhaps a misapplication of the principles expressed in that opinion. I would conjecture that the County would be alluding a portion of the opinion that dealt with a report about certain individuals regarding their ethical conduct or conflicts of interest. It was advised that when individuals are the subjects of those kinds of inquiries, and no determination has been reached to the effect that a person has engaged in misconduct, records involving such allegations or questions may be withheld. As stated in that opinion:

> "Insofar as those portions of the report identifiable to individuals include recommendations or opinions regarding their ethical conduct or possible conflicts of interest, for example, I believe that they could have been withheld if no final determination concerning their conduct had been reached. In situations in which a person is the subject of allegations or questions involving impropriety or misconduct that have not yet been determined or did not result in disciplinary action, it has been held that records relating to those allegations or questions may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS2d 460 (1980). Similarly, to the extent that allegations or charges are found to be without merit, such records may in my view be withheld."

The records sought were not prepared as the result of an inquiry regarding the conduct of a public employee; on the contrary, if my view of the matter is accurate, they were prepared in the ordinary course of business. A key aspect of the request involves 26 bi-weekly payroll certifications. Those records are routinely prepared, and I believe that they would be available, irrespective of whether an employee is the subject of some sort of inquiry. In contrast, the records at issue in the opinion cited by the County were prepared in response to or as part of an inquiry concerning individuals, conduct.

I note, too, that payroll information has long been available to the public [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)]. Even before the enactment of the Freedom of Information Law, it was held that payroll records:

> "...represent important fiscal as well as operation information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favortism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

Similarly, in a decision dealing with attendance records that was affirmed by the State's highest court, the Court of Appeals, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

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

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

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

With regard to the remainder of the records falling within the scope of this category of request, the comments offered earlier concerning paragraphs (b) and (g) of §87(2) would be apt and need not be restated.

A third area of request involves records that establish an "'On call, as needed' classification for any county employees" and related records, including the names and title of employees "who hold or have held the status of 'On Call as Needed' for their employment status." The request was denied "due to the fact that it may interfere with an ongoing investigation of the District Attorney and deprive a person of a right to an impartial adjudication." The language used in the denial is derived from §87(2)(e) of the Freedom of Information Law, which enables an agency to withhold records "compiled for law enforcement purposes" under certain circumstances. In my view, that provision would be inapplicable as a basis for denial, for the records sought, i.e., civil service classifications and similar or related documents, would have been created in the ordinary course of business, not for any law enforcement purpose.

To characterize the records at issue as having been compiled for law enforcement purposes, even though they may be used in or pertinent to an investigation, would be inconsistent with both the language and the judicial interpretation of the Freedom of Information Law. The Court of Appeals 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)]. Based upon the thrust of those decisions, §87(2)(e) should be construed narrowly in order to foster access. Further, there is case law that illustrates why §87(2)(e) should be construed narrowly, and why a broad construction of that provision would give rise to an anomalous result. Specifically, in King v. Dillon (Supreme Court, Nassau County, December 19, 1984), the District Attorney was engaged in an investigation of the petitioner, who had served as a village clerk. In conjunction with the investigation, the District Attorney obtained minutes of meetings of the village board of trustees. Those minutes, which were prepared by the petitioner, were requested from the District Attorney. In granting access to the minutes, the decision indicated that "the party resisting disclosure has the burden of proof in establishing entitlement to the exemption," and the judge wrote that he:

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

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

From my perspective, the kinds of records that you requested, by their nature, indicate that the exception concerning records "compiled for law enforcement purposes" is inapplicable. To contend that records which were generated for purposes wholly unrelated to any law enforcement investigation may now be withheld due to their use in an investigation would, in my opinion, be unreasonable and tend to subvert the purposes of the Freedom of Information Law. In support of this view, I again point to the decision rendered by the Court of Appeals in Capital Newspapers, supra. In its discussion of the intent of the Freedom of Information Law, the court found that the statute:

> "affords all citizens the means to obtain information concerning the day-to-day functioning of the state and local government thus providing the electorate with sufficient information to 'make intelligent, informed choices with respect to both the direction and

> scope of governmental activities' and with an effective tool for exposing waste, negligence or abuse on the part of government officers" (id. at 566).

Assuming that §87(2)(e) of the Freedom of Information Law could not be asserted as a basis for denial, I believe that the records sought, if I have accurately construed their nature, should be disclosed.

The remaining area of inquiry pertains to your request for a "copy of the tape which recorded the transmissions and dispatch of an 'intercept' to meet the Berlin Volunteer Ambulance" that transported a particular person on a particular date. The request was denied on the basis of §308(4) of the County Law. That provision makes "records...of calls made to a municipality's E911 system" confidential. The transmissions in question, however, were not the 911 calls made by persons seeking emergency assistance. Rather they were apparently made between a dispatcher and one or more ambulance drivers. If that is so, the cited provision of the County Law would not apply, and rights of access would be determined by the Freedom of Information Law. If, as you indicated, the transmissions consisted of instructions to take a certain route, case law indicates that records of such transmissions must generally be disclosed [see Buffalo Broadcasting Co., Inc. v. City of Buffalo. 126 AD2d 983 (1987)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to attempt to avoid the need for litigation, 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: Jack Madden
Stephen A. Pechenik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1027

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 12, 1997

Mr. Randall G. Lawrence
Randall G. Lawrence & Associates, PC
Attorneys at Law
73 Old Deer Park road
Katonah, NY 10536

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

Dear Mr. Lawrence:

I have received your letter of July 16 in which you raised a "hypothetical question."

The scenario involves a citizen who admits in writing and in public that he is in possession of agency property, specifically, agency records. The agency has contended orally and in writing that the individual in possession of the records is unauthorized to possess them and demands their return. The individual refuses to return the property or to provide an accounting of the nature of the records he possesses. Thereafter, that individual requests records under the Freedom of Information Law similar to those "which he admits to having." In response to the request, the "[a]gency refuses to produce documents citing (a) Applicant's unclean hands in possessing and refusing to return such property and further stating that (b) Applicant's refusal to state with specificity exactly what property of the Agency he does possess allows Agency to assume that Applicant already possesses what he is seeking."

You asked initially whether such a case would be "one of first impression." In this regard, I know of no judicial decision that deals with analogous facts. Further, although I have dealt with numerous issues relating to the Freedom of Information Law over the course of more than twenty years, I do not recall any concerning a scenario exactly like that described.

Second, you asked how I would consider the request. As you indicated, as a general matter, the status or interest of an applicant for records is irrelevant in determining rights of access

[see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Neverthelees, it is unclear how the individual came into possession of the records. If they were stolen, it might be worthwhile to contact local law enforcement authorities. If they were acquired by some other means but are clearly the property of the agency, an action in replevin might be considered. In addition, there are decisions indicating that if records have previously been disclosed, i.e., by an agency or by a court during a public proceeding, an agency is not required to make available the same records to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence" [see Moore v. Santucci, 151 AD 2d 677, 678 (1989); see also Walsh v. Wasser, 639 NYS 2d 506, ___ AD 2d ___ (1996)]. Unless the applicant can, "in evidentiary form", demonstrate that neither he nor his representative maintains the requested records in conjunction with your claim that those records had previously been disclosed, you might consider rejecting the request.

Again, I emphasize that there is no decision of which I am aware that is clearly pertinent to the matter, and the nature of a decision that might be reached judicially is conjectural.

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-10272

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 13, 1997

Mr. Jerome Jones
100-96-02153 6S/1U
125 White Street
New York, NY 10013

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

Dear Mr. Jones:

I have received your letter of July 10, which reached this office on July 18. You have sought assistance in obtaining records from various agencies in preparation for a parole hearing.

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 note that there are other provisions that may serve to enable you obtain many of the records of your interest. Perhaps of primary significance are the regulations promulgated by the Division of Parole, which state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. The regulations appear to recognize due process, for you should have the ability to gain access to records "to be considered" at a hearing. Further, the exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure

pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

Similarly, §5.21(a) of the regulations promulgated by the Department of Correctional Services states that:

> "information from the person history portion of an inmate record shall be made available to the inmate, a representative of his estate, his legal guardian or committee, or his attorney."

Further, §5.09(i) provides that:

> "Personal history means 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."

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 Hospital 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 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 send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking 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 Program
> New York State Department of Health
> Hedley Park Place
> Suite 303
> 433 River Street
> Troy, NY 12180

Lastly, since you indicated that some requests had 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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-1027S

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 13, 1997

Hon. Eloise Wittholt
Town Clerk
Town of Fishkill
401 Route 52
Fishkill, NY 12524

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

Dear Ms. Wittholt:

I have received your letter of July 17 in which you sought guidance concerning the Freedom of Information Law.

You referred initially to a conversation pertaining to fees to be charged to an applicant before the Planning Board and our view that irrespective of an individual's purpose for seeking records, he or she may be advised "of the cost per page and charged accordingly."

In this regard,in general, the reasons for which a request is made and a person's potential use of records are irrelevant, and it has been held that if records are accessible under the Law, they should be made equally available to any person, without regard to status or interest [see e.g., M. Farbman & Sons v. New York City. 642 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. The only situation in the Freedom of Information Law in which the intended use of records is relevant to rights of access arises under §89(2)(b)(iii), which permits an agency to withhold "lists of names and addresses if such lists would be used for commercial or fund-raising purposes" on the ground that disclosure would constitute an unwarranted invasion of personal privacy. Due to the language of that provision, the intended use of a list of names and addresses is relevant, and case law indicates that an agency can ask why a list of names and addresses has been requested [see Goldbert v. Suffolk County Department of Consumer Affairs, Sup. Ct., Suffolk Cty., (September 5, 1980). In the context of the matter that you described, however, no list of names and addresses is involved, and the

purpose for which the request was made is, in my view, irrelevant to rights of access.

Second, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., tape recordings, computer disks, etc.). I note, too, that it has been held that an agency may require payment in advance of duplicating records (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

The second area of inquiry pertains to "confidential" marriage records and my contention that they are generally public.

By way of background, §201(1)(b) of the Public Health Law provides that the Department of Health shall "supervise and control the regulation of...marriages", and §206(1)(e) requires the Commissioner of the Department to "obtain, collect and preserve...information relating to marriage..." Nevertheless, I am unaware of any provision of the Public Health Law that pertains specifically to access to marriage records or that refers to the confidentiality of those records. Further, it is noted that marriage records are maintained in two locations, the State Department of Health, and at the offices of town and city clerks that issue marriage licenses. In a decision involving access to marriage records that was unanimously affirmed by the Appellate Division, it was held that "names of couples to whom marriage licenses have been issued, as those names are recorded in the City Clerk's Office" are accessible [Gannett Co., Inc. v. City Clerk's Office, City of Rochester, 596 NYS 2d 968; aff'd 197 AD 2d 919 (1993)].

That decision focused on §19 of the Domestic Relations Law, as well as the Freedom of Information Law, and adopted much of the reasoning of an advisory opinion prepared by this office that was cited in the decision. Enclosed are copies of both Gannett and the opinion to which it referred.

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-1027Y

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 13, 1997

Mr. Nemesio Turull
93-A-2948
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. Turull:

I have received your letter of July 14. You asked whether an agency may deny a request made under the Freedom of Information Law if it "duplicates a previous request...made in 1994."

In this regard, in Moore v. Santucci [151 AD 2d 677 (1989)], it was 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.

If the request involves records that were withheld, a second denial of access to the records would be proper, unless some change in circumstances necessitated a different finding [see Corbin v. Ward, 160 AD2d 596 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1027S

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 13, 1997

Mr. Hans Carlson
[redacted]

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

Dear Mr. Carlson:

I have received your letter of July 16, which reached this office on July 21.

You referred to a situation in which you submitted petitions for a rehearing on a certain matter. When the agency failed to respond, you appeared before the Town Board and "asked for an explanation of the procedure to be followed by a local agency responding to a petition." The Town Board looked to its attorney, who "stated that he had instructed the agency on the procedure and, therefore, would not discuss the matter further because it was confidential." As such, you did not receive an answer, and you asked whether you "have a right to know the procedure an agency will follow to make a decision on [your] petition."

From my perspective, if the procedure exists in some written form, such as a rule, a local law or a policy, for example, you would have a right to review it or obtain a copy. If no such provision exists in the form of a record, there may be no requirement to describe it at a meeting. Further, there may be a distinction between a procedure and an explanation of the procedure. In this regard, I offer the following comments.

First, 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. Nevertheless, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak, I believe that it should do so based upon rules that treat members of the public equally.

In short, I know of no law that would require a town board to provide an explanation of its procedure. Again, while it could choose to do so, I do not believe that it would be required to do so.

Second, the Freedom of Information Law may be pertinent 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.

If a procedure exists in the form of a record, I believe that a town would be obliged to disclose it. Relevant is §87(2)(g). While that provision potentially serves as basis for a denial of access, due to its structure, it often requires disclosure. Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

A written procedure adopted or used by a town board would be reflective of its policy with respect to certain area and,

therefore, in my view would clearly be accessible under §87(2)(g)(iii) of the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10276

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 14, 1997

Mr. Frederick J. Gorman
[redacted]

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

Dear Mr. Gorman:

As you are aware, I have received your letter of July 18, as well as a variety of related material. You have sought an advisory opinion relating to difficulties that you have experienced in your efforts to obtain information and "certifications" from the Sachem Central School District. The issues pertain to a recent School District election.

In the first area of inquiry, you referred to a request for various records submitted to the District Clerk by election inspectors. In response, the District Clerk indicated that no such records exist. That response "bewildered" you, "for a voter told [you] that he formally registered a complaint with the district clerk who recorded the complaint personally." Moreover, you indicated that "[s]everal election inspectors told [you] they wrote irregularities on sheets of paper given to them by the district clerk for that purpose." When you asked for a certification from the Clerk "swearing she searched for the record and the record did not exist", she and the District's appeals officer asserted that nothing in §89 of the Freedom of Information Law "requires them to prepare any record not in their possession, thus they don't have to prepare a certification."

It is true that §89(3) of the Freedom of Information Law provides in part that an agency need not create a record or prepare a record in response to a request. However, the same provision requires that agencies prepare a certification, on request, in certain circumstances. 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) 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)].

A second issue involves limitation on the time during which you have the ability to review District records. There was an initial restriction to certain hours during given days; later the District contended that it could restrict the hours of inspection to the times during which the Clerk was present or working. Based upon the regulations promulgated by the Committee on Open Government and a decision rendered by the Appellate Division, Second Department, which includes Suffolk County, I believe that you should have the right to inspect District records during the entirety of the District's business hours; in my view, you cannot be restricted to certain hours of the day or only those hours in which the Clerk is present.

In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee 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."

Relevant to your inquiry and the foregoing is the decision to which I alluded earlier rendered by the Appellate Division. Among the issues was 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].

The foregoing is not to suggest that an agency must permit an applicant to review records during its regular business hours day after day without end. Records may be in use by staff, and there may be other reasons that would enable an agency to permit access on given days, rather than every day.

Lastly, based upon a review of the correspondence, I believe that there are additional issues. One request involves copies of all District records reviewed by the District Clerk pertaining to School District elections or budget votes that were read by the Clerk since the first day of her employment. Another involves a list of all District records subject to the Freedom of Information Law pertaining to budget votes. Here I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. As such, although an applicant is not required to identify requested records with particularity, I believe that he or she must provide sufficient detail to enable agency staff to locate and identify the records [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. From my perspective, it is unlikely that the requests to which reference was made would meet the standard of "reasonably describing" the records.

Similarly, in one request you sought "at no charge a list of all Sachem documents subject to FOIL requests that pertain to budget votes." In another, you sought a "letter of explanation as to why and when the district wide voter registration books were thrown away." It is reiterated that the Freedom of Information Law pertains to existing records. Therefore, if there is no list of records involving the budget or a record which offers an

"explanation" of certain action, I do not believe that the District would be obliged by the Freedom of Information Law to prepare those records on your behalf.

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: Neil M. Block
Patricia E. Godek
Carol Adelberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10277

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 14, 1997

Mr. Marc Santiago
97-A-4801
Downstate Correctional Facility
P.O. Box F
Fishkill, NY 12524

Dear Mr. Santiago:

I have received your letter of August 8 in which you requested various records from this office relating to your arrest and conviction.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain possession or control of records, and it has no authority to compel an agency to grant or deny access to records or obtain records for an applicant. In short, I cannot make the records sought available, because this office does not possess them.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating the agency's response to requests. In the context of your correspondence, it is suggested that you send a request to Sgt. Louis Lombardo, Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

Lastly, since you referred to 5 U.S.C. and §§552 and 552a, I note that those provisions, respectively, are the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies. The statute that generally governs rights of access to records maintained by entities of government in New York is the New York Freedom of Information Law, Public Officers Law, §84-90.

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-10278

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 14, 1997

Mr. Terry Daum
97-A-1295
Downstate Correctional Facility
Box F
Fishkill, NY 12524

Dear Mr. Daum:

I have received your letter of August 11 in which you requested various records from this office relating to your arrest and conviction.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain possession or control of records, and it has no authority to compel an agency to grant or deny access to records or obtain records for an applicant. In short, I cannot make the records sought available, because this office does not possess them.

To seek records under the Freedom of Information Law, a request should be made to the "records access officer" at the agency that maintains the records. The records access officer has the duty of coordinating the agency's response to requests. In the context of your correspondence, it is suggested that you send a request to Sgt. Louis Lombardo, Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

Lastly, since you referred to 5 U.S.C. and §§552 and 552a, I note that those provisions, respectively, are the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies. The statute that generally governs rights of access to records maintained by entities of government in New York is the New York Freedom of Information Law, Public Officers Law, §84-90.

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-10279

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 15, 1997

Mr. Ronald Timmons
98-A-9240
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. Timmons:

I have received your letter of July 14, which reached this office on July 22. You have sought assistance in obtaining information concerning a person who gave testimony in your criminal case. You indicated that the court "sealed the person's criminal file", and you asked whether there is any way that you might obtain the records through this office.

In this regard, 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 is not empowered to compel an agency to grant or deny access to records or to obtain records on behalf of an applicant. In conjunction with your comments, however, I offer the following remarks.

Pursuant to regulations promulgated by the Committee (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 a request should be directed to the records access officer at the agency or agencies that you believe might maintain the records of your interest. 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.

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

Enclosed, as requested, is a copy of "Your Right to Know", which describes the Freedom of Information Law in detail.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 218
FOIL-AO- 10280

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 15, 1997

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 July 21. Having sent a request to the Town of Lake Luzerne in which you sought "any and all information kept regarding [your] property", you wrote that the records access officer indicated that "there was nothing in her files and would be sending [you] nothing." It is your belief that the Town does maintain records about you and your property. As such, you have asked what your rights of access might be and whether the "Personal Privacy Act" would apply.

In this regard, I offer the following comments.

First, the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government", such as a town. Consequently, the Personal Privacy Protection Law would not be applicable to records maintained by a unit of local government.

Second, if you own property in the Town, I would conjecture that the Town would maintain some records pertaining to that property, such as assessment or building code records. However, often when a request is as broad as you indicated, the issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

In the context of your request, I am unaware of the means by which the Town maintains records pertaining to property or residents. If the Town maintains all such records in a file or group of files that are retrievable on the basis of the terms of your request, I believe that you would have met the requirement that the records be reasonably described. On the other hand, however, it is possible that the Town maintains records falling within the scope of your request in a number of locations or departments and by means of different filing systems within those

departments. If records are kept by location or by name, it may be easy to locate them. If they are kept chronologically, it may not be possible to locate records sought by means of a name or address.

In short, it is questionable whether your request "reasonably described" the records as required by law. Rather than requesting "any and all records", it is suggested that a request include sufficient detail to enable agency staff to locate and identify the records of your interest.

Lastly, when a request reasonably describes a record and an agency indicates that it does not maintain or cannot locate the 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)].

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

I hope that I have been of 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-1028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 18, 1997

Mr. Washington Davis
84-A-6907
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. Davis:

I have received your letter of July 18. You have sought guidance concerning your efforts in obtaining records pertaining to yourself from the Bronx House of Detention.

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, and a request should be sent to that person at the agency that maintains the records of your interest.

While I believe that the person in receipt of your request should either have answered in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, since the Bronx House of Detention operates within the New York City Department of Correction, it is suggested that you resubmit your request to Mr. Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

It is noted, 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 acknowledgment of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Ernesto Marrero, General Counsel.

Lastly, some of the records in which you are interested would appear to maintained by the Supreme Court. If that is so, a request might be direct to the clerk of the Court. While the Freedom of Information Law excludes the courts from its coverage, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ms. C. Scott
Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1228[illegible]-A

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 18, 1997

Mr. Bruce T. Reiter
05549-052 A-1
P.O. Box 1000
Montgomery, PA 17752

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

Dear Mr. Reiter:

I have received your letter of July 21. You have sought assistance in obtaining various records from the Church of the Good Shepherd in Green Island.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee, 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 on the foregoing, the Freedom of Information Law applies to records maintained by entities of state and local government. A church is not a governmental entity and, therefore, falls outside the coverage of that law.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1028-B

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 18, 1997

Mr. Matthew Matagrano
96-A-4326
Sullivan Correctional Facility
Riverside Drive 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. Matagrano:

I have received your letter of July 21 in which you complained that you have encountered delays in obtaining responses to your requests for records, and you sought assistance in the matter.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 your inquiry involves access to medical records maintained by various governmental facilities, 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.

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 Hospital 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, general 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 send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking 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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OMC-AO- 2788
FOIL-AO- 10782

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 21, 1997

Ms. Kathleen Smith
Assessor
Town of DeerPark
Drawer A
Huguenot, NY 12746

The staff of the Committee on 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. Smith:

I have received your letter of July 21 in which you sought an opinion relating to the obligations of a board of assessment review.

You referred to a situation in which such a board "met for their deliberations" and "[b]eing a quasi-judicial board they deliberated and voted in closed session." Although minutes were prepared, you indicated that they do not indicate how each member voted, and you raised the following question: "If a quasi-judicial board is exempt from the Open Meetings Law, are they also exempt from keeping a voting record."

From my perspective, your question is predicated upon a mistaken assumption. While the deliberations of a board of assessment review could be characterized as quasi-judicial and exempt from the Open Meetings Law, other aspects of its meetings would not be quasi-judicial and, therefore, would be subject to that statute. For that reason, I believe that a voting record must be maintained. In this regard, I offer the following comments.

First, by way of background, a board of assessment review is, in my opinion, both a "public body" for purposes of the Open Meetings Law, and an "agency" for purposes of the Freedom of Information Law. Section 102(2) of the Open Meetings Law defines the phrase "public body" to mean:

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

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."

Since a board of assessment review is a municipal board that performs a governmental function for a town, I believe that it clearly constitutes a "public body" and an "agency" that falls within the scope of both statutes.

Second, while meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, as you suggested their deliberations could be considered 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 held in accordance with the Open Meetings Law.

Lastly, 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 sum, because an assessment board of review is a "public body" and an "agency", I believe that 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1083

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 21, 1997

Mr. Clifford Howard
84-A-4818
Wende Correctional Facility
3622 Wende Road
P.O. Box 1187
Alden, NY 14004-1187

Dear Mr. Howard:

Your letter of August 8 addressed to the Secretary of State and received on August 19 has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer advice concerning the Freedom of Information Law.

It is noted at the outset that neither the Department of State nor the Committee on Open Government serves as a general repository of records. Neither, for example, would maintain the records regarding the bill to which you referred. It is suggested that you seek the information through your facility librarian.

For future reference, a request for records under the Freedom of Information Law should be directed to the "records access officer" at the agency that you believe maintains the records. Pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), each agency must designate one or more persons as records access officer, and that person 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 of interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 21, 1997

Mr. Samuel Lucifer Robinson
73-B-5282
Wende State Prison
Alden, NY 14004-1187

Dear Mr. Robinson:

Your letter of August 17 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 offer advice concerning the Freedom of Information Law.

It is noted at the outset that neither the Department of State nor the Committee on Open Government serves as a general repository of records. Neither, for example, would maintain the business address of former Governor Cuomo. As a licensed attorney, that information would be maintained by the Office of Court Administration, which is now located at 25 Beaver Street, New York, NY 10004.

For future reference, a request for records under the Freedom of Information Law should be directed to the "records access officer" at the agency that you believe maintains the records. Pursuant to the regulations promulgated by the Committee (21 NYCRR Part 1401), each agency must designate one or more persons as records access officer, and that person 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 of interest.

With respect to the remaining aspects of your request, this office does not maintain records regarding the bill to which you referred. It is suggested that you seek such information through your facility librarian. "Representing You" is no longer in print. However, a directory of state agencies is available for $7.50 payable by check or money order made out to the "Office of General Services" and sent to the NYS Office of General Services, Directory Sales, 27th Floor, Erastus Corning II

Tower Building, Empire State Plaza, Albany, NY 12242. Lastly, the attorney for the New York State Athletic Commission is Mr. Larry Mandelker, and the Commission's offices are located at 270 Broadway, New York, NY 10007, which is the New York City office of the Department of State.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1085

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 22, 1997

Mr. Dennis DeLucia
29431-053
FCI Schuylkill Unit 3B
P.O. Box 759
Minersville, PA 17954

Dear Mr. DeLucia:

I have received your letter of July 18 in which you sought assistance in relation to your request for records of the New York City Organized Crime Task Force, which appears to be a unit of the New York City Police Department.

As I understand the matter, although you provided your name, your social security number, your NYSID number and other details, your request was rejected because the Department "does not archive its records in the manner suggest i.e., by name."

From my perspective, the issue is whether your request "reasonably described" the records sought as required by §89(3) of the Freedom of Information Law. In this regard, 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. In the case of your request, it appears that the records in which you are interested are not filed or indexed by name or by means of the other identifiers that you provided. If that is so, the request would not meet the standard of reasonably describing the records as required by law.

It is suggested that you attempt to learn of the nature of the Department's record keeping system in order to enable you make a request that meets legal requirements.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2789
FOIL-AO-10286

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

August 22, 1997

Mr. James W. Fowler
Saugerties President
2674 Box 642
MT. Marion, NY 12456-0642

Dear Mr. Fowler:

I have received your letters of July 24 and August 6, both of which relate to the Saugerties Festival Development Corporation, the Town of Saugerties, and access to various records and meetings. Having reviewed the correspondence and the materials attached to them, I offer the following comments.

First, the Saugerties Festival Development Corporation was the subject of an advisory opinion rendered in April. In short, it is my belief that it is an "agency" required to comply with the Freedom of Information Law, and that its governing board constitutes a "public body" subject to the Open Meetings Law. Rather than reiterating the points offered in that opinion, copies of which were sent to the Town Supervisor and the Town Board, I have enclosed a copy for your consideration.

Second, one of the issues appears to involve a promise by Town officials that certain records would be kept confidential. 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.

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, 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 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.

Third, as I understand the matter, the records in which you are interested involve an "environmental evaluation" of a certain parcel of real property. If that is so, I believe that they should be disclosed in great measure, if not in their entirety.

If the records were prepared by or for an agency, i.e., by a consultant, they would fall within the scope of §87(2)(g) of the Freedom of Information Law. Although that provision serves as a potential basis for a denial of access, due to its structure, it frequently requires disclosure. Specifically, the cited provision permits an agency to withhold records that:

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

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

A remaining issue involves meetings and the extent to which they must be conducted open to the public. Here , 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 public body gathers to discuss public business, any such gathering, in my opinion, would constitute a "meeting" subject to the Open Meetings Law.

It is also noted it has been held that a gathering of a quorum of a public body, the Kingston City Council, for the purpose of holding a "planned informal conference" involving a matter of public business constituted a meeting that fell within the scope of the Open Meetings Law, even though the Council was asked to attend by a city official who was not a member of the city council [Goodson-Todman v. Kingston Common Council, 153 AD 2d 103 (1990)]. Therefore, even though a gathering might have been held at the request of a person who is not a member of the public body. I believe that it would be a meeting, if a quorum is present for the purpose of conducting public business.

The Open Meetings Law requires that notice be given to the news media and posted prior to every meeting. Specifically, section 104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

Lastly, the Open Meetings Law is based on a presumption of openness. Meetings of public bodies must be conducted open to the public, except to the extent that the subject matter may properly be considered during executive sessions. Moreover, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed and it must be carried by majority vote of a public body's total membership before such a session may validly be held. the ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session to discuss the subject of its choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Saugerties Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1028?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1997

Mr. Nathaniel Green
96-R-8512 I-2 49 Top
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

Dear Mr. Green:

I have received your letter of July 24 in which you asked that I inquire with respect to the status of your appeal made under the Freedom of Information Law and sent to the Department of Correctional Services on June 11.

Having contacted the Department on your behalf, I was informed that your appeal was received by that agency and that it is still pending. I note that §89(4)(a) of the Freedom of Information Law requires that an agency determine an appeal within ten business days of its 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal and the ensuing determination thereon."

In an effort to enhance compliance with the Freedom of Information law, a copy of this response will be forwarded to the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1997

Mr. William Davidson
96-A-8024
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. Davidson:

I have received your letter of July 18, which reached this office on July 28. You have sought assistance in obtaining your medical records from the New York City Health and Hospitals Corporation concerning an injury that you incurred at the Brooklyn House of Detention.

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 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 hospital 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 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 send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking 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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

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-10289

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 3, 1997

Mr. Douglas E. Gerhardt
Director of Governmental Relations
School Administrators Association of
New York State
8 Airport Boulevard
Latham, NY 12110

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

Dear Mr. Gerhardt:

As you are aware, I have received your letter of July 22, which reached this office on July 28. Please accept my apologies for the delay in response.

You referred initially to the School Administrators Association of New York State (SAANYS), an organization consisting of administrators and supervisors employed by public schools. You wrote that those professionals, who are typically school principals or administrators:

> "commonly meet with students on a wide variety of issues. Frequently, these meetings are used as forums to discuss issues a student or students are facing. These may relate to a class, program, teacher or another student. Quite often, other students, administrators and/or teachers attend these meetings. Occasionally, notes are taken by a member of the staff."

You have asked whether, in my view, "if an administrator meets with a student or group of students, with other professional staff present, the meeting is deemed public for purposes of the open meetings law." You also asked whether if notes taken at the kind of meeting described above are subject to the Freedom of Information Law, particularly if they include comments made by children.

In this regard, I offer the following comments.

First, as you described the meetings at issue, they would fall outside the coverage of the Open Meetings Law. That statute pertains to meetings of public bodies, and the phrase "public body" is defined 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" [see §102(1)].

Based on the foregoing, the gatherings in question would not consist of members of any particular public body, such as a board of education. Therefore, again, the Open Meetings Law would not apply.

Second, I believe that the Freedom of Information Law would be applicable. That statute pertains to agency records and 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)].

Also pertinent is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "FERPA". In brief, FERPA applies to all educational agencies or institutions that participate in funding, loan or grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over similarly waives his or her right to confidentiality. The federal 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, references to students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld from the public in order to comply with federal law. Concurrently, if a parent of student requests records pertaining to his or her child, the parent ordinarily will have rights of access to those portions of records that are personally identifiable to their children.

I point out that the federal regulations exclude from the definition of "education records" :

> "Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record..." [34 CFR 99.3(b)(1)].

Therefore, if, for example, a principal prepares notes of a meeting and does not share or disclose the notes to any other person, FERPA would not apply. In that scenario, even though FERPA would not apply to the notes, due to the breadth of the definition of "record" in the Freedom of Information Law, the notes would fall within the scope of that statute. 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.

Assuming that the Freedom of Information Law governs rights of access rather than FERPA, two of the grounds for denial would likely be pertinent to an analysis of rights of access to notes or similar records. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." If, for instance, a parent requests notes and the notes include reference to several students, I believe that a school district could withhold those portions pertaining to the students other than the child or children of the person making the request in order to protect privacy.

The other provision 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.

If notes taken at a meeting merely consist of a factual rendition of what was said or what transpired, they would consist of factual information available under §87(2)(g)(i), except to the extent that a different ground for denial could be asserted [i.e., §87(2)(b) concerning the protection of privacy]. Insofar as notes might include expressions of opinion, or conjecture on the part of the author, they would fall within the scope of the exception.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10090

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Mr. Gregory 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 July 24, as well as the form attached to it. According to your letter, a candidate running for the Board of Education in your school district was required to complete a request form and sign the following statement:

> "I request the right to examine or copy school records described above and hereby state that I will not use them for profit making or business purposes nor will I use them for solicitation or any other activities that constitute invasion of personal privacy."

It appears that the statement must be signed by any applicant for records, and not only a candidate for the Board. 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 (§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" [§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 processes and responds to the request, it is probable that more than five business days would have elapsed, particularly if a form is sent by mail and returned to the agency by mail. Therefore, to the extent that an agency's response granting, denying or acknowledging the receipt of a request is given more than five business days following the initial receipt of the written request, the agency, in my opinion, would have failed to comply with the provisions of the Freedom of Information Law.

While the Law does not preclude an agency from developing a standard form, as suggested earlier, I do not believe that a failure to use such a form can be used to delay a response to a written request for records reasonably described beyond the statutory period. However, a standard form may, in my opinion, be utilized so long as it does not prolong the time limitations discussed above. For instance, a standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

In sum, it is my opinion that the use of standard forms is inappropriate to the extent that it unnecessarily serves to delay a response to or deny a request for records.

Second, 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.

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.

In the context of the request as it appears on the form, since it does not involve a list of names and addresses, I do not believe that the purpose for which the request is made is relevant. Similarly, I do not believe that the District could condition disclosure of the record sought upon signing the statement.

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 Jefferson School District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1029

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Mr. Thomas Grieco
[redacted]

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

Dear Mr. Grieco:

I have received your letter of July 24, as well as the correspondence attached to it. According to your letter, after your wife's conversation with staff at the Office of the Oneonta County Sheriff's Department, staff "complained of the inconvenience of [y]our requests, and stated that they are too busy to search for the documents [you] desire." You wrote that your wife also referred to the requirement that a subject matter list be prepared.

In this regard, I offer the following comments.

First, it has been held by several courts, including the State's highest court, that compliance with the Freedom of Information Law is a governmental obligation and that the language of that law "imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved" [Gould v. NYC Police Department, 89 NY 2d 267, 279 (1996); see also Doolan v. BOCES, 48 NY 2d 341, 347 (1979)]. As stated in a decision rendered recently: "An agency's disclosure of information pursuant to a FOIL request is as much a service owed by the agency to the public as the furnishing of police, fire or sanitation services" (Messinger v. Giuliani, Supreme Court, New York County, NYLJ, September 2, 1997).

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request

has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

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 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 I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff Middaugh
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10292

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Mr. William J. Darby
[redacted]

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

Dear Mr. Darby:

I have received your letter of July 24. Please accept my apologies for the delay in response. You have asked "how [you] can obtain a Freedom of Information Act form to serve upon the telephone company N.Y.N.E.X."

In this regard, it is noted at the outset that the Freedom of Information Law pertains to agency records, and that §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 generally applies to records maintained by entities of state and local government in New York. It does not apply to private companies, such as NYNEX.

Since telephone companies are regulated by the Public Service Commission, it is possible that a representative of that agency could provide information concerning the subject of your interest. That agency has a toll free number for consumer complaints, 1-800-342-3377.

Lastly, when the Freedom of Information Law is applicable, there is no particular form that must be used to request records. Any request made in writing that reasonably describes the records sought should be sufficient.

I hope that the preceding 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1093

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Mr. Bruce T. Reiter
05549-052 A-1
P.O. Box 1000
Montgomery, PA 17752

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

Dear Mr. Reiter:

I have received your letter of July 25, as well as the materials attached to it.

In brief, you submitted a request for records to the Tax Compliance Division of the NYS Department of Taxation and Finance on June 9. You indicated that as of the date of your letter to this office, you had received 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 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 directed to that person. While I believe that the person in receipt of your request should have either responded directly in a manner consistent with the Freedom of Information Law or forwarded the request to the records access officer, it is suggested that you resubmit your request to the Department's records access officer. I note that the Department's main offices are located at the State Campus, Building 9, Albany, NY 12227.

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 under the Freedom of Information Law is Terrence M. Boyle.

Lastly, having reviewed your request, I note that the Freedom of Information Law pertains to existing records. Several aspects of your request involve records prepared as long as sixteen years ago. Agencies are not required to maintain records interminably; rather, records may be disposed of in accordance with specific provisions of law or retention schedules developed pursuant to the Arts and Cultural Affairs Law. While I am unfamiliar with the minimum retention periods applicable to the kinds of records that you requested, it is possible that some of the records sought have been legally destroyed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jude Mullins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10994

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Mr. Douglas Ames
90-A-4509
Sing Sing Correctional Facility
345 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. Ames:

I have received your letter of July 24 concerning a request made under the Freedom of Information Law directed to the Office of the Kings County District Attorney.

According to your letter, the request was initially denied on the basis of §87(2)(g) of the Freedom of Information Law. However, in response to your appeal, you were informed that that agency did not have possession of the record sought. It is your understanding that the appeals officer is not bound by the reasons for denial expressed in an initial denial of a request, and you referred to an opinion rendered by this office in which it was so advised. You have asked whether that opinion is available and remains valid.

In this regard, enclosed is a copy of the opinion to which you referred. The advice rendered therein continues to be the opinion of this office. It was stated in relevant part that: "there is nothing in the [Freedom of Information] Law or the regulations to the effect that an appeals officer is bound to the reasons for a denial initially offered by the records access officer. Similarly, there is nothing that binds a court to the reasons for denial stated by an agency when it reviews the matter in a judicial proceeding."

While I know of no judicial decision that has considered the issue directly, there is case law in which a consistent conclusion was reached. In a situation in which an agency failed to respond to

both a request and an appeal, it was contended by the applicant that the records must be disclosed, because the agency did not indicate any basis for its denial of access. While it was determined that the applicant had the ability to initiate a judicial proceeding because he had exhausted his administrative remedies, it was found that the agency could nonetheless offer grounds for denial during the proceeding [see Floyd v. McGuire, 87 AD2d 388 (1982)].

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10295

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 4, 1997

Ms. Deanna Dauber
[redacted]

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

Dear Ms. Dauber:

I have received your letter of July 26, as well as the materials attached to it. In brief, you have sought an opinion concerning access to information maintained either by the New York City Board of Education or Community School District #13.

Having reviewed the materials, it appears that you may misunderstand the Freedom of Information Law. The title of that statute may be misleading, for it is not a vehicle that requires an agency to respond to questions or provide information per se in response to a request; rather, it is a statute that pertains to existing records. I note that §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request.

Several elements of your requests involve, for example, "how much money" might have been spent with respect to certain kinds of purchases. Similarly, you requested "a complete listing" of certain monies with "breakdowns" involving how those monies may have been allocated. If responding to those requests would involve the preparation of new records or tabulating figures, the requests would be beyond the requirements of the Freedom of Information Law. Again, an agency is not required to create records in order to respond to requests for information.

Insofar as the kinds of information that you are seeking exist in the form of a record or records, it appears that they 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. The records sought would appear to consist of statistical or factual information that would be available under §87(2)(g)(i).

Another issue involves the requirement that an applicant "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. 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.

Some aspects of your request might not meet the standard of reasonably describing the records. For example, you asked for purchase orders relating to an after school science program. If purchase orders are kept in a file or electronically under the heading of "after school programs" or some similar designation, it may be relatively easy to locate those records. In that circumstance, I believe that the request would reasonably describe the records. On the other hand, if purchase orders are kept in a different way, i.e., in chronological order, rather than by means of the kind of designation by which you requested them, the requirement that you reasonably describe the records might not have been met.

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: Michael J. Valente

FOIL-AO-3793
FOIL-AO-10996

Subject: Tape of Public Meetings; Minutes of Public Meeting

Date: Friday, September 5, 1997

From: Robert J. Freeman, Executive Director, Committee on Open Government

To: Mark Blazejewski[redacted]

Dear Mr. Blazejewski:

As you are aware, I have received your communication of July 28. Please accept my apologies for the delay in response. You have raised two questions concerning access to certain records.

First, you asked whether the public may gain access to tape recordings of "public" meetings of local governmental bodies. From my perspective, such recordings must be made available.

By way of background, 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."

Based on the foregoing, a tape recording maintained by school district would clearly constitute a "record" that falls 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. In my view, a tape recording of an open meeting is accessible, for any person could have been 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].

I note too that a 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)],

Second, you asked whether "the written minutes of public local government meetings [are] privileged from disclosure for a time period." In my opinion, minutes of meetings are accessible under the Freedom of Information Law as soon as they exist. When the minutes are prepared, they would constitute "records."

Additionally, the Open Meetings Law provides direction on the subject. 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, there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. 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.

I hope that I have been of assistance.

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10297

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 5, 1997

Mr. Mark Eldridge
[redacted]

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

Dear Mr. Eldridge:

I have received your letter of July 29, as well as the correspondence attached to it. You have sought an advisory opinion concerning a request made under the Freedom of Information Law directed to the Capital District Transportation Authority (CDTA).

According to your letter, you requested "a list of advertisers which are on the sides of CDTA buses and bus shelters." In response to the request, you were informed that it would be denied pursuant to §87(2)(d) of the Freedom of Information Law. Thereafter, in response to your appeal, you were informed that CDTA does not maintain a list of advertisers and that it is not obliged to prepare a list in response to your request.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no list of advertisers exists, CDTA would not be required to prepare such a record on your behalf.

Rather than requesting a list that apparently does not exist, it is suggested that you request records or portions thereof that identify entities that have advertised on the sides of CDTA buses or bus shelters during a certain period of time.

Second, insofar as those kinds of records exist, I believe that they must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, none of the grounds for denial could justifiably be asserted to withhold the kinds of records at issue.

The provision cited by CDTA, §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..."

From my perspective, the language quoted above would be inapplicable. In short, when an advertisement is placed on the side of a bus or bus shelter, it is there for any member of the public to see; it is not secret.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thomas H. Clements
Carm Basile

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10298

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Mr. Nat. L. Jones
87-A-9707
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Jones:

As you are aware, your letters addressed to Attorney General Vacco concerning your requests for records of the City of Rochester Police Department have 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 indicated that the Police Department has failed to respond to your requests, which were made on July 28 and August 18. 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 regarding requests for records of the City of Rochester is Ms. Linda Kingsley, Corporation Counsel.

In an effort to enhance compliance with law, a copy of this response will be sent to Ms. Kingsley.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Linda Kingsley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10299

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Ms. Bernice J. McCormick
[redacted]

Ms. Bernice J. McCormick:

I have received your letter of July 28 and the correspondence attached to it.

The attachment consists of a request addressed to the Ithaca office of the United States Department of Agriculture (USDA) for records pertaining to the "North Java Water Grant," and specifically a "copy of the great application and what attorney is listed as working for the town on this matter."

In this regard, first, although your request was made pursuant to the New York Freedom of Information Law, the USDA, a federal agency, is not subject to that statute. Federal agencies fall within the coverage of the federal Freedom of Information Act (5 U.S.C. §552). For your information, the Freedom of Information Officer for the USDA is Andrea E. Fowler, whose address is USDA Room 536A, Whitten Bldg., Washington, DC 20250-1300. She can be reached by phone at (202) 720-8164.

The New York Freedom of Information Law pertains to records maintained by agencies of New York State and local government. 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 or other governmental 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 town clearly constitutes an "agency" required to comply with the New York Freedom of Information Law.

Second, while the Committee on Open Government, a state agency, has no jurisdiction with respect to the USDA, I believe that duplicates or copies of the records sought if they are maintained in any Town of Java office or by any Town official would be subject to disclosure by the Town under the New York 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. As I understand the nature of the records, none of the grounds for denial would apply, and the Town would be obliged to disclose them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10300

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Ms. Tania Gelin
[redacted]

Dear Ms. Gelin:

I have received your letter of July 29 and the correspondence attached to it.

The materials involve your request to the New York City Department of Housing Preservation and Development for records identifying applicants for "the 8A Loan," including their names, whether they have paid an application fee, and "how much the City received from the applicants"during a certain period.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if no record exists dealing specifically with "how much the city received from applicants", for example, the agency would not be obligated to create new records or prepare totals on your behalf.

Second, as a general matter, the Freedom of Information Law is based upon presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one mor more grounds for denial appearing in §87(2)(a) through (i) of the law. I am unfamiliar with the "8A Loan" program. If it involves some sort of an income qualification, §87(2)(b) would be pertinent. That provision enables an agency to withhold records or portions thereof the disclosure of which constitute "an unwarranted invasion of personal privacy."

While I believe that the Freedom of Information Law is intended to ensure that

government is accountable, the privacy provisions of the Law enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. As such, with respect to grant, loan or similar programs, often the question involves the extent to which disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, a disclosure that permits the public determine their general income level of a participant in such a program based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy.

Therefore, if the loan program involves an income qualification, insofar as the records sought include the names, addresses or other identifying details of applicants for loans, I believe that those items may be withheld or deleted, as the case may be, from the Department's records (see Tri-State Publishing Co. v. City of Port Jervis, Community Development Agency, Supreme Court, Orange County, March 4, 1992).

If my assumption is erroneous, I would be pleased to review the matter upon a receipt of additional explanatory material.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Ira Bourstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1030

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Ms. Victoria Ventresca
[redacted]

Dear Ms. Ventresca:

I have received your letter of July 29 and the materials attached to it. You have sought assistance in obtaining certain information from the Shenendehowa Central School District.

Specifically, you have requested "student grade information with regard to the ninth and tenth grade Global Studies Course," in " a listing presented by teacher of those grades, with an indication of which course it is (i.e. ninth or tenth grade regents or non-regents) with a record of the student's quarterly grades and final examination grade." In response to the request, you were informed that the information was not available in an existing report, but after some negotiation, you were advised that you could have the information upon payment of a fee of twenty-five cents per page plus "a $40.00 charge for the person collecting the information." Further, you were informed that in addition to the students' names, teachers' names would also be redacted.

From my perspective, insofar as the information in question exists, including teachers' names, it must be disclosed. Further, I do not believe that the District may charge any fee other than for photocopying. In this regard, I offer the following comments:

First, the Freedom of Information Law pertains to existing records, and §89 (3) of the Law states in part that an agency need not create a record in response to a request. On the basis of your letter, it appears that the information sought exists, perhaps not in the form a single "listing." If no single record contains the information, rather than requesting a "listing", it is suggested that you seek records that contain the information of your interest.

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 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.

In a case dealing with a similar request, the records of test scores were prepared by class alphabetically. The school district contended that, even if names of students were deleted, because the lists were maintained alphabetically, the identities of some students might be made known. In determining the issue, the Court ordered that names be deleted from the records and that the records be "scrambled" in order to protect against the possible identification of students [Kryston v. East Ramapo School District, 77 AD 2d 896 (1980)]. In my view, the School District would be

required to disclose the grades in a manner in which students' identities are protected. Stated differently, the grades must be disclosed, but any identifying details pertaining to students must, in my view, be withheld.

Third, as suggested earlier, I believe that the teachers' names must be disclosed. Pertinent to the issue is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy.' Based upon the judicial decisions, 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].

In the context of your inquiry, the records are relevant not only to the performance of the students in certain classes but also the teachers of those classes. Therefore, in my opinion, again, the teachers' identities must be disclosed.

Next, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, 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. In this instance, I know of no statute that would authorize the District to do so.

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 personnel time, 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, the requirement referenced earlier that imposes an obligation on the Board of Education as the District's governing body to promulgate regulations includes the duty to inform a person denied access of the right to appeal. Section 1401.7(b) of 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.'

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

RJF:tt

cc: Board of Education
Lorraine Longhurst

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10302

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

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 July 30. Once again, the issue deals with the time during which you may inspect records.

In my view, there is no need to reiterate the points offered in earlier opinions. I attempted to suggest, in as clear a way as possible, that when an agency authorizes the inspection of records on a certain day, it must permit an applicant to view the records during the entirety of the regular business hours of that day, unless some other mutually agreeable arrangement has been reached.

With respect to the days on which an applicant may inspect records, even if records are clearly public, there may be valid reasons for authorizing access to the records on some days, but perhaps not others. For instance, if it is known that requested records will be in use by staff on certain day, I do not believe that an applicant could insist to inspect them on that day.

I hope that the foregoing serves to clarify the matter. .

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Reichardt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10303

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Mr. Frank Williams
79-C-0053
Collins Correctional Facility
P. O. Box 340
Collins, NY 14034-0340

Dear Mr. Williams:

I have received your letter of July 31 concerning your ability to obtain your co-defendant's criminal history record.

Based on the content of your letter, I offer the following comments.

First, 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. I note that court records may be available under other provisions of law (see e.g. Judiciary Law, §255).

Second, 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 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.

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.

Lastly, I know of no judicial decision in which it has been held that the provisions of the Civil Rights Law cited by the Office of the District Attorney serve in any way to prohibit an inmate or any other person from asserting rights under the Freedom of Information Law. On the contrary, it has been held that when a person seeks records under the Freedom of Information Law, that person is as a member of the public [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)], and that records accessible under that statute must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Similarly, in a recent decision rendered by the Court of Appeals, the State's highest court, the court

> "recognize[d] that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such categorical limitation in the statute" [Gould v. New York City Police Department, 89 NY2d 267, 274 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1030

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Mr. Isidore Gerber
[redacted]

Dear Mr. Gerber:

I have received your letter of August 1 and the materials attched to it, which pertain to your efforts to obtain records, particularly budget worksheets, from the Village of Liberty.

In this regard, it is emphasized at the extent that 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 to comply that law. Therfore, insofar as the Village does not maintain the information sought in the form of a record or records, the Freedom of Information Law would not apply.

As the Freedom of Information Law pertains to existing records and budget worksheets in particular, I offer the following remarks.

One of the grounds for withholding records clearly relates to the kind of documents at issue. However, due to its structure, it often requires broad 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.

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.

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.

A second provision of potential relevance is §87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." If contract negotiations are ongoing, it is possible that some aspects of the records, but in all likelihood not all aspects, could be withheld under §87(2)(c). If negotiations are not ongoing, it does not appear that §87(2)(c) would be pertinent or applicable as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Mayor Galloway
Judy Zwrawski

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10305

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 8, 1997

Mr. Maxwell D. Weinstein
Attorney at Law
121 Beverly Road
South Huntington, NY 11746-4521

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

Dear Mr. Weinstein:

I have received your letter of July 29, which reached this office on August 4. Please accept my apologies for the delay in response.

You have sought assistance in relation to a request for records of the Village of Ocean Beach that is "long outstanding." Although there is no indication of when your client submitted a request, the receipt of the request was acknowledged on July 7, and the records access officer advised that she was searching for the records and would inform your client of the availability of the records upon completion of her search. He had apparently received no further response as of the date of your letter to this office. His request involves payments made by the Village in relation to certain litigation, "and a list of all funds or contract's [sic] for lobbyist..."

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

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

Based 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 acknowledgment is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgment 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. When some records are easy to locate and others difficult, it has been suggested that records be made available on an ongoing or piecemeal basis.

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

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

within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I note that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency need not create a record in response to a request. If, for example, there is no "list of all funds", the Village would not be required to prepare a new record or list on behalf of your client.

Third, as it pertains the 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, lists of funds and contracts are generally available under the Law, for none of the grounds for denial would be applicable.

With 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.

> "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-

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 client's request, it was not as detailed as the request at issue in Orange County Publications. It appears that the request involves amounts expended. In my view, those aspects of the records would clearly be available.

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

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Nancy J. Balarezo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10306

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1997

Mr. E. Fred Marasa
97-B-0214
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. Marasa:

I have received your letter of July 31 in which you sought assistance in obtaining information concerning your ability to have your property returned to you by the Ontario County Sheriff's Department. You indicated that neither your attorney, nor personnel from the Sheriff's Department or the court have answered your inquiries.

In this regard, for purposes of clarity, it is emphasized that the Freedom of Information Law pertains to existing records maintained by agencies; it does not pertain to objects, such as physical evidence or the items of property that are the subject of your interest. Similarly, §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. As such, an agency is not required provide information by answering questions; rather, it is required to respond to requests for records.

I note, too, that 86(3) of the Freedom of Information defines the term "agency" to include:

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

Section 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 is applicable to the Sheriff's Department; it would not apply, however, to a court. This not to suggest that court records are beyond the scope of public rights of access, for other provisions of law often grant rights of access to those records (see e.g., Judiciary Law, §255; Uniform Justice Court Act, §2019-a). If you believe that a court maintains records of your interest, a request should be directed to the clerk of the court, citing an appropriate provision of law as the basis for your request. Since charges against you were apparently dismissed, §160.50 of the Criminal Procedure Law may also be pertinent. That provision generally requires that records be sealed after charges are dismissed in favor of an accused. The accused, however, has the ability to obtain some of those records.

Insofar as you are seeking agency records, 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 an agency's response to requests, and requests should be made to him or her.

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: Clerk, Victor Town Court
Records Access Officer, Sheriff's Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10307

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1997

Mr. Arthur Buckley
[redacted]

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

Dear Mr. Buckley:

I have received your letter of August 3 and the correspondence attached to it. You have sought assistance in obtaining a copy of a site plan from the Town of Wappinger. Although you requested the record in January, you had not received it as of the date of your letter to this office.

In this regard, I offer the following comments.

First, 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. While I believe that the Zoning Administrator should have responded directly to your request in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, it is suggested that you contact the records access officer to expedite your request. In most towns, the records access officer is the town clerk, for the clerk is the legal custodian of all town records (see Town Law, §30).

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 acknowledgment 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 acknowledgment is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgment 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. When some records are easy to locate and others difficult, it has been suggested that records be made available on an ongoing or piecemeal basis.

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

From my perspective, the kind of record that you are seeking must be disclosed, 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

cc: Town Clerk
Donald Close

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10308

41 State Street, Albany, New York 12231
(518) 474-2513
Fax (518) 474-1927

September 9, 1997

Mr. Anthony M. Campolito
82-C-0884
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589-0700

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

Dear Mr. Campolito:

I have received your letter of July 28 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, on July 4, you sent a request to the Division of Parole by means by Certified/Return Receipt Mail. Although the correspondence was received on July 9, you received no response as of the date of your letter to this office.

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

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

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

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

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

For your information, the person designated to determine appeals at the Division of Parole is its Counsel, Terrence Tracy.

With respect to the information sought, you asked to "review, not purchase at this time", stenographic minutes of a business meeting, and an itemized list of "all documents and statements and transcripts that were presented and reviewed" at the meeting. In addition, you indicated that you are indigent.

It is noted that the Freedom of Information Law pertains to existing records, and §89(3) indicates that an agency is not required to create records in response to a request. Therefore, if, for example, there is no stenographic transcript of the meeting, the Division of Parole would not be required to prepare a transcript on your behalf. Similarly, if there is no itemized list of the documents that were used at the meeting, the Division would not be required to create a list for you.

Section 87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations require that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations. Further, it has been held that an agency may assess its established fees for copies, even though a request is made 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
cc: David Mollick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10309

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 9, 1997

Mr. Shawn Parker
95-R-4863
SHU A-1
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. Parker:

I have received your letter, which reached this office on August 4. As I understand the matter, you have attempted unsuccessfully to seek records under the Freedom of Information Law from the manufacturer of a skin care product.

In this regard, I do not believe that the manufacturer is subject to either the state or federal freedom of information provisions. 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 or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law pertains to records maintained by entities of state and local government in New York. Similarly, the federal Freedom of Information Act (5 USC §552) pertains to records maintained by federal agencies; it does not apply to private corporations.

In short, while the company in question could choose to respond to you, it would not be required to do so under the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10310

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1997

Mr. Edward Russo
97-R-0415
Riverview Correctional Facility
P.O. Box 247
Ogdensburg, NY 13669

The staff of the Committee on Open 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:

I have received your letter of August 3 and the correspondence attached to it. You have sought assistance in obtaining records pertaining to you while incarcerated at the Ulster Correctional Facility.

Having reviewed the materials, you were informed that the records in question are no longer maintained at the Ulster Correctional Facility. As I understand the practices of the Department of Correctional Services, records pertaining to inmates are transferred with inmates when they are moved to different facilities. Consequently, the records regarding your incarceration at the Ulster Correctional Facility would be maintained at the facility in which you are currently incarcerated.

I note, too, that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a facility should be directed to the facility superintendent or his designee.

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.

Although I am unfamiliar with the specific records in which you are interested, I point out that §5.21(a) of the regulations promulgated by the Department of Correctional Services states that:

> "information from the personal history portion of an inmate record shall be made available to the inmate, a representative of his estate, his legal guardian or committee, or his attorney."

Further, §5.09(i) provides that:

> "Personal history means 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."

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-1031

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1997

Mr. William R. Piper
95-A-5376
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. Piper:

I have received your letter of July 29, which reached this office on August 6. The nature of the response that you seek from this office is unclear. It appears that you are focusing on an appeal and what appears to be your contention that the Nassau County Police Department failed to inform you of your right to appeal a denial of access to records under the Freedom of Information Law.

Assuming that I have interpreted the matter accurately, I offer the following comments.

The provision in the Freedom of Information Law dealing with the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1032

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1997

Mr. Dennis DeLucia
29431-053
FCI Schuylkill Unit 3B
P.O. Box 759
Minersville, PA 17954-0759

The staff of the Committee on Open 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:

As you are aware, I have received your letter of July 31. As I understand the matter, you were subpoenaed to appear before the Kings County grand jury in 1970 or 1971, and you wrote that you were informed by the official who subpoenaed you that you were under surveillance and investigation. Having requested records pertaining to the matter, the Office of the District Attorney denied access, apparently on the basis of §87(2)(e) of the Freedom of Information Law. You have questioned how that provision could serve as a ground for denial in view of the time that has passed, and you asked that I look at the file "to see if they are correct."

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have the right to review records on behalf of an applicant; only a court, following the initiation of a judicial proceeding for review of an agency's denial of access, would have the authority to conduct an in camera inspection of records to determine whether or the extent to which they should be disclosed or withheld. Similarly, the Committee is not empowered to compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. In view of the passage of time since the occurrence of the events to which you referred, it is possible that records concerning those events may legally have been destroyed. Insofar as the records of your interest no longer exist, the Freedom of Information Law would not apply.

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.

Of likely relevance 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, §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."

The provision quoted above pertains not only to testimony, but also to "any matter attending a grand jury proceeding." Therefore, to the extent that the records at issue involve or relate to grand jury proceedings, they would be exempt from disclosure under the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

Lastly, as your request deals with records other than those that would be exempt from disclosure pursuant to the Criminal Procedure Law, I would agree with your inference that it is unlikely that §87(2)(e) would serve as a valid basis for denial of access to every element of any such records. 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."

While the records might have been compiled for law enforcement purposes, they may be withheld only to the extent that the harmful effects of disclosure described in subparagraphs (i) through (iv) of §87(2)(e) would arise by means of disclosure. Again, due to the period of time that has passed since the occurrence of the events resulting in the preparation of the records, the ability to assert that provision validly as a basis for a denial of access is, in my view, questionable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Regina V. Kelly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1031 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1997

Mr. James H. Rolston
91-B-1197
Wyoming Correctional Facility
P.O. Box 501
Attica, NY 14011

Dear Mr. Rolston:

I have received your letter of September 5, which reached this office today. You have requested various records concerning a correction officer from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the records available, because this office does not maintain them. Nevertheless, I offer the following comments.

First, a request for records should be directed to the agency that maintains them. According to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be made to the facility superintendent or his designee. To seek records from the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration in Albany.

Second, you referred to your request being made under the federal Freedom of Information and Privacy Acts. Those statutes do not apply, for they pertain only to records maintained by federal agencies. Pertinent in this instance is the New York Freedom of Information Law, which applies to records maintained by entities of state and local government.

Third, it is likely that many of the records in which you are interested 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.

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)].

Also relevant is §87(2)(b), which permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." In addition, §89(2)(b) includes examples of unwarranted invasions of personal privacy, the first two of which deal with:

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

As such, a request involving medical or mental health information could justifiably be denied.

Lastly, you asked that your request be "exempt" from all fees. While there is a provision in the federal Freedom of Information Act dealing with 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, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1031

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 10, 1997

Mr. Michael S. Rabin
General Counsel
NYC Department for the Aging
2 Lafayette Street
New York, NY 10007-1392

Dear Mr. Rabin:

I appreciate receiving a copy of your determination of an appeal by Mr. Christopher K. Heaney of NYNEX rendered on August 4 pursuant to the Freedom of Information Law. In brief, NYNEX requested a list the names of executive directors of senior centers, and you upheld an initial denial of access on the basis of §89(2)(b)(iii) of the statute.

I respectfully disagree with your determination and ask that you reconsider your response. In this regard, I offer the following comments.

First, as a general matter, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Farbman pertained to a situation in which a person involved in litigation against an agency requested records from that agency under the Freedom of Information Law. In brief, it was found that one's

status as a litigant had no effect upon that person's right as a member of the public when using the Freedom of Information Law, irrespective of the intended use of the records. Similarly, unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, including the potential for commercial use, is in my opinion irrelevant; when records are accessible, once they are disclosed, the recipient may do with the records as he or she sees fit.

Second, 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)].

Several judicial decisions indicate that the provisions cited above pertaining to the protection of personal privacy cannot validly be asserted when records identify commercial entities or persons acting in business capacities. In a decision rendered by the Court of Appeals that focuses on those 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 another decision, the opinion of this office was cited and confirmed, and the court held that "the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence" [American Society for the Prevention of Cruelty to Animals v. New York State Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In a case concerning records pertaining to the performance of individual cardiac surgeons, the court granted access and cited an opinion prepared by this office in which it was advised that the information should be disclosed since it concerned professional activity licensed by the state (Newsday Inc. v. New York State Department of Health, Supreme Court, Albany County, October 15, 1991).

In short, I do not believe that the provisions in the Freedom of Information Law pertaining to the protection of personal privacy could be asserted to withhold the record in question, for it involves the names and addresses of persons in their business capacities; there is nothing intimate or personal about it.

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

cc: Christopher K. Heaney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10315

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Nancy Cruickshank
[redacted]

The staff of the Committee on 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. Cruickshank:

I have received your letter of August 11 in which you sought assistance concerning a certain contract that you requested from the New York City Economic Development Corporation. Although the receipt of your request was acknowledged by the Corporation's records access officer, you received no further response. Similarly, you received no response to an appeal. You suggested that the record in question may not exist.

In this regard, I offer the following comments.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgment 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 acknowledgment is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgment 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. When some records are easy to locate and others difficult, it has been suggested that records be made available on an ongoing or piecemeal basis.

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, 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, when an existing record can be found, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a contract between an agency and a firm must likely be disclosed, for none of the grounds for denial could typically be asserted to withhold a contract.

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 Corporation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Charles Millard, President
Deborah McGovern, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10316

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Reggie McAllister
89-A-7685
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. McAllister:

I have received your letter of August 19 in which you sought assistance in obtaining records pertaining to your case, including "exculpatory" and "incriminatory" materials "relating to" Brady and Rosario respectively, as well as grand jury testimony.

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, 89 NY 2d 267, 274 (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.

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.

Without knowledge of the contents of the records in which you are interested, I cannot offer specific guidance. However, I point out that the first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 would be outside the scope of rights conferred by the Freedom of Information Law. Any disclosure of those records would be based upon a court order or perhaps a vehicle authorizing or requiring disclosure that is separate and distinct from the Freedom of Information Law.

In considering other records falling within the scope of your request, relevant is the Gould decision cited earlier concerning "complaint follow up reports" prepared by police officers that are also known as "DD5's" 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. Axelrod, 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, supra, 276-277; emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1031?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Bill VanAllen
[redacted]

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

Dear Mr. VanAllen:

During a visit to the offices of the Committee on Open Government on August 8, you sought an advisory opinion relating to a portion of a request directed to the State Education Department and the Commissioner's determination of your appeal under the Freedom of Information Law.

One aspect of your request involved a log of Commissioner's decisions that is apparently prepared to "track the status of appeals." In the determination sustaining the initial denial, it was found that the log:

> "Includes the names of parties to Commissioner's appeals which may not be released because statutory confidentiality requirements (e.g., Education Law §4403(9) and 20 USC §1417(c) require confidentiality of personally identifiable information concerning a student with a disability) and because release of the names would constitute an unwarranted invasion of personal privacy (See, Public Officers Law 87[2][b]. It is not apparent on the face of the log which names must be withheld. Staff would have to research each of the cases to determine which names must be withheld, and a new list would have to be prepared, which does not contain the names which must be kept confidential.
>
> "As stated above, FOIL does not require and agency to prepare or compile a record not possessed or maintained by such entity (See, Public Officers Law §89[3], Matter of Gannet Co., Inc., et al v.

> James, 86 AD2d 744, 745 [4th Dept, 1982] appeal denied by 56 NY2d 502 [1982]). Petitioner's request is denied on the grounds that complying with it would require SED to prepare a record not maintained by the agency."

You have asked whether the log must be disclosed if all of the names are deleted. As I understand its contents, the log would be available following the deletion of personally identifiably details. 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. It is emphasized that the introductory language of §87(2) refers to the ability of an agency to withhold records "or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record may, depending upon its specific contents, be available or denied in whole or in part. That provision also imposes an obligation on agencies to review records sought in their entirety for the purpose of disclosing those portions that are available and deleting those portions that fall within the scope of one or more exceptions.

In this instance, it would appear that portions of the log (i.e., those elements that identify students) would be exempted from disclosure by statute, and, therefore, deniable pursuant to §87(2)(a) of the Freedom of Information Law, or deniable under §87(2)(b), which permits agencies to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

If it is impossible to determine on the face of the log which names would be excepted from disclosure and if you agree to the deletion of all names, I believe that the remainder of the log would be available. In my view, the deletion of personally identifying details would not represent the creation of a new record, but rather the disclosure of portions of an existing record.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stephen Earle, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10318

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Louise J. Campbell
[redacted]

The staff of the Committee on 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. Campbell:

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

According to the correspondence, having requested copies of records from the Village of Lynmbrook, you were informed that the fee for photocopies would be twenty-five cents photocopy, except in the case of copies of certificates of occupancy. For those records, you were informed that the fee is $5.00 per photocopy.

You have asked whether the Village is permitted to charge a fee of $5.00 for photocopies of certificates of occupancy. In this regard, from my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, 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. In this instance, I know of no statute that would authorize the Village to do so.

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); also Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS2d 214,_AD2d_ (1996)].

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 personnel time, 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)].

In short, I do not believe that the Village can validly charge more than twenty-five cents for a photocopy of a certificate of occupancy.

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..

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10319

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Wallace S. Nolen
94-A-6723
P.O. 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. Nolen;

I have received your letter of June 30 which reached this office on August 7. You raised a series of issues and questions relating to the implementation of the Freedom of Information Law by the Department of Correctional Services.

The initial area of concern involves your intention that the Department "misconstrues" the Freedom of Information Law, for you suggested that it appears not to recognize that requests for records in its possession that originated at other agencies must be answered. In this regard, the Freedom of Information Law pertains to all agency records and §86(4) of the 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, irrespective of its origin or source, I believe that the Department of Correctional Services is required to respond to a request for any record in its possession.

Next, in accordance with its regulations, I believe that the Department has the authority to require that requests be made either to the Superintendent of a facility or his designee when records are maintained at a facility, or to the Deputy Commissioner for Administration when records are maintained at its central offices in Albany. The matter, as I understand your remarks, involves the Department's compliance with its own regulations and directives. In my view those provisions should be followed consistently by Department personnel.

Third, you complained that the Department "claim[s] that they can take unlimited amounts of time to make available 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

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

You asked whether there is any case law in which class action certification has been conferred under the Freedom of Information Law. I am unaware of any such decision.

Lastly, you raised questions regarding venue in Article 78 proceedings . Those issues are beyond the scope of the jurisdiction or expertise of this office.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10320

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

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 August 6. As in the case of previous correspondence, the matter pertains to a request for photocopies of certain pages of a South Glens Falls Senior High School yearbook.

Your initial request was granted, and you were informed that the yearbook would be available for your review at a certain time and date. You wrote to the District's business administrator and indicated that you could not be at the District on the specified date and asked that copies be mailed to you. In response, he wrote that "Since you did not avail yourself for this inspection opportunity and did not come to South Glens Falls Senior High School, the South Glens Falls Central School District is no longer obligated to provide you the requested information and thus closes the file on the matter." You have sought an opinion concerning the "district's unwillingness to provide the requested photocopies by mail."

From my perspective, the District is required to provide photocopies by mail in accordance with the ensuing comments.

First, §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying, and §89(3) provides that an agency must make copies of the records available upon payment of the requisite fee.

Second, I note that 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, which indicates that agencies are required to make records available "wherever and whenever feasible" (see §84), I believe

that is implicit that agencies must respond to requests by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

In sum, assuming that you remit the appropriate fee for copies, plus postage if the District chooses to include such charge, the District in my opinion would be required to send the documentation sought to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: James P. McCarthy
Joseph Kerbelis

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10321

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Ernesto Oquendo
[redacted]

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

Dear Mr. Oquendo:

I have received your letter of August 7, as well as the materials attached to it. According to the correspondence, you made a series of requests to the City of Middletown on July 22. However, as of the date of your letter to this office you had received no response.

In this regard, I offer the following comments.

First, I note 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 is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request.

In several elements of your requests, you sought information by asking questions (i.e., "what was the snow removal cost"; "what is the City of Middletown doing with certain properties"). In short, an agency is not required to answer questions. Again, an agency's obligation is to disclose existing records. Therefore, to the extent that the City does not maintain the information sought in the form of a record or records, it would not be required to prepare new records on your behalf. In the future, rather than seeking information or raising questions in an effort to elicit answers, it is suggested that you request existing records.

Second, notwithstanding 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 acknowledgment 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 acknowledgment is given, it must include an approximate date indicating when it can be anticipated that a request will be granted or denied. The acknowledgment 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. When some records are easy to locate and others difficult, it has been suggested that records be made available on an ongoing or piecemeal basis.

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of

Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

From my perspective, the kinds of record that you are seeking, to the extent that they exist and can be located, must be disclosed, 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

cc: Mayor, city of Middletown
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2796
FOIL-AO-10322

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Betsy Whitefield
Director
Saranac Lake Free Library
100 Main Street
Saranac Lake, NY 12983

The staff of the Committee on 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. Whitefield:

I have received your letter of August 14 concerning the conduct of the Board of Trustees of the Clinton Essex Franklin Library System, which you serve as Member Librarian.

According to your letter, at a meeting of the Board held in February during which a quorum was present, Ms. Mary Brown was appointed, with a probationary period of six months, to the position of permanent director. However, you wrote that "a move to fire Ms. Brown...has culminated in a secret mailed ballot that was sent to all the trustees asking for their vote on whether to keep Ms. Brown or not." It is your view that the procedure violated the Library System's constitution and by-laws, as well as the Public Officers Law. You have sought an opinion "on the standing of the vote."

From my perspective, the Board can validly take action only at a meeting in which a quorum is present. Further, I do not believe that a vote can validly be taken by secret ballot. In this regard, I offer the following comments.

First, I believe that the Board of Trustees is required by comply with the Open Meetings Law. Section 260-a of the Education Law states that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the

> general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law. Provided, however, and notwithstanding the provisions of subdivision one of section ninety-nine of the public officers law, public notice of the time and place of a meeting scheduled at least two weeks prior thereto shall be given to the public and news media at least one week prior to such meeting."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including library systems, must be conducted in accordance with that statute.

Second, in order to take action, I believe that a quorum, a majority of the Board's total membership, must convene. 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, an entity subject to the Open Meetings Law 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 during which a majority of the Board is physically present. Moreover, if challenged, action purportedly taken outside of a meeting attended by a quorum could be found to be a nullity, and that no action was validly or effectively taken.

Lastly, although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I note 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)]. Section 87(3)(a) of the Freedom of Information Law requires that agencies

maintain a record indicating the vote of each member in every agency proceeding in which the member votes.

In short, I do not believe that the members of an entity subject to the Open Meetings Law may cast votes or otherwise take action by means of a secret ballot.

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-10383

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Adrian Valle
88-A-5635
Shawangunk Correctional Facility
P.O. Box 750
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. Valle:

I have received your letter of August 6. You have sought assistance in obtaining 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1623Y

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Nathaniel Green
96-R-8512
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

The staff of the Committee on Open Governr ed to issue advisory opinions. The ensuing staff advisory opinion is based solely presented in your correspondence.

Dear Mr. Green:

I have received your undated ce on August 7. You have sought assistance in obtaining your pre-sente

In this regard, although the Freedo mation Law provides broad rights of access to records, the first ground for denial, §87(2)(a), es 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.

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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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-219
FOIL-AO-10325

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Gary Olsen
Director of Governmental Affairs
General Building Contractors
6 Airline Drive
Albany, NY 12205

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

Dear Mr. Olsen:

I have received your letter of August 21 in which you referred to S.3550-B/A.6394-B. At the time of the preparation of your correspondence, the legislation had been approved by the Legislature, but had not yet been signed by the Governor. You have sought my views concerning access to records that would be maintained by agencies if the legislation becomes effective.

As you have described it, in brief:

> "This legislation would require contractors/subcontractors to submit payroll records to the public agency/municipality that has contracted for a public works project. This includes thousands of local and state contracting municipalities, agencies and authorities statewide. It is our hope that provisions be adopted to ensure confidentiality and consistency among all public owners on projects subject to Section 220 of the Labor Law, the Prevailing Wage statutes...
>
> "Currently, contractors must produce these records upon request of the Department of Labor. The Department of Transportation also requests this information as required by federal law on federally aided projects. These agencies, as we have been informed, redact some or all personal information as outlined in Public Officers Law in Sections 89 (2) and 96, before production, in response to Freedom of Information Law requests. We believe all public owners potentially affected should abide by these laws, but we feel that they will not know, because of the limited time frame, the procedures they must use

> to ensure employee privacy and respect business proprietary interests. Our Members would not feel comfortable submitting personal information with no assurance that Public Officers Laws are being followed or enforced."

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, assuming that the payroll records at issue include a contractor's employees' names, addresses, social security numbers and their wages, I believe that portions of those records could properly be withheld pursuant to §87(2)(b). That provision permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(a) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintained it...[§89(2)(b)(iv)].

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

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

In sum, while I believe that portions of the records reflective of the titles, duties, wages, hours worked and similar data must be disclosed, disclosure of personally identifiable details pertaining to a contractor's employees may in my view be deleted or redacted from the records prior to disclosure.

If indeed disclosure of certain details would constitute an unwarranted invasion of personal privacy, a state agency would be prohibited from disclosing them to the public. I note that the

Personal Privacy Protection Law applies to state agencies; it does not apply to entities of local government [see definition of "agency", Personal Privacy Protection Law, §92(1)]. Consequently, an entity of local government may withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy, but it would not be required to do so.

In the case of a state agency subject to the Personal Privacy Protection Law, a key element of that statute deals 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 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." 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 or portions of records pursuant to §96 of the Personal Privacy Protection Law, which I believe to be so in this instance, it is precluded from disclosing 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-10326

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Ricky Williams
95-B-0646
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open 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 August 14, as well as the materials attached to it.

You have sought assistance in obtaining records relating to your case form the Office of the Erie County District Attorney. The request was denied on the bais of "Civil Rights Law §79 or §79-a", and you have asked whether "there is something that [you] did incorrectly."

In this regard I offer the following comments:

First, in addition to the New York Freedom of Information Law, you based your request on the federal Freedom of Information Act (U.S.C. §55). That statute pertains to records maintained by federal agencies and , in my view, is not applicable.

Second, in your request, you asked for records of "any agency." From my perspective, a request directed to a particular agency can include only those records maintained by or for that agency. For instance, if the Office of the District Attorney does not maintain records prepared by a police department, it would not be required to obtain records from the police department in an effort to satisfy the request. A request for records maintained solely by a police department or some other agency should be directed to the "records access officer" at the department or other agency. Pursuant to the regulations promulgated by the Committee on Open Government, the records access officer has the duty of coordinating an agency's response to requests for records.

Third, I know of no judicial decision in which it has been held that the provisions of the Civil Rights Law cited by the Office of the District Attorney serve in any way to prohibit an inmate or any other person from asserting rights under the Freedom of Information Law. On the contrary, it has been held that when a person seeks records under the Freedom of Information Law, that person is as a member of the public [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)], and that records accessible under that statute must be made equally available to any person, without regard to status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Similarly, in a recent decision rendered by the Court of Appeals, the State's highest court, the court

> "recognize[d] that petitioners seek documents relating to their own criminal proceedings, and that disclosure of such documents is governed generally by CPL article as well as the *Rosario* and *Brady* rules. However, insofar as the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, we cannot read such categorical limitation in the statute" [Gould v. New York City Police Department, 89 NY2d 267, 274 (1996)].

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. While some aspects of the records sought might properly be withheld, relevant is the Gould decision cited earlier, for it dealt with complaint reports prepared by police officers 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. Axelrod, 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" [(id., 276- 277) emphasis added by the Court].

Based on the foregoing, neither a police department nor an office of a district attorney can claim that the kinds of reports that you requested 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 or other 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.

I also note 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).

Next, 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 do not believe that there is any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

of this information" [Nalo v. Sullivan, 125 AD 2d 311, 312 (1987)].

Lastly, since you asked that the fees for photcopies be waived, I point out that, unlike the federal Freedom of Information Act, the New York Freedom of Information Law makes no reference to fee waivers. Further, it has been held that an agency may charge its established fees, even if 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:tt

cc: John J. DeFranks
J. Michael Marion

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10329

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

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 letter of August 7. You questioned why, in view of the nature of the crime for which you were convicted, you did not receive psychological or psychiatric treatment. You also sought an opinion concerning your right to obtain various records from the Department of Correctional Services (DOCS) and asked "who has the master index to the records as well as the Parole Board's records as applies to [your] case."

In this regard, it is noted the outset that the Committee on Open Government is authorized to offer advice and opinions concerning access to records, primarily under the Freedom of Information Law. Matters involving the propriety of your treatment, or the absence of treatment, are beyond the scope of the Committee's jurisdiction or expertise. Consequently, the ensuing remarks will deal solely with issues relating to access of records.

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, insofar as the records sought do not exist, neither the DOCS nor the Division of Parole would be required to prepare a new record on your behalf.

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

The kinds of records described in your request to the DOCS would appear to fall within §87(2)(g) of the Freedom of Information Law. That provision, due to is structure, enables agencies to withhold some aspects of records, but may require the disclosure of other parts of the same records. Specifically, the cited provision permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, 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 phrase "master index" appears in the regulations promulgated by the DOCS, and reference to the master index appears in a section of the Department's regulations 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. However, 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 for inspection at each facility.

The Division of Parole is also required to maintain a subject matter list. It is reiterated, however, that such a list should make reference to categories of an agency's records and is not specific to an individual.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles Devane

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1638

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Collette Jankowski
[redacted]

The staff of the Committee on 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. Jankowski:

I have received your letters of August 12 and September 3 and the correspondence attached to them.

The matter involves a request addressed to the Syracuse office of the United States Department of Agriculture (USDA) for records pertaining the North Java Water District.

In this regard, first, although your request was made pursuant to the New York Freedom of Information Law, the USDA, a federal agency, is not subject to that statute, federal agencies fall within the coverage of the federal Freedom of Information Act (5 U.S.C. §552). For your information, the Freedom of Information Officer for the USDA is Andrea E. Fowler, whose address is: USDA, Room 536A, Whitten Bldg., Washington DC 20250-1300. She can be reached by phone at (202) 720-8164

The New York Freedom of Information Law pertains to records maintained by agencies of New York State and local government.. 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 or other governmental 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 town or a water district would clearly constitute an "agency" required to comply with the New York Freedom of Information Law.

While the Committee on Open Government, a state agency, has no jurisdiction with respect to the USDA, I believe that duplicates or copies of the records sought if they are maintained in any Town of Java office, by any Town official, or by the North Java Water District would be subject to disclosure by the town or the District under the New York 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. As I understand the nature of the records, none of the grounds for denial would apply, and the Town or the District would be obliged to disclose them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIC-A0-10329

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Rose Campbell
[redacted]

The staff of the Committee on 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. Campbell:

I have received your letter of September 5 and the correspondence attached to it.

The matter involves a request addressed to the Syracuse office of the United States Department of Agriculture (USDA) for records pertaining to the North Java Water District.

In this regard, first, although your request was made pursuant to the New York Freedom of Information Law, the USDA, a federal agency, is not subject to that statute. Federal agencies fall within the coverage of the federal Freedom of Information Act (5 U.S.C. §552). For your information, the Freedom of Information Officer for the USDA is Andrea E. Fowler, whose address is: USDA, Room 536A, Whitten Bldg., Washington, DC 20250-1300. She can be reached by phone at (202) 720-8164.

The New York Freedom of Information Law pertains to records maintained by agencies of New York State and local government. 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 or other governmental 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 town or water district would clearly constitute an "agency" required to comply with the New York Freedom of Information Law.

While the Committee on Open Government, a state agency, has no jurisdiction with respect to the USDA, I believe that duplicates or copies of the records sought if they are maintained in any Town of Java office, by any Town official, or by the North Java Water District would be subject to disclosure by the Town or the District under the New York 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. As I understand the nature of the records, none of the grounds for denial would apply, and the Town or the District would be obliged to disclose them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10330

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Robert K. Gogola
92-B-0265
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. Gogola;

I have received your letter of July 31, which reached this office on August 7.

According to your correspondence, you requested a copy of your "parole folder" in order to prepare a "parole denial appeal." Additionally, you sought a copy of a letter sent to the Division of Parole by the Erie County District Attorney. You indicated that your request was denied. Although you appealed the denial on June 9, you had received no response as of the date of your letter to this office.

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

First, the regulations promulgated by the Division of Parole, state in relevant part that you may obtain "those portions of the case record which will be considered by the board or authorized hearing officer or pursuant to an administrative appeal of a final decision of the board..." [9 NYCRR §8000.5(c)(2)(i)]. The regulations also state that other materials may be exempt from disclosure under §8000.5(c)(2)(i)(a) and (b).

From my perspective, the regulations appear to recognize due process, for you should have the ability to gain access to records "to be considered" at a hearing. Further, the exceptions described in the regulations are, in my view, consistent with the grounds for withholding records appearing in §87(2) of the Freedom of Information Law. For instance, diagnostic opinions could likely be withheld under §87(2)(g) of the Freedom of Information Law; records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, I believe that the Division required to disclose all records to be considered at the hearing that are not deniable under the regulations or the Freedom of Information Law.

With respect to the letter from the District Attorney, §87(2)(g) is most relevant. That provision permits an agency to withhold records that:

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

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

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to appeals. Specifically, §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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt
cc: Terrence Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1033

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Philip Gerace
88-A-5369
Sing Sing
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. Gerace;

I have received your letter of August 11 in which you asked for an opinion concerning the "reasonableness" of a request made under the Freedom of Information Law to the New York City Police Department.

In a letter directed to the Superintendent , you requested "the names of the police officers, detectives and assistant district attorneys who questioned, interviewed or otherwise had contact" with two named individuals "from the period of July 7,1 985 to July 9, 1990", as well as "the exact dates and places where the questioning or interviewing occurred."

In this regard, I offer the following comments:

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Consequently, a request should include sufficient detail to enable agency staff to locate and identify the records [Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. In the context of your request, unless the Department has the ability to locate the information of your interest on the basis of the names of those identified, the request would not, in my opinion, meet the standard of reasonably describing the records, particularly since the request involves a period of five years. Further, it is unlikely in my view that the Department would maintain records regarding the activities of the district attorneys.

In short, to locate the information in question, a search might involve a review of records of or pertaining to every police officer, detective and assistant district attorney covering a period of five years. From my perspective, an agency is not required to engage that kind of effort or search.

Second, the Freedom of Information Law pertains to existing records, and §89(3) of the Law provides in part that an agency need not create a record in response to a request. Even if the records at issue could be found, whether the"exact dates and" places of contacts would be included in the records is conjectural. If those details are not included, Department staff would not be obliged to attempt to create new records containing information.

Lastly, absent knowledge of the contents of any such records that might be located, the extent to which they would be available would be dependent upon the nature of content of the records. For instance , if either of the persons named in your request was charged with a crime, and if the charges were later dismissed, the records would likely be sealed pursuant to §160.50 of the Criminal Procedure law.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Sgt. Louis Lombardi
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-10332

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Ms. Bernice J. McCormick
[redacted]

The staff of the Committee on 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. McCormick:

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

The matter involves a request addressed to the Syracuse office of the United States Department of Agriculture (USDA) for records pertaining to the North Java Water District.

In this regard, first, although your request was made pursuant to the New York Freedom of Information Law, the USDA, a federal agency, is not subject to that statute. Federal agencies fall within the coverage of the federal Freedom of Information Act (5 U.S.C. §552). For your information, the Freedom of Information Officer for the USDA is Andrea E. Fowler, whose address is: USDA, Room 536A, Whitten Bldg., Washington, DC 20250-1300. She can be reached by phone at (202) 720-8164.

The New York Freedom of Information Law pertains to records maintained by agencies of New York state and local government. 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 or other governmental 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 town or water district would clearly constitute an "agency" required to comply with the New York Freedom of Information Law.

While the Committee on Open Government, a state agency, has no jurisdiction with respect to the USDA, I believe that duplicates or copies of the records sought, if they are maintained in any Town of Java office, by any Town official, or by the North Java Water District, would be subject to disclosure by the Town or the District under the New York 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. As I understand the nature of the records, none of the grounds for denial would apply, and the Town or the District would be obliged to disclose them.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10333

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Mohamed Thiam
94-R-6229
Otisville Correctional Facility
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. Thiam:

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

According to your letter, during a judicial proceeding, a detective employed by the New York City Police Department testified that you gave him a tape recorder and a tape, and that he "vouchered them." In response to your request for "a copy of the voucher receipt", you were denied access on the basis of §50-b of the Civil Rights Law. You have sought my opinion concerning the propriety of the denial

In this regard, §50-b of the Civil Rights Law provides, in brief, that a governmental officer or entity cannot disclose a record insofar as disclosure would identify or tend to identify the victim of a sex offense. As the documentation has been described, it does not appear that it would include reference to the identity of a victim of a sex offense. If that is so, §50-b would not apply and the documentation would appear to be available, for none of the grounds for denial in §87(2) of the Freedom of Information Law would be pertinent.

On the other hand, insofar as disclosure of the documentation at issue identifies or would tend to identify the victim of a sex offense, the material would fall within the requirements of §50-b and, therefore, would be exempted from disclosure by statute pursuant to §87(2)(a) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10334

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 18, 1997

Mr. Giles A. Richards
97-A-2625
P.O. Box 338
Napanoch, NY 12458-0338

Dear Mr. Richards:

I have received your letter of August 12. According to your letter, you complained to the Commission on Judicial Conduct about a certain judge, but the Commission concluded that "there was insufficient indication of judicial misconduct to warrant an investigation." You have asked that this office intervene on your behalf.

In this regard, 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 is not empowered to intervene in the case that you described, and the matter is beyond the jurisdiction of this office.

As the matter pertains to access to records, 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.

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". One such statute, §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..."

Under the circumstances, I do not believe that I can be of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10335

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 19, 1997

Mr. Dennis DeLucia
29431-053
FCI Schuylkill Unit 3B
P.O. 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 letter of August 15 and the materials attached to it. Having reviewed them, there is little that I can add to the remarks offered in advisory opinion addressed to you on September 10. However, I offer the following brief comments.

First, I have no knowledge regarding the number that appears at the bottom of your letter.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10336

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 19, 1997

Mr. John Gordon Smith
Attorney at Law
P.O. Box 2044
Middletown, NY 10940

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

Dear Mr. Smith:

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

The matter relates to a request made under the Freedom of Information Law to several fire districts that you represent. The request involves a copy of a list including "the full names (not initials), titles and salaries of each employee of your fire district", preferably "in computer format." You wrote that "volunteers are considered employees" under the Volunteer Fireman's Benefit Law and asked whether the Districts must respond.

From my perspective, although fire districts must respond to requests, they may not necessarily fully accommodate the applicant. In this regard, I offer the following comments.

First, I believe that a fire district is required to comply with the Freedom of Information Law. That statute pertains to agency records, and 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."

A fire district, according to Town Law, §174(6) is a public corporation. As such, I believe that it constitutes an "agency." I note, too, that the Court of Appeals 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, found that volunteer fire companies, despite their status as not-for-profit corporations, are "agencies" subject to the Freedom of Information Law.

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

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

However, a payroll list of employees is included among the records required to be kept pursuant to "subdivision three of section eighty-seven" of the Law. Specifically, that provision states in relevant part that:

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

As such, a payroll record that identifies all officers or employees by name, public office address, title and salary must be prepared to comply with the Freedom of Information Law.

In consideration of rights of access, 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.

If an agency maintains a payroll record as required by the Freedom of Information Law, and the list refers to some or all employees' first and/or middle names by means of initials, I do not believe that the agency would be obliged to prepare a new record that includes employees' full names. In short, if the payroll record required by 87(3)(b) exists, an applicant for the record could, in my view, be given that record, even if first and/or middle names are included by means of initials.

Similarly, if an agency maintains available records in computer format, has the ability to make the records available in the format requested by the applicant, and if the applicant is willing and able to pay the actual cost of reproduction [see Freedom of Information Law, §87(1)(b)(iii)], an agency, according to case law, would be obliged to do so [see Brownstone Publishers v. New York City Department of Buildings, 166 AD 2d 294 (1990)]. On the other hand, if an agency maintains records only on paper or cannot make records available in the format requested by the applicant, the agency would not be obliged to transfer the contents of the records to electronic information systems or develop new computer programs to generate the data in the format of the applicant's choice.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wallace Nolen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10337

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 19, 1997

Ms. Marie MacDonald
[redacted]

The staff of the Committee on 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. MacDonald:

As you are aware, your letter of August 21 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.

Your inquiry pertains to a request for records of the City of Mount Vernon relating to your property. Specifically, you indicated that a request was made on July 15 to the City's Legal Department for the files involving your property since August of 1995. You identified your parcels by block and lot numbers. After being told that your records were "ready", you traveled to City Hall and were informed that you "could not get a copy from the building dept or dept of assessment."

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, and requests should generally be made to that person. While I believe that the person in receipt of your request should have responded to you in a manner consistent with the Freedom of Information Law, it is suggested that you contact the records access officer. Frequently, a municipality's clerk is 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records in question were found and are accessible, they must be made available for inspection and copying. Further, under §89(3), an agency is required to make copies of such records available upon payment of the appropriate fee. Unless the record is larger than 9 by 14 inches or a statute other than the Freedom of Information Law authorizes the assessment of a different fee, an agency can charge no more than twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Corporation Counsel
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1033

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 19, 1997

Mr. Anthony Dickerson
96-R-1008
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601

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

Dear Mr. Dickerson:

I have received your letter of August 13. You have sought information that might be helpful to you in getting responses from certain entities concerning your claim of discrimination by the St. Vincent's Children's Services.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records, primarily under the Freedom of Information Law. Issues relating to discrimination are beyond the jurisdiction or expertise of the Committee, and this office maintains no information on the subject.

If you are seeking records from the entities identities identified in your letter, I note 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 on the foregoing, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It would not apply to the St. Vincent's Children's Services on the Providers' Legal Aid Society, for example, because they are not governmental entities.

In situations in which it does apply, the Freedom of Information Law provides direction concerning the time and names in which agencies must respond to request. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10339

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 19, 1997

Mr. Timothy D. Bunn
Deputy Executive Editor
Syracuse Newspapers
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, unless otherwise indicated.

Dear Mr. Bunn:

I have received your letter of August 4 in which you asked that I issue an opinion concerning access to marriage records.

From my perspective, the contents of those records must generally 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, with respect to marriage records, according to judicial decisions, rights of access must be determined on the basis of the Freedom of Information Law in conjunction with another statute, §19 of the Domestic Relations Law. That statute, which is entitled "Records to be kept by town and city clerks", states that:

> "Each town and city clerk hereby empowered to issue marriage licenses shall keep a book supplied by the state department of health in which such clerk shall record an index such information as is required therein, which book shall be kept and preserved as a part of the public records of his office."

I do not believe that it could be reasonably suggested that the language quoted above may be construed to mean that marriage records are confidential. Nevertheless, that appears to be the stance adopted by many agencies.

From an historical perspective, it is my understanding that certain kinds of activities have been licensed because of some significant governmental interest in whatever the area of activity might be. In general, the issuance of a license is intended to enable the public to know that an individual is qualified to engage in a certain kind of activity, such as practicing law or medicine, selling real estate, being an architect, possessing a firearm, or driving a car. In every instance, a record indicating that an individual is licensed, qualified to carry out a certain kind of activity, is public. The same is true according to the Domestic Relations Law, and the only judicial decision on the subject rendered within the past several years concerning those who apply for and are granted marriage licenses has so held [see Gannett Co., Inc. v. City Clerk's Office, City of Rochester, 596 NYS 2d 968, affirmed unanimously, 197 AD 2d 919 (1993)].

In its decision, the court referred to provisions in the Freedom of Information Law that enable agencies to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." In my view, disclosure of the names of applicants for marriage licenses or those who have been granted marriage licenses hardly rises to the level of an unwarranted invasion of personal privacy. The Court in Gannett referred to an opinion that I prepared and found that such a disclosure "does not equate with the type of personal, confidential, or sensitive information precluding public access." The fact of the issuance of all those other licenses referenced above is a matter of public record, and I believe that the same conclusion must be reached in the context of your inquiry. Marriages are, in most instances, social events. To inform their communities about an upcoming or recent marriage, many people have an announcement published in the local newspaper, often with a photograph; the event is anything but a secret. Further, if a couple becomes divorced, a record indicating that they are divorced is available from a county clerk pursuant to §235 of the Domestic Relations Law. As the Court in the Gannett decision observed, it would be anomalous to suggest that a record reflective of a divorce must be disclosed, but that a record reflective of a marriage would, if disclosed, result in an unwarranted invasion of personal privacy.

Representatives of some agencies have suggested, since the request in Gannett involved only the names of applicants for marriage licenses, that only the names must be disclosed. While the Court focused on names of applicants, nowhere was it stated that other items are confidential. The issue, in my view, involves the extent to which disclosure of the records in question would constitute an unwarranted invasion of personal privacy. In Hanig v. State Department of Motor Vehicles (79 NY 2d 106), the issue involved a request for a driver license application that included reference to the existence of or treatment for certain medical disabilities. Even though those items were not medical records or medical histories, the Court affirmed the lower court's denial of access, stating that "it does capture the essence of the exemption in that it encompasses the very sort of detail about personal medical condition that would ordinarily and reasonably be regarded as intimate, private information" (id., 112). Based on the foregoing, the Court considered the nature of the information and whether it could be characterized as intimate. In a similar analysis, it was found that "an individual's educational background, i.e., the level of education attained and the particular institutions attended" must be disclosed, for the court was not "persuaded that a reasonable person of ordinary

sensibilities would find if offensive and objectionable to have such information disclosed" [Ruberti, Girvin and Ferlazzo v. Division of State Police, 64 NYS 2d 411, 415 (A.D. 3 Dept. 1996)].

If a special consent is noted on a marriage record, or if such a record includes medical or health information, those items might justifiably be deleted. However, other items, such as dates of applications or marriages, the addresses of the licensees and similar items could not, in my opinion, be characterized as intimate personal information that the courts have found to be deniable. Again, the fact of peoples' marriages and a variety of information about them are readily disclosed by most people via announcements, references in telephone books, the wearing of rings and a variety of other details commonly known in our society. In my view, those disclosures typify reasonable people of ordinary sensibilities, and other than the special consents or health related information referenced above, I believe that the marriage records that you are seeking must be disclosed.

I note that in a decision concerning access to death records, it was held that a request for the purpose of routine publication in a newspaper constituted a "proper purpose" and that, therefore, the municipality was required to disclose [see Rome Sentinel v. Bousledt, 43 Misc. 2d 598, 252 NYS 2d 10 (1964)]. Although the statute regarding death records has been amended since that decision was rendered, I believe that the essential holding, as it would apply to marriage records, which, again, are generally available under §19 of the Domestic Relations Law, remains the same as in Rome Seninel.

In sum, the restrictive interpretation by certain agencies regarding the disclosure of marriage records reflected in the correspondence is, in my view, inconsistent with the Freedom of Information Law, with §19 of the Domestic Relations Law, and judicial interpretations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Peter Carucci
Vivian I. Mason

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10340

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 22, 1997

Mr. Thomas Montague
#81986-054
P.O. Box 7000
Fort Dix, NJ 08640

Dear Mr. Montague:

I have received your letter, which you characterized as a second request, and which reached this office on September 19. Please note that, having searched our files, I do not believe that your first request reached this office.

You have requested a certified copy of the oath of office filed by the Dutchess County District Attorney, as well as any other records that this agency might maintain relating to the matter.

In this regard, the Committee on Open Government, a unit of the New York State Department of State, is authorized to provide advice concerning the New York Freedom of Information Law. The Committee does not maintain custody or control of records generally, and maintains no records regarding the Dutchess County District Attorney.

Nevertheless, having contacted a different unit within the Department of State, I learned that it maintains oaths of offices filed by district attorneys. Accordingly, I have forwarded your letter to the Office of Miscellaneous Records for its response.

For future reference, since your request was made under the federal Freedom of Information Act, I point out that the federal Act pertains only to records maintained by federal agencies; it does not apply to records of entities of state and local government. In addition, you requested a "Vaughn Index." In this regard, 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 do not believe that there is 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Office of Miscellaneous Records

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10341

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 22, 1997

Mr. Bashir Hameed
82-A-6313
Sullivan Correctional Facility
Box AG
Fallsburg, NY 12733

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

Dear Mr. Hameed:

I have received your letter, which reached this office on August 25. You indicated that you have attempted without success to obtain copies of hearing tapes and certain medical records from the Department of Correctional Services. Although the tapes are apparently in your "personal property" file, your repeated requests have not been answered.

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

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

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

> "...any person denied access to a record may within thirty days appeal

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 under the Freedom of Information Law is Anthony J. Annucci, Counsel to the Department.

As you requested, copies of this response will be forwarded to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Senior Counselor Mitchell
D. Kahn, Inmate Records Clerk II

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10342

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 23, 1997

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 correspondence addressed by you to the attorney for the Town of Warrensburg, Mr. John Hall. You have sought an opinion relating to that letter and your correspondence.

As I understand the issue, you requested records from the Town of Warrensburg, and the Town Clerk denied the request in part. At the bottom of her response, she indicated that you have the right to appeal to the Warrensburg Town Board. Nevertheless, the Town Board did not respond to your appeal; the response was prepared by the Town Attorney. You added that although the Board met within the time period during which an appeal was required to have been determined, it apparently did not consider the appeal either during an open meeting or an executive session. In essence, it appears that you are questioning whether the appeal must be determined by the Town Board, or whether it could validly have been determined by the Town Attorney.

In this regard, the provision in the Freedom of Information Law pertaining to the right to appeal a denial of a request, §89(4)(a) states in part that:

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

Based on the foregoing, the Town Board as the governing body, in my view, has the authority to designate a person or body to render a determination following an appeal on its behalf.

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 Hall
Donna Combs

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1034

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 23, 1997

Mr. Bradley G. Kristel
[redacted]

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

Dear Mr. Kristel:

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

In brief, having been ticketed for speeding by a state trooper, you asked whether an officer's traffic citations are available for inspection, and if so, whether you may review them to ascertain whether the officer issues citations "all at 75 mph." In your letter to the Division of State Police, you asked to see "how many tickets were issued at 75 mph", how many were out-of-state drivers, and "what the normal traffic ratio is on [a particular] stretch of the thruway for in-state vehicles vs out-of state vehicles." In response to the request, you were informed that "we do not maintain records in the manner which you describe..."

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 there is no breakdown, ratio or statistical compilation concerning in-state as opposed to out-of-state traffic in a certain area, an agency would not be obliged to prepare new records in order to satisfy a request.

Second, an issue in my view involves whether or the extent to which your request "reasonably described" the records sought as required by §89(3) of the Law. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and

identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

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

In the context of your request, I am unaware of the means by which the Division of State Police maintains its records. If there is no way of locating tickets indicating a speed of 75 miles per hour except by reviewing thousands of records individually, it is likely in my opinion that a court would determine that the request would not have reasonably the records. On the other hand, if speeding tickets issued within a particular time frame can be retrieved by means of the name of a trooper, a request for all such tickets issued within that period would, in my view, meet the standard imposed by the law. In that kind of situation, upon receipt of the tickets, an applicant could review and analyze them in order to determine on his or her own whether tickets are routinely issued by citing a certain speed.

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.

In the context of your inquiry, the Court of Appeals determined in 1984 that speeding tickets issued and lists of violations of the Vehicle and Traffic Law complied by the State Police during a certain period in a county must be disclosed, unless charges were dismissed and the records sealed pursuant to §160.50 of the Criminal Procedure Law [see Johnson Newspaper Corp. V. Stainkamp, 61 NY2d 958). That provision states that when charges are dismissed in favor of an accused, the records relating to an event are sealed.

Your remaining questions are beyond the jurisdiction of the Committee on Open Government. However, as a service to you, I note that a deposition contains the testimony of a witness taken upon interrogatories in a proceeding outside of a court. Also, I know of no law that "dictates the doubling of the penalty if you elect to go to trial", rather than accepting a plea to a lesser charge.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce M. Arnold, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10314

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Donald Gooley
Odessa-Montour Central School District
Odessa, NY 14869

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

Dear Mr. Gooley:

I have received your undated letter, which reached this office on August 28. You have asked "whether a school district must disclose the address of an employee when requested to do so by a taxpayer under the Freedom of Information Law."

In this regard, as you may be aware, §87(3)(b) of the Freedom of Information Law 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. However, §89(7) provides that nothing in the Freedom of Information Law requires the disclosure of the home address of a present or former public officer or employee. As such, it is clear that the home address of a public employee need not be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-220
FOIL-AO-10345

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Greg D. Lubow
Attorney at Law
P.O. Box 839
Tannersville, NY 12485

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

Dear Mr. Lubow:

I have received your letter of August 27, as well as the materials attached to it. You have sought an opinion concerning your efforts in gaining access to records pertaining to a client, who is an inmate at the Oneida Correctional Facility, which operates within the State Department of Correctional Services.

In brief, you submitted a request for records with a photocopy of an authorization signed by your client. The authorization was notarized by a licensed notary public, who you believe to be an employee at the facility in which your client is incarcerated. Notwithstanding the foregoing, the inmate records coordinator at the facility refused to disclose the records to you without an original signature by your client. Her refusal is apparently based on a memorandum prepared by a former Deputy Commissioner and Counsel to the Department in 1987 requiring that all releases and authorizations "contain an original signature (not photocopy, carbon, etc.)..."

From my perspective, the question is whether the policy and practice of the Department as implemented are reasonable and consistent with law.

In this regard, although both the Freedom of Information Law and the Personal Privacy Protection Law make reference to the ability of the subject of a record to authorize disclosure of the record, neither statute refers a specific method of providing such authority. Section 89(2)(c)(ii) of the former states that disclosure would not constitute an unwarranted invasion of personal privacy "when the person to whom a record pertains consents in writing to disclosure." Similarly, §96(1) of the latter refers to a state agency's authority to disclose records pertaining to a data subject, the person to whom records pertain, via "the voluntary written consent of the data subject..." There is no requirement imposed by either statute that consent to disclose by the subject of a record must consist of an original record bearing an original signature.

Under the circumstances, in my opinion, it is unreasonable for the inmate records coordinator or the Department, as a matter of policy, to require an authorization bearing an original signature. The authorization signed by client is notarized. It is my understanding that the signature and seal of a licensed notary public are intended to guarantee that the person who signed the document is who he or she claims to be; that guarantee by the notary, so long as his or her commission is current, should, in my view, be sufficient, with the signature of the individual, to authorize the disclosure of records under the Freedom of Information Law, whether those ingredients appear on an original document or a photocopy.

I note, too, that in the evidentiary rules found in the Civil Practice Law and Rules, a photocopy is "as admissible in evidence as the original." Specifically, §4539, entitled "Reproductions of original", states in relevant part that:

> "If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied or reproduced it by any process, including reproduction, which accurately reproduces or forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not..."

If a photocopy is as admissible in a judicial proceeding for evidentiary purposes, I believe that it should be equally acceptable for the purpose of authorizing disclosure under the Freedom of Information or Personal Privacy Protection Laws.

Since you sought advice concerning a possible challenge to the Department's stance, one avenue, as you are aware, would involve the initiation of litigation under Article 78 of the Civil Practice Law and Rules. However, in an effort to avoid litigation and encourage the Department to alter its policy, a copy of this opinion will be forwarded to Counsel to the Department of Correctional Services for his consideration.

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-2799
FOIL-AO-10346

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. James J. Hills
[redacted]

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

Dear Mr. Hills:

I have received your letter of August 27, as well as a variety of related correspondence.

Please note that the Committee on Open Government is not part of the State Education Department, but rather is a unit of the Department of State. The Committee is authorized to provide advice concerning the Freedom of Information Law and Open Meetings Law. It is also noted that your wife called this office and that I have attempted to return her call on several occasions without success.

You have raised a series of issues involving the North Collins Central School District, many of which do not involve either the Freedom of Information Law or the Open Meetings Law and are, therefore, beyond the jurisdiction of this office. Consequently, the ensuing remarks will pertain solely to issues involving access to records and meetings.

First, the Freedom of Information Law includes all agency records within its coverage, such as those of a school district. 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.

It is emphasized that the Law pertains to existing records. Section 89(3) states in part that an agency is not required to create a record in response to a request for information. In several instances, you requested explanations of certain actions or dates on which certain activities occurred. If there is no record reflective of an explanation of an action or which indicates particular dates, the School District would not be obliged to prepare new records on your behalf in an effort to respond to your requests.

Insofar as your requests involve records identifiable to your children, perhaps of greatest significance is the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). FERPA is applicable to all educational agencies or institutions that participate in federal educational funding programs. As such, it applies to virtually all public educational institutions. 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." 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. I note that the regulations promulgated by the U.S. Department of Education define the term "education record" broadly to include "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..." Based on the foregoing, to the extent that the records sought consist of "education records" pertaining to your children, I believe that they would be accessible to you pursuant to federal law.

I point out, too, that FERPA authorizes a parent to attempt to amend a record about a student "if a parent...believes the education records relating to the student contain information that is inaccurate, misleading, or in violation of the student's rights of privacy or other rights..." [34 CFR §99.20(a)]. In response to a request to amend education records, an educational agency may do so or, if it refuses, it is required to inform the parent of its decision and the right to a hearing pursuant to §99.21 of the regulations promulgated under the FERPA.

Certain elements of your request involve examinations taken by your child or children. If the child's answers are on the same papers as the questions, I believe that the examination papers would constitute "education records" to which you have a right of access. However, if a student's answers are on records separate from the question sheets, those sheets would not constitute education records, for they would not be personally identifiable to the student. In that event, the Freedom of Information Law would apply, and §87(2)(h) would be pertinent. That provision permits an agency to withhold examination questions or answers, if the questions are to be used in the future.

Reference was made in your correspondence to your desire to take school district records out of the school building for the purpose of photocopying them yourself. From my perspective, a school district is required to maintain the physical custody of its records and could not provide them to you on a temporary basis if doing so would remove the records from the district's physical custody. Section 57.25 of the Arts and Cultural Affairs Law pertains to the custody, retention and disposal of local government records, including those of school districts , and 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..."

Based on the foregoing, local officials must "have custody" and "adequately protect" records.

Next, you questioned the amount of the fee sought to be imposed by the District and asked for a waiver of fees. In this regard, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy. Further, although there are provisions in the federal Freedom of Information Act (which applies only to records maintained by federal agencies) that authorize fee waiver in certain circumstances, no such provision appears in the New York Freedom of Information Law, and it has been held that an agency may charge its established fee, even when the applicant is indigent [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, you criticized the placement of members of the Board of Education during meetings. In this regard, with respect to the capacity to see and hear what is said at meetings, I direct your attention to §100 of the Open Meetings Law, its legislative declaration. That provision states that:

> "It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

Based upon the foregoing, it is clear in my view that public bodies must conduct meetings in a manner that guarantees the public the ability to "be fully aware of", to observe and "listen to" the deliberative process. Further, I believe that every statute, including the Open Meetings Law, must be implemented in a manner that gives effect to its intent. In this instance, the Board must in my view situate itself and conduct its meetings in a manner in which those in attendance can observe and hear the proceedings.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Gary P. Nicholson, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10347

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Hon. Diane Rumrill-Hall
Town Clerk
Town of Canajoharie
12 Mitchell Street
Canajoharie, NY 13317

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

Dear Mr. Rumrill-Hall:

I have received your letter of August 28, as well as the materials attached to it.

You referred to a form entitled "Notice of Intention to Examine Public Employment Records" and asked whether that form is still used.

The form to which you referred was prepared pursuant to the Freedom of Information Law as originally enacted in 1974. Under that version of the Law, payroll information identifying employees by name, address, title and salary were only available to the news media. Further, the names of law enforcement officers and employees did not have to be disclosed. The original statute, however, was repealed and replaced with the current version of the Law, which became effective on January 1, 1978. The pertinent provision concerning payroll information has since then required that each agency maintain a record setting forth "the name, public office address, title and salary of every officer or employee of the agency." As such, there is no distinction made between law enforcement officers and employees and other public employees of an agency. Moreover, the payroll record is available to any person and not only members of the news media.

Because of the change in the Freedom of Information Law, it is suggested that the form in question be ignored and discarded.

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- 10348

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Alan Jennings
91-A-1827
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. Jennings:

I have received a copy of your letter of August 26 in which you requested "trial minutes" from the Clerk of the Orange County Court under the Freedom of Information Law.

In this regard, the Freedom of Information Law would not be applicable. 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."

In short, the courts and court records fall outside the coverage of the Freedom of Information Law.

This is not to suggest that court records might not be available to the public. In many instances, they are accessible under other provisions of law (see e.g., Judiciary Law, §255). It is suggested that any future requests for court records be directed 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-10349

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

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 August 27 concerning your requests for records of the Division of State Police and the alleged failure on the part of that agency to respond to your appeal. You have asked what I "want [you] to do" with my letter to you of July 28 and what I will do "with regard to the State Police's non-response to a FOIL appeal."

First, you can do with my letter as you see fit.

Second, as you may be aware, an agency has ten business days from the receipt of an appeal to render a determination by either granting access to the records sought by fully explaining in writing the reasons for further denial. If an agency fails to render a determination within the statutory time, the appellant may consider such a failure as a denial, and it has been held that in such a circumstance, the appellant would have exhausted his or her administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd, Matter of v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

Lastly, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law; this office has no authority to enforce the Freedom of Information Law or compel an agency to grant or deny access to records.

In an effort to encourage compliance, a copy of this response will be forwarded to Colonel Fitzgerald.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Colonel James Fitzgerald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16350

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Dana E. Sydnor
97-A-4590 A2-70B
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. Sydnor:

I have received your letter of August 27. You have sought assistance in obtaining photographs "and/or photographic descriptions of [you] before and after" a certain date. The records have been requested from the New York City Department of Homeless Services and the Boston Passport Agency.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government is the New York Freedom of Information Law. That statute applies to entities of state and local government in New York. As such, it includes the New York City Department of Homeless Services within its coverage. However, the "Boston Passport Agency" is likely a branch of the United States State Department, a federal agency. If that is so, it would be subject to the federal Freedom of Information Act. Inquiries regarding access to records of that agency may be directed to its Freedom of Information Officer, Room 1239, 2201 C Street, NW, Washington, DC 20520.

With respect to the request to the Department of Homeless Services, 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. Under the circumstances, it would appear that the kinds of records that you are seeking must be disclosed in accordance with §89(2)(c). That provision states that disclosure would not constitute an unwarranted invasion of personal privacy "when upon presenting a reasonable proof of identity, a person seeks access to records pertaining to him."

Since you indicated that your request was not answered, I point out that 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. While I believe that the agency official in receipt of your request should have either responded in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, it is suggested that you might renew your request and sent to the records access officer.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Records Access Officer, Department of Homeless Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1035

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Michael K. Scott
94-A-2807 D-1-31
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, NY 10309

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

Dear Mr. Scott:

I have received your letter of August 28 in which you sought assistance in obtaining records from the New York City Department of Corrections. You requested a variety of records and complained that the agency has failed to respond in a timely manner.

In this regard, I offer the following comments.

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

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

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)].

Second, with respect to the information that you requested, 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 need not create records in response to a request. I am unaware of whether each of the kinds of records to which you referred exists. To the extent that they do not exist or are not maintained, the Department would not be required to prepare new records on your behalf.

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

One aspect of your request involves job descriptions. From my perspective, those kinds of records would be available, for none of the grounds for denial would be pertinent. Those kinds of records likely represent the policy of an agency with respect to the duties inherent in certain positions and, are, therefore, available under §87(2)(g)(iii) of the Freedom of Information Law.

You requested a "current index file" regarding certain employees and former employees of the Department. I do not know what an "index file" is or contains.

Since several of the employees to whom you referred are correction officers, I note that §50-a of the Civil Rights Law exempts from disclosure personnel records of correction officers that are used to evaluate performance toward continued employment or promotion. When that provision applies, the records would be exempted from disclosure by statute pursuant to §87(2)(a) of the Freedom of Information Law.

Another aspect of your request pertains to an employee manual. 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 record sought 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, 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 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

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10352

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 24, 1997

Mr. Wallace S. Nolen
94-A-6723
Sullivan Correctional Facility
P.O. Box A6
Fallsburgh, NY 12733-0116

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

Dear Mr. Nolen:

I have received your letter of August 20 in which you referred to an opinion addressed to you on August 12 concerning voter registration records. You suggested that my response was unclear, for it did not refer to the kinds of information within those records that might be redacted, such as residence addresses, dates of birth, party designations and similar information.

From my perspective, it is likely that the records in question must be disclosed in their entirety.

First, as indicated in the earlier opinion, §3-220(1) of the Election Law states in part that: "All registration records, certificates, lists and inventories referred to in, or required by, this chapter shall be public records..." Additionally, §5-210 of the Election Law, entitled "Registration and enrollment and change of enrollment upon application", includes reference to voter application forms and provides in paragraph (k) of subdivision (5) that the form must include:

> "(i) A space for the applicant to indicate whether or not he has ever voted or registered to vote before and, if so, the approximate year in which he last voted or registered and his name and address at the time."
>
> "(ii) The name and residence address of the applicant including the zip code and apartment number, if any."
>
> "(iii) the date of birth of the applicant."

> "(iv) A space for the applicant to indicate whether or not he is a citizen of the United States."
>
> "(v) the gender of the applicant (optional)."
>
> "(vi) A space for the applicant to indicate his choice of party enrollment, with a clear alternative provided for the applicant to decline to affiliate with a party."
>
> "(vii) the telephone number of the applicant (optional).
>
> "(viii) A place for the applicant to execute the form on a line which is clearly labeled 'signature of applicant'..."

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.

One of the grounds for denial involves the capacity to withhold records of portions thereof when disclosure would result in "an unwarranted invasion of personal privacy" [see §87 (2)(b)]. In my opinion, if only the Freedom of Information Law applied to the records in question, many of the items referenced in the provision quoted above could be redacted on the ground that disclosure would constitute an unwarranted invasion of personal privacy. However, §89(6) of the Freedom of Information Law provides that:

> "Nothing in this article shall be construed to limit or abridge any otherwise right of access at law or in equity of any party to records."

Under the circumstances, since the Election Law requires the disclosure of registration records, which include the items referenced above, nothing in the Freedom of Information Law may be asserted to withhold those records. Therefore, although certain of those items might justifiably be denied as an unwarranted invasion of personal privacy if contained in other kinds of records, the specific direction provided in the Election Law in my opinion requires disclosure of registration records, including those items.

I note that §6212.5 of the regulations promulgated by the State Board of Elections provides in part that, when disclosing, a county board of elections must ensure that the disclosures "do not include facsimile voter signatures or the capability to generate facsimile voter signatures, but do include all other data contained in those records."

Lastly, you wrote that the Orange County Attorney has contended that since you did not request a certification pursuant to §89(3) of the Freedom of Information Law at the time of your initial request, you cannot seek the certification at time of your appeal. In this regard, since a certification merely indicates that copies of records made available are true copies, I cannot envision

why an agency would not, after making copies of records available, offer a statement, i.e., a certification, to the effect that the records that had previously been disclosed were true copies of the agency's records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Richard B. Golden, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10353

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Wayne Gardine
96-A-5097 A-2-20 Cell
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Gardine:

I have received your letter of August 27. You referred to a request directed to the office of a district attorney that was denied, but that agency directed you to this office. You have requested your "case records (e.g.: Trial Min.,, Appeal Records, documentary evidence etc.)" from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain custody or control of records generally. In short, I cannot make the records of your interest available to you, because this office does not possess them.

It is suggested that you seek the records either from the attorney who represented you or from the court in which the proceeding was conducted. Should you seek records from the court, I point out that the Freedom of Information Law would not be applicable. 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."

In short, the courts and court records fall outside the coverage of the Freedom of Information Law.

This is not to suggest that court records might not be available to the public. In many instances, they are accessible under other provisions of law (see e.g., Judiciary Law, §255). Therefore, any requests for court records should be directed 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-10354

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Jabbar Collins
95-A-2646
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. Collins:

I have received your letter of August 27. You indicated that you are interested in inspecting records that are not maintained at your facility, and you asked whether the Freedom of Information Law requires that the records be transferred to your facility to enable you to view them.

In this regard, §87(2) of the Freedom of Information Law requires that accessible records be made available for inspection and copying, and the regulations promulgated by the Committee on Open Government state in part that "[e]ach agency shall designate the locations where records shall be available for public inspection and copying" (21 NYCRR §1401.3). In my view, neither the Law nor the regulations requires that records be transferred from their usual locations to accommodate an applicant at a site convenient to the applicant. In short, while inmates may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than its designated or customary locations.

As you requested, enclosed is a copy of the supplement to the Committee's latest annual report, which includes an index to advisory opinions.

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-10355

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Darrell James
94-A-8579
3622 Wende Road
Alden, NY 14004

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

Dear Mr. James:

I have received your letter of September 1. You have complained that a request for records sent to One Police Plaza has not been answered. and you have sought guidance in the matter.

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

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

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

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

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

For your information, the person designated to determine appeals at the New York City Police Department is Susan Petito, Special 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-16356

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Chemal Gant
97-A-2838
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. Gant:

I have received your letter of August 30 in which you raised a series of questions concerning the scope of the Freedom of Information Law.

In conjunction with your questions, I offer the following comments.

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

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

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

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

Based upon the foregoing, a police department or office of a district attorney would clearly constitute an "agency" required to comply with the Freedom of Information Law. However, the courts and court records fall outside the coverage of the Freedom of Information Law. This is not to suggest that court records might not be available to the public. In many instances, they are accessible under

other provisions of law (see e.g., Judiciary Law, §255). Therefore, any requests for court records should be directed to the clerk of the appropriate court, citing an applicable provision of law.

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

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

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).

The Court in Moore also specified that an agency "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, with regard to medical records, if a medical facility is a governmental entity, its records would be subject to the Freedom of Information Law; if, however, medical records are maintained by a privacy physician or private hospital, the Freedom of Information Law would not apply.

Insofar as the Freedom of Information Law would be applicable, it would likely permit some medical records to be withheld. For instance, medical records prepared by Hospital 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 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 send your request to the hospital and make specific reference to §18 of the Public Health Law when seeking 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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

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-10357

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Frank L. Gennuso
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. Gennuso:

I have received your letter of August 28 in which you sought assistance in obtaining a "subject matter list" from the Department of Motor Vehicles. Specifically, in your request, you sought "a subject matter list of all records of the Department of Motor Vehicles available under the Freedom of Information Law."

In this regard, by way of background, the Freedom of Information Law pertains to existing records and states 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. It is noted, too, that the subject matter list does not

involve only records that are available under the Freedom of Information Law. Rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency.

In an effort to resolve the matter, a copy of this opinion will be forwarded to the Department of Motor Vehicles.

In addition, enclosed are copies of advisory opinions that you identified. Many of the opinions were rendered several years ago and may be out of date.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Alexandra Sussman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10358

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 25, 1997

Mr. Raymond B. Howard
96-B-1776
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. Howard:

I have received your letter of August 28 in which you sought assistance in your attempts to locate a "Nysid file" and a file involving an "old din."

In this regard, I offer the following comments.

First, the "Nysid" number is a means of identifying criminal history records maintained by the Division of Criminal Justice Services. If you are interested in obtaining your own criminal history record, I believe that you may request it either through the Department of Correctional Services pursuant to §5.20 of the Department's regulations or directly from the Division of Criminal Justice Services. The letters "din" represent an identification number assigned to an inmate by the Department of Correctional Services. In order to seek records maintained at a correctional facility, the regulations promulgated by the Department of Correctional Services indicate that such a request should be directed to the facility superintendent or his designee. If records are maintained at the Department's central offices in Albany, a request may be made to the Deputy Commissioner for Administration.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10359

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

Mr. Darrell James
94-A-8579
3622 Wende Road
Alden, NY 14004

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

Dear Mr. James:

I have received your letter of September 2 in which you sought assistance concerning your requests for records to the New York City Police Department and the Civilian Complaint Review Board.

In this regard, 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, and a request should ordinarily be sent to that person. While I believe that a person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded your request to the records access officer, it is suggested that you renew your request and send it to the records access officer at the agency that you believe maintains the records in which you are interested.

I note, 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)].

For your information, the person designated by the New York City Police Department to determine appeals is Susan Petito, Special 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-10360

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

Mr. Jeff Blocker
93-A-0989
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. Blocker:

I have received your letter of September 2 addressed to William Bookman. Please be advised that Mr. Bookman has retired. You have asked for a review of your request made under the Freedom of Information Law to the Department of Correctional Services and advise as to whether the request might be "out of order."

First, since in your request, you indicated that you "do not want to duplicate anything [you already] have", I note that it was held in Moore v. Santucci [151 AD 2d 677 (1989)] 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. Otherwise, insofar as the records sought have been disclosed to you in the past, the Department of Correctional Services in my view would not be required to provide copies of those same records.

Second, if, in responding to the request, the "materials sent [do] not constitute 'all' concerning this request", you asked that the Department "indicate what is not included and why." In this regard, although an agency must provide a denial of access in writing, 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, 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. From my perspective, it is possible that some of the records that you are seeking may no longer exist. For example, you requested a "receipt of service", concerning materials sent to you in March of 1993. Whether such a receipt was prepared or continues to exist is unknown to me. If it does exist, the Freedom of Information Law would not apply. Similarly, you asked for transcripts and dates of certain conversations. If no such records exist, the agency would not be required to prepare them on your behalf. You also asked for a citation identifying a particular law under which certain action was taken. In my view, the Freedom of Information Law involves requests for records; it does not require agency staff to perform legal research and answer questions of a legal nature.

Next, you asked that fees for copying be waived. Here I point out that there is nothing in the Freedom of Information Law that requires that an agency waive fees, irrespective of the status of an applicant for records. Further, it has been held that an agency may charge its established fees even though the applicant is an indigent inmate [Whitehead v. Morgenthan, 552 NYS 2d 518 (1990)].

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.

Without knowledge of the contents of the records in which you are interested, I could not conjecture as to the extent to which the records in question might justifiably be withheld. Whether records are accessible or deniable, an agency is required to respond to a request, and 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 under the Freedom of Information Law is Anthony Annucci, Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Roxanne Underwood

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10361

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

Mr. Stan Wertheimer
[redacted]

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

Dear Mr. Wertheimer:

I have received your letter of September 4, as well as the correspondence attached to it. The materials relate to a request in which you sought from the Centerport Fire District "the number of members presently on medical or disability and the dates they went on medical or disability", as well as the number of those on medical or disability, collecting Service Award points." You indicated that it is your understanding that there should be no issue concerning "invasion of privacy", because you did not seek specific names.

In one response it was indicated that the request would be denied based upon considerations of privacy; in another, you were informed that the record that you want "is not maintained by this office."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) indicates that an agency is not required to create or prepare a record in response to a request. Therefore, if the District does not maintain a record that includes figures or statistics indicating the number of members on medical disability, the dates on which they went on disability and whether they are collecting service award points, the District would not be required by the Freedom of Information Law to prepare a new record containing a total, a statistic or similar tabulation based on a review of its records.

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

quoted in the preceding sentence in my view evidences a recognition on the part of the Legislature that a single record might include both available and deniable information, and that an agency is obliged to disclose those portions that do not fall within any grounds for denial.

Rather than requesting "the number", it is suggested that you request records that include reference to members within the categories of interest, and that you specify that identifying details be deleted from those records. As you may be aware, the Freedom of Information Law authorizes an agency to withhold records when disclosure would constitute an unwarranted invasion of personal privacy [§87(2)(b)]. If, however, records can be disclosed after deletions have been made so that the subjects of those records would not be identified, I believe that the remainder of the records would be accessible [see §89(2)(c)(i)]. When an agency deletes identifying details from a record in order to protect against an unwarranted invasion of personal privacy, I do not believe that it would be preparing a new record; rather, it would be disclosing portions of an existing record.

As you requested, copies of this opinion will be sent to the attorney for the New York Association of Fire Districts and the Chief of the Centerport Fire Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William N. Young, Jr.
Chief Paul Heglund

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10362

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

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:

I have received your letter of August 30, which reached this office on September 8. You have sought an advisory opinion concerning access to evaluations of employees that are maintained by the Enlarged City School District of Troy.

In this regard, I offer the following comments.

I point out initially that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. The nature and content of so-called personnel files may differ from one agency to another and from one employee to another. Neither the characterization of documents as personnel records nor their placement in personnel files would necessarily render those documents confidential or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents are the factors used in determining the extent to which they are available or deniable under the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. While two of the grounds for denial may be relevant to an analysis of rights of access to the records in question, I do not believe that either could be cited to withhold the information sought.

Section 87(2)(g) enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Also significant is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear based upon judicial decisions that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Further, with regard to records pertaining to public employees, the courts have found in a variety of contexts that records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While the contents of evaluations may differ, I believe that a typical evaluation contains three components.

One component involves a description of the duties to be performed by a person holding a particular position, or perhaps a series of criteria reflective of the duties or goals to be achieved by a person holding that position. Insofar as evaluations contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a

duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves the 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, perhaps as an unwarranted invasion of personal privacy, but clearly under §87(2)(g), on the ground that it constitutes an opinion concerning performance.

A third possible component is often a final rating, i.e., "good", "excellent", "average", etc. Any such final rating would in my opinion be available, assuming that any appeals have been exhausted, for it would constitute a final agency determination available under §87(2)(g)(iii), particularly if a monetary award is based upon a rating. Moreover, a final rating concerning a public employee's performance is relevant to that person's official duties and therefore would not in my view result in an unwarranted invasion of personal privacy if disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Minton
Eva DeFiglio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2802
FOIL-AO-10363

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

Ms. Mary P. Crowley
[redacted]

The staff of the Committee on 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. Crowley:

I have received your letter of September 2, as well as the news article attached to it. It is your view that Community School Board 24 took action in private and failed to record the votes of its members, and you have sought an opinion on the matter.

From my perspective, even though a board of education may validly discuss certain issues during executive sessions, action by the board must generally be taken in public, and a record must indicate how each member voted. In this regard, I offer the following comments.

First, minutes reflective of action taken by a public body 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."

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 short, I believe that any action or final vote by a board of education should occur during an open meeting.

Lastly, 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)].

In a decision dealing with the notion of a consensus reached at a meeting of a public body, 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 at issue, if the Board reached a "consensus" reflective of its final determination, I believe that minutes that indicate the manner in which each member voted are required.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Community School Board 24

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10364

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 29, 1997

Mr. Jack White
Beekman Bulletin
R2, Box 400
Poughquag, NY 12570

Hon. Virginia M. Ward
Town Clerk
Town of Beekman
41 Main Street
Poughquag, NY 12750-9601

The staff of the Committee on Open 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 and Ms. Ward:

I have received your letters, which are dated, respectively, September 5 and September 12.

In the former, Mr. White referred to requests made under the Freedom of Information Law that allegedly had not been answered by the Town of Beekman and asked that this office "intercede" on his behalf. In the latter, Ms. Ward indicated that Mr. White's initial request had been answered and that records were forwarded to him a day after receipt of the request. She added with respect to the second request and nine others later made by Mr. White that as of September 12 "all of Mr. White's requests have been answered, not all fulfilled, but answered as to acceptance or denial." Ms. Ward also indicated that many of the records sought had been previously requested and made available to Mr. White.

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 "intercede" in the legal sense or compel an agency to grant or deny access to records. Nevertheless, based on the contents of your letters, I offer the following comments.

First, I note that it was held in Moore v. Santucci [151 AD 2d 677 (1989)] that an agency need not make available records that had been previously disclosed to the applicant, unless there is

an allegation "in evidentiary form, that the copy was no longer in existence." In my opinion, if Mr. White can "in evidentiary form" demonstrate that he no longer maintains records that had previously been disclosed, the Town would be required to respond to a request for the same records. Otherwise, insofar as the records sought have been disclosed to you in the past, the Town in my view would not be required to provide copies of those same records.

Second, a key issue appears to involve the timeliness of responses to requests for records directed to the Town. Here I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Although 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10365

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1997

Mr. Robert Kushner
[redacted]

The staff of the Committee 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. Kushner:

As you are aware, I have received your letter of September 8 in which you sought an advisory opinion concerning a denial of access to a record by the East Williston Union Free School District. I note that the matter has been discussed with the attorney for the District, Jay Hellman.

By way of background, you wrote that the District "hired an architect to make recommendations for the expansion of two school buildings to accommodate increased enrollment." You added that the architect presented his recommendations, including floor plans and a cost analysis, at an open meeting. Nevertheless, your request for the documentation was denied on the ground that it consists of "intra-agency documents which are in draft form and consist solely of opinions and recommendations of the District's consultant." The response also suggested that the records could be withheld because "no final determination has been made."

In this regard, I offer the following comments.

First, according to Mr. Hellman, the architect functions as a consultant. That would appear to be so based upon the information that you provided, that the architect presented recommendations to the District, and the ensuing paragraphs will be based upon the assumption that the architect is indeed a consultant.

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.

Perhaps the provision of primary significance in the context of your inquiry is §87(2)(g). Although that provision serves as one of the grounds for denial of access to records, due to its structure, it often requires substantial disclosure. 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.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals, the State's highest court, 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 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 note that in a recent case that reached the Court of Appeals, one of the contentions was that certain reports could be withheld because they were not final and because they related to incidents for which no final determination had been made. The Court rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are "draft" or "non-final" would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents to determine rights of access..

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277)."

I would conjecture that at least some elements of the records, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed, irrespective of their status as draft or non-final.

Additionally, while the extent to which the documentation was constructively disclosed at one or more open meetings is not clear, from my perspective, any such disclosure would serve as a waiver of the ability to withhold records containing information imparted to the public.

Lastly, Mr. Hellman suggested that another ground for denial may also be pertinent. Specifically, he referred to §87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations."

Without additional knowledge of the facts, I could not conjecture as to the propriety of asserting that provision as a basis for denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David J. Helme, Superintendent
Jay Hellman, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10366

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1997

Mr. Charles Freeman
76-A-0873
Eastern New York Correctional Facility
Box 338
Napanoch, NY 12458

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

Dear Mr. Freeman:

I have received your letter of August 29, which reached this office on September 8. You have requested assistance in obtaining records from the New York City Police Department that were prepared 1975 and 1976 in relation to your arrest.

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 the agency's response to requests for records, and a request should be directed to that person.

Second, I point out that the Freedom of Information Law pertains to existing records. Since the events to which you referred occurred more than twenty years ago, it is possible that some of the records in which you are interested no longer exist. To that extent, the Freedom of Information Law would not apply.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10307

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

September 30, 1997

Mr. Marcus 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 August 31, which reached this office on September 8. You have asked whether grand jury minutes may be obtained under 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.

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, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2803
FOIL-AO- 10368

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 1, 1997

Mr. Timothy R. Kavanaugh
[redacted]

The staff of the Committee 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. Kavanaugh:

I have received your memorandum of September 30 on the subject of "Taping of School Board Executive Session", as well as the materials attached to it.

In your capacity as a member of the Cambridge Central Schools Board of Education, you have raised a variety of issues concerning the ability to tape record executive sessions. As indicated in our telephone conversation, the matter has generated several calls to this office and a memorandum prepared by Charles H. Noe, Superintendent of Schools, in which he offered several recommendations to the Board based on advice offered by myself and others as follows:

> "1. Do not have an executive session until the tapes are given to the superintendent for destruction.
>
> 2. Do not have an executive session if it is being taped.
>
> 3. Make no records of executive session what-so-ever."

With all due respect to Mr. Noe, who might have misinterpreted or misconstrued my comments to him, I would not have offered the advice reflected in the recommendations as he presented them. In conjunction with our conversation and the foregoing, you have asked "what statutes, if any, apply to taping executive sessions, and any other information [I] feel would be germane to this issue."

In this regard, I offer the following remarks.

First, there is no statute that deals directly with the taping of executive sessions. Several judicial decisions have dealt with the ability to use recording devices at open meetings, and although those decisions do not refer to the taping of executive sessions, their thrust is pertinent to the matter. Perhaps the leading decision concerning the use of tape recorders at meetings, a unanimous decision of the Appellate Division, involved the invalidation of a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings [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).

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.

Again, while there are no decisions that deal with the use of tape recorders during executive sessions, I believe that the principle in determining that issue is the same as that stated above, i.e., that a board may establish reasonable rules governing the use of tape recorders at executive sessions.

Unlike an open meeting, when comments are conveyed with the public present, an executive session is generally held in order that the public cannot be aware of the details of the deliberative process. When an issue focuses upon a particular individual, the rationale for permitting the holding of an executive session generally involves an intent to protect personal privacy, coupled with an intent to enable the members of a public body to express their opinions freely. Viewing the matter from a different vantage point, when representatives of public bodies have asked whether they should tape record executive sessions, I have suggested that doing so may result in unforeseen and potentially damaging consequences. For reasons to be discussed later in detail, I believe that a tape recording is

a "record" as that term is defined in section 86(4) of the Freedom of Information Law and, therefore, would be subject to rights conferred by that statute. Further, a tape recording of an executive session may be subject to subpoena or discovery in the context of litigation. Disclosure in that kind of situation may place a public body at a disadvantage should litigation arise relative to a topic that has been appropriately discussed behind closed doors.

In short, I am suggesting that tape recording an executive session could potentially defeat the purpose of holding an executive session, and that, in my opinion, a board of education, based on its authority to adopt rules to govern its own proceedings conferred by §1709 of the Education Law, could, by rule, prohibit a member from using a tape recorder at an executive session absent the consent of a majority of the board. I believe that a recommendation was made to the Superintendent consider the adoption of such a rule; it was not suggested that an executive session should not be held if it is being recorded.

Second, from my perspective, a tape recording of an executive session prepared by a board member would fall within the coverage of the Freedom of Information Law. Moreover, if that is so, the tape recording could be destroyed or erased only in conjunction with provisions of the Arts and Cultural Affairs Law dealing with the retention and disposal of records.

The Freedom of Information Law pertains to all agency records and 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

> spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

Additionally, in another decision rendered by the Court of Appeals, the Court focused on an agency claim that it could "engage in unilateral prescreening of those documents which it deems to be outside of the scope of FOIL" and found that such activity "would be inconsistent with the process set forth in the statute" [Capital Newspapers v. Whalen, 69 NY 2d 246, 253 (1987)]. The Court determined that:

> "...the procedure permitting an unreviewable prescreening of documents - which respondents urge us to engraft on the statute - could be used by an uncooperative and obdurate public official or agency to block an entirely legitimate request. There would be no way to prevent a custodian of records from removing a public record from FOIL's reach by simply labeling it 'purely private.' Such a construction, which would thwart the entire objective of FOIL by creating an easy means of avoiding compliance, should be rejected" (id., 254).

Perhaps closest to your situation is a case involving notes taken by the Secretary to the Board of Regents that he characterized as "personal" in conjunction with a contention that he took notes in part "as a private person making personal notes of observations...in the course of" meetings. The court cited the definition of "record" and determined that the notes did not consist of personal property but rather were records subject to rights conferred by the Freedom of Information Law [Warder v. Board of Regents, 410 NYS 2d 742, 743 (1978)].

Based upon the foregoing, assuming that you recorded the meeting in furtherance of the performance of your duties as a member of the Board, I believe that the tape recording would constitute a "record" that falls within the coverage of the Freedom of Information Law.

With respect to the retention and destruction of the tape, 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 includc 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.

Based on the preceding points, I would not have advised that the tape recording of the executive session be destroyed. It is suggested that you or the District's records management officer review the applicable retention schedule to ascertain the minimum period of retention, which I believe is four months from the date of the meeting.

Similarly, I believe that it was advised that, in my view, tape recording executive sessions could result in unforeseen consequences; I do not believe that it was recommended that no records "whatsoever" be prepared regarding executive sessions.

Although somewhat tangential but in my view pertinent to the issues, 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 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 generally prohibit a Board member from disclosing information acquired during an executive session. Further, even when information might have been obtained during an executive session properly held or from records marked "confidential", I point out 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 most matters considered in executive session.

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).

As suggested earlier, 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. Nevertheless, particularly in a case in which an executive session might have been improperly held, there would be no provision of law that would prohibit a person in attendance from disclosing information acquired during the closed session.

In an effort to clarify my position on the matter and to enhance compliance with and understanding of applicable law, copies of this response will be forwarded to the Superintendent and the Board of Education.

I hope that I have been of assistance..

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles H. Noe
Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10369

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1997

Mr. Albert A. Gaudelli
Counselor At Law
16 Tennis Place
Forest Hills, NY 11375

Dear Mr. Gaudelli:

I have received your "formal request to appeal the denial of [your] request for information pursuant to the Freedom of Information Act, 5 U.S.C. 552." The request involves a memorandum prepared by the Office of the Queens County District Attorney.

In this regard, it is noted at the outset that the statute to which you referred is the federal Freedom of Information Act, which pertains only to records maintained by federal agencies. The applicable statute in this instance is the New York Freedom of Information Law (Public Officers Law, Article 6, §§ 84-90).

Further, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law; it is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. Based on a review of the correspondence attached to your letter, you appealed an initial denial in accordance with §89(4)(a) of the Freedom of Information Law. Since the appeal was denied, you have exhausted your administrative remedies, and your next course of action, should you choose to do so, would involve the initiation of an Article 78 proceeding to seek judicial review of the denial of your request.

While I am unfamiliar with the content of the record at issue, the provision cited by representatives of the District Attorney, §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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Andrew Zwerling
Young C. Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1637O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1997

Mr. Christopher Joseph LeGere
%general delivery, Jensen Beach Post Office
Jensen Beach, Florida

Dear Mr. LeGere:

I have received your letter of October 3.

You referred to our earlier correspondence, which pertained to oaths of office, but your recent letter refers to unspecified contracts and "bonding agents or insurance policies as previously requested." It appears that you are seeking the records in relation to the Capital District Psychiatric Center, Mental Health Legal Services, and perhaps other entities.

As suggested in earlier communications with you, a request for records should be directed to the records access officer at the agency that maintains the records of your interest. Neither the Department of State nor the Committee on Open Government would have custody or control of contracts or insurance policies involving other agencies. I note further 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, it appears that you contended that you are unable to pay fees for copies of the records. In this regard, it has been held that an agency may charge its established fees under the Freedom of Information Law, even when the applicant for records is indigent [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0321

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 8, 1997

Mr. Jim Littlefoot
Local 613 President
Wallkill Correction Officers
Box G
Wallkill, NY 12589

Dear Mr. Littlefoot:

I have received your letter of September 29, which reached this office on October 8. You have requested from this office information indicating the salaries of certain employees of the Department of Correctional Services and the amount of rent paid for certain housing.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law; the Committee does not have custody of control of records generally. In short, I cannot provide the information sought because this office does not maintain it.

As a general matter, a request for records should be made the agency that maintains them. Pursuant to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility should be directed to the facility superintendent or his designee; to seek records maintained at the Department's central offices in Albany, a request may be made to the Department's records access officer, Mr. Mark Shepard.

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. From my perspective, the kinds of records that you are seeking would have to be disclosed, 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10372

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 15, 1997

Ms. Gerardine C. Yakovleff
[redacted]

The staff of the Committee on 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. Yakovleff:

I have received your letter of September 1, which reached this office on September 9. You have sought assistance in obtaining a report from the Division of State Police concerning the investigation of the death of your sister in 1989.

Based upon your letter, it appears that your sister's death was the result of a suicide. The Division of State Police has denied access and stated that it must receive "a notarized waiver, executed by the administrator of the...estate, specifically authorizing the New York State Police to release the report to you..." You indicated that your sister died without a will and that, following the distribution of her estate, the duties of the executor ended.

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, it is likely that two of the grounds for denial are pertinent to an analysis of rights of access.

The primary issue in my view involves §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) includes a series of examples of unwarranted invasions 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. Further, having discussed the issue with national experts, there is no clear consensus on the matter. 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 and must be disclosed. Depending on their nature, however, disclosure of 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 addition, depending upon the nature of the records, there may be privacy considerations relating to the family of the deceased as well. I have no personal knowledge regarding the content of the report in question. Nevertheless, it seems unlikely that the State Police could justify a denial of access when records are sought by you as the sister of the deceased, particularly since all matters involving her estate were resolved years ago. I note, too, that there is no provision in the Freedom of Information Law that would require that a statement, notarized or otherwise, be obtained from the administrator of an estate as a condition precedent to disclosure.

The other provision of significance is §87(2)(g). Although that provision potentially serves as a basis for denial of access, due to its structure, it often requires substantial disclosure. 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.

One of the contentions offered by New York City in the recent decision was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277)

The information sought clearly consists of factual data; that some of it may relate to investigations that have not yet been closed is irrelevant. As such, in my view, §87(2)(g) would not serve as a basis for a denial of access.

In sum, the blanket denial of access by the Division of State Police in my opinion is inconsistent with the requirements of the Freedom of Information Law. In an effort to encourage the State Police to review the matter, copies of this opinion will be forwarded to officials of that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Col. James A. Fitzgerald
Lt. Laurie M. Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10323

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 15, 1997

Mr. Harold Massey
86-C-0909
Auburn Correctional Facility
135 State Street
Auburn, NY 13024-9000

Dear Mr. Massey:

As you are aware, your letter of August 28 addressed to the Attorney General has been forwarded to this office. In brief, you have requested assistance in obtaining court records from the Monroe County Clerk.

In this regard, I point out that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office is not empowered to review records, such as sentencing transcripts, which you believe are maintained by the Monroe County Clerk.

It is noted 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.

Second, 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...".

Lastly, according to the correspondence attached to your letter, the Monroe County Clerk's Office does not maintain the transcripts in which you are interested. As that office suggested, you could have your attorney search its files in an effort to locate records of interest to you.

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

cc: Maggie Brooks, County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1637Y

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Michael Gray
84-A-4897
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. Gray:

I have received your letter of September 8. In brief, you have sought assistance concerning an unanswered request for records of 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 Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10375

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Earl M. Wilbur, Jr.
96-B-0423
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. Wilbur:

I have received your letter of September 9, as well as the correspondence attached to it. In brief, you indicated that you requested records from the Division of State Police, Troop C, in Cortland County, on August 13. However, as of the date of your letter of your letter to this office, you had received no response. As such, you asked that this office "intervene to obtain the information" for you.

In this regard, first, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense or compel an agency to grant or deny access to records.

I note, however, 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 Division to determine appeals is Col. James A. Fitzgerald, Chief Inspector.

Lastly, one element of your request involves evidence. In this regard, I point out that the Freedom of Information Law pertains to records; it does not apply to items of physical evidence [see Allen v. Strojnowski, 129 AD2d 700].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Col. James A. Fitzgerald
Records Access Officer, Troop C

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10376

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

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 letters of September 10 and 28, as well as a variety of related materials. Your correspondence pertains to the fees that may be assessed by the office of the Erie County Clerk.

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, others of which may be held in the capacity as clerk of a court. As you may be aware, 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 under 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...".

Lastly, I note that §8019(f) of the Civil Practice Law and Rules, entitled "Copies of records", states in relevant part that:

> "The following fees, up to a maximum of thirty dollars per record shall be payable to a county clerk or register for copies of the records of the office except records filed under the uniform commercial code:

1. to prepare a copy of any paper or record on file in his office, except as otherwise provided, fifty cents per page with a minimum fee of one dollar."

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: David J. Swarts
Kenneth A. Schoetz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10377

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Timothy Dumpson
86-B-2265
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. Dumpson:

I have received your letter of September 7. In brief, you complained that the Division of State Police has failed to respond 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 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, I believe that the person designated by the State Police to determine appeals is Col. James A. Fitzgerald, Chief Inspector.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Col. James A. Fitzgerald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10378

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Thomas J. McClane
[redacted]

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

Dear Mr. McClane:

I have received your letter of September 8. As in the case of previous correspondence, you have focused on your requests for records directed to the Department of Environmental Conservation. The issues have been considered in the past, and, from my perspective, there is no need to revisit them.

Since you referred to an alleged failure on the part of the Department to engage in a "diligent search", 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

cc: Kathrine Guadagnino

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10379

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Alan Jennings
91-A-1827
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Jennings:

I have received your letter of September 8. In brief, you complained that your appeal made under the Freedom of Information Law directed to Orange County has not been determined in a timely manner. As such, you asked that this office "exercise [its] duties and powers...to ensure...compliance..."

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 that statute or compel an agency to grant or deny access to records.

With respect to the time within which an agency must respond to an 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, who shall within ten business days of the receipt of 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 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: Richard Golden, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10380

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Billy W. Patrick
[redacted]

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

Dear Mr. Patrick:

I have received your undated letter, which reached this office on September 15. You have sought assistance in obtaining records under the Freedom of Information Law from the Clerk of the Orange County Family Court.

In this regard, it is emphasized at the outset that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to include:

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

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

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

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

Of possible relevance to the matter is §166 of the Family Court Act. That statute states that:

> "The records of any proceeding in the family court shall not be open to indiscriminate public inspection. However, the court in its discretion in any case may permit the inspection of any papers or

> records. Any duly authorized agency, association, society or institution to which a child is committed may cause an inspection of the record of investigation to be had and may in the discretion of the court obtain a copy of the whole or part of such record."

Because you are the subject of the records in question, it would appear that you are not seeking "indiscriminate public inspection."

Since the matter is outside the jurisdiction of this office, it is suggested that you contact the Office of Court Administration, 25 Beaver Street, New York, NY 10004 or that you seek the services of an attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Elizabeth Holbrook
Joseph P. Fogarty

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1038

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Scott R. Petrie
92-B-0106
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. Petrie:

I have received your letter of September 15. You wrote that requests for records made under the Freedom of Information Law sent to the Syracuse office of the Division of Parole and the Onondaga Pastoral Counseling Center had not been answered as of the date of your letter to this office.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to records maintained by 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."

Based on the foregoing, while the Division of Parole is clearly an agency that falls within the requirements of the Freedom of Information Law, the Pastoral Counseling Center would not be a governmental entity and, therefore, would not fall within the coverage of that statute.

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

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

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

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

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

I believe that the person designated by the Division of Parole to determine appeals is Terrence Tracy, Counsel to the Division.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence Tracy
Edward White

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10382

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 16, 1997

Mr. Kevin P. DuMond
[redacted]

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

Dear Mr. DuMond:

I have received your letter of September 12. In brief, as I understand the matter, you requested records under the Freedom of Information Law from the Ulster County Department of Health on July 23. However, as of the date of your letter to this office, you had received no response.

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

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

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

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

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

I believe that the person designated by Ulster County to determine appeals is Francis Murray, County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
Francis Murray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10383

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 17, 1997

Mr. Aramis Fournier, Jr.
96-B-0805
P.O. Box 340
Collins, NY 14034

The staff of the Committee on Open 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 September 14 in which you sought assistance in obtaining a copy of your pre-sentence report from the Erie County Probation Department. According to your letter, an order requiring the release of the report was issued by the Erie County Supreme Court and was transmitted with a request made under the Freedom of Information Law to the Department.

In this regard, from my perspective, the Freedom of Information Law is not the governing statute, and the issue involves what appears to be a failure on the part of the Department to comply with a court order.

By way of background, 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. If indeed a court order requiring disclosure of the pre-sentence report to you has been issued, the matter involves the enforcement of that order. As such, it is suggested that you inform the Court of any failure to comply with its order or seek the services of an attorney or perhaps Prisoners' Legal Services.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kenneth A. Schoetz, Erie County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10384

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 22, 1997

Mr. Harvey Elentuck
[redacted]

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

Dear Mr. Elentuck:

I have received your note of September 10, which appears on a letter of the same date addressed to Ron LeDonni, Secretary to the New York City Board of Education.

You focused on a subject that has been considered many times in the past, access to observation reports pertaining teachers, and you wrote that "the Board of Ed has finally admitted that observation reports do contain 'statistical or factual tabulations or data', but they still claim the records are entirely exempt" (emphasis yours). Specifically, in a denial addressed to you on July 25, Mr. LaDonni wrote that the reports in question "are not final agency determinations and that these reports consist of opinions and recommendations. The reports do contain statistical or factual tabulations or data and are therefore exempt from disclosure." Because of the internal inconsistency in the passage quoted above, it appeared from my perspective that there was a typographical error. Indeed, having contacted the Board to discuss the matter, I was informed that a word, "not", was inadvertently omitted from Mr. LaDonni's response, which was intended to state that the reports "do not" contain statistical or factual data. If that is so, and if the records consist entirely of opinions and recommendations, I believe that they may be withheld pursuant to §87(2)(g) of the Freedom of Information Law.

The other issue, which pertains to absence of certification regarding an inability to locate records following a diligent search, in my opinion involves a matter that has also been considered previously. That is the requirement in §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. If a request does not reasonably describe the records, I do not believe that an agency would be required to provide the certification. For instance, if an agency maintains a large record series chronologically, but the applicant seeks records by name, an agency would not be required to search all of the records in an effort to locate those that have been

requested. In that circumstance, due to the nature of the agency's filing system, no search would have been made, and consequently, no certification would have to be prepared. On the other hand, if the applicant requested records chronologically, in a manner consistent with the agency's filing system, but the agency could not locate the records sought, I believe that the agency would be required to prepare a certification concerning its search as required by §89(3).

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:tt

cc: Ron LaDonni
Michael Valenti

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1038S

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 22, 1997

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 September 15, as well as the correspondence attached to it.

You referred to an opinion addressed to you on July 25 and asked that I prepare an "up-dated opinion" based on the new information that you provided. In this regard, having reviewed the earlier opinion, it appears that only one additional point would be pertinent.

The Fulton County District Attorney indicated that the record in question is exempt from disclosure due to provisions requiring grand jury secrecy, and the County attorney affirmed that contention in his determination of your appeal. Assuming that their contention is accurate, I would agree with their conclusion. As you may be aware, §87(2)(a), the first ground for denial in the Freedom of Information Law, pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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, records reflective 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: Arthur Spring, County Attorney
Polly Hoye, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10386

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Mr. Raasaikh El Barrow
General Delivery
Bronx General Post Office
Bronx, NY 10451-9999

The staff of the Committee 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. El Barrow:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with the Freedom of Information Law.

In this regard, for the following reasons, I believe that your complaint is misplaced.

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 Freedom of Information Law does not apply to the courts or court records. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

Second, having called Ms. Wolfe on your behalf to learn more of the matter, I was informed that you have been in contact with the Office of Court Administration, which is dealing with the matter of your concern.

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1038?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Mr. Yasuf Rami Bey
[redacted]

The staff of the Committee 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. Bey:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with 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 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. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10388

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Abdallah Zaffer Elhatrim Bey
[redacted]

The staff of the Committee 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. Bey:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with 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 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. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10389

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Mwamba Sentwali el Bey
[redacted]

The staff of the Committee 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. Bey:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with 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 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. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-16390

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Musa Abdul Bey
[redacted]

The staff of the Committee 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. Bey:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with 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 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. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1039 1

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Mr. Roberto Ciaprazi
96-A-5408
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. Ciaprazi:

I have received your letter of September 16, as well as the materials attached to it. Having reviewed the correspondence, 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 "take action", to determine appeals, to compel an agency to grant or deny access to records or otherwise comply with law.

Second, while there may be some aspects of the records that you are seeking that would be accessible under the Freedom of Information Law, it appears that there may be areas of misunderstanding. For instance, there is nothing in that statute pertaining to the waiver of fees for copies of records, and it has been held that an agency may charge its established fees for copies, even when an applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)]. Similarly, there is no requirement that an agency indicate the number of pages withheld, identify every record withheld or provide 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)].

Third, I note that the Freedom of Information Law pertains to agency records, and that §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, a videotape or an audio recording maintained by an agency would in my view constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a blanket 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

Next, 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).

The Court in Moore also specified that an agency "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, 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: Anthony Annucci, Counsel
FOI Appeals Officer, Office of the Nassau County District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10392

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 27, 1997

Mr. David Hunt
83-A-4739
Woodbourne Correctional Facility
Riverside Drive
Woodbourne, NY 12226

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

Dear Mr. Hunt:

I have received your note of September 15 in which you sought my views concerning your attempts to obtain records from the Department of Correctional Services.

In this regard, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. 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) also 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 a request is made for 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.

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.

The correspondence also makes reference to mental health records. In this regard, 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.

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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 note that although an agency must grant access to records, deny access or acknowledge the

receipt of a request within five business days, when such acknowledgment 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. When an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, it must provide an approximate date indicating when the request will be granted or denied. If 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark E. Shepard
Rhonda Toohey
Denise E. Reed

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10393

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1997

Mr. Frank V. Bifera
Acting General Counsel
NYS Department of Environmental Conservation
50 Wolf Road
Albany, NY 12233-5500

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

Dear Mr. Bifera:

I have received your letter of October 7 in which you requested an advisory opinion "as to whether information compiled pursuant to Chapter 279 of the Laws of 1996 ('Pesticide Reporting Law' or 'PRL') qualifies as material that is specifically exempted from disclosure under the Freedom of Information Law..."

The provision to which you referred has been codified as subdivision (2) of §33-1201 of the Environmental Conservation Law, and you focused on the following language:

> "The commissioner [of environmental conservation] shall not provide the name, address, or any other information which would otherwise identify a commercial or private applicator, or any person who sells or offers for sale restricted use or general use pesticides to a private applicator, or any person who received the services of a commercial applicator."

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. The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, the passage quoted above clearly serves to exempt the information described therein from disclosure under the Freedom of Information Law through the application of §87(2)(a).

The provision at issue constitutes a recent amendment to the Environmental Conservation Law that appears to be intended to ensure that certain records are exempted from public disclosure. While that passage does not make specific reference to the Freedom of Information Law, in construing analogous language in a different statute, the Court of Appeals indicated that it has "never held that a State statute must expressly state that it is intended to establish a FOIL exemption" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. The Court noted, however, that there must be "a showing of clear legislative intent to establish and preserve that confidentiality which one resisting a FOIL disclosure claims as protection" (id.). Assuming that there is legislative history suggesting an intent to ensure confidentiality, I believe that the information described in the provision is question would be "specifically exempted from disclosure by...statute" and, therefore, beyond the scope of rights conferred by the Freedom of Information Law.

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-10394

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1997

Mr. Hector Orta
93-R-4709
Bare Hill Correctional Facility
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. Orta:

I have received your letter of September 19 in which you sought assistance in obtaining records relating to a denial of your request for a transfer to a different facility. You indicated that your request for the records had not been answered and expressed the belief that both state and federal law require that agencies respond within five business days.

In this regard, I offer the following comments.

First, the federal Freedom of Information Act pertains only to records maintained by federal agencies. The state's Freedom of Information Law applies to records maintained by entities of state and local government in New York, including the Department of Correctional Services and its facilities.

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

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

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

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

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

For your information, the person designated to determine appeals at the Department of Correctional Services is Counsel to the Department.

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. 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10395

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1997

Mr. Charles McCormick
[redacted]

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

Dear Mr. McCormick:

I have received your letter of September 17 concerning a request made under the Freedom of Information Law on July 24 to Wyoming County for the "amount of payroll #10 for Schedule D Personal" for 1996 and 1997. You specified in your letter that your request did not involve information concerning "any specific individual that could be interpreted as confidential."

In this regard, I offer the following comments.

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

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

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

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

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

Second, I note 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 or prepare a record in response to a request. I am unfamiliar with the particular record to which you referred. If it does not contain an "amount" or total, for example, the County would not be obliged to prepare a record that includes a figure reflective of the information sought.

On the other hand, if the record in question includes an "amount", I believe that it must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is noted that §87(2)(g)(i) requires that those portions of internal agency records ("intra-agency materials") consisting of "statistical or factual tabulations or data" must be disclosed. Therefore, if the information of your interest exists in the form of a record, it would be accessible under the Law.

Lastly, assuming that the record pertains to payments made to public employees, I point out that records indicating the amounts of those payments to public employees are generally available. Further, §87(3)(b) of the Freedom of Information Law requires that each agency maintain and make available "a record setting forth the name, public office address, title and salary of every officer or employee of the agency."

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Chairman, Board of Supervisors
Records Access Officer
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10396

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 28, 1997

Mr. Robert Apy
85-A-5562
Bare Hill Correctional Facility
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. Apy:

I have received your letter of September 18. You wrote that a request for records was made to the "mental health dept." at your facility and that you had received no response.

In this regard, it is my understanding that mental health "satellite units" that operate within state correctional facilities are such "facilities' that 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 suggested that you resubmit your request to that office.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1039

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 30, 1997

Mr. Peter W. Sluys
Managing Editor
Community Media Inc.
25 W. Central Ave., 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 September 23 and a variety of correspondence related to it.

According to the materials, you have attempted without success to obtain records concerning "two major series of vandalism...in Pearl River." You added that in one incident, "a young person knocked down signs that were public property", as well as "mail boxes and other personal property of more than 15 individual homeowners." In the other, "three young men played 'mail box polo'...smashing mailboxes and signs with a bat." The Orangeburg Police Department has denied access to the names or address of those "who committed acts of criminal mischief", as well as the names and addresses of the "victims" of the events of vandalism. As I understand the matter, it is unlikely that arrests will be made, for there may be an informal arrangement under which the youths will pay for damages that they caused.

From my perspective, the names of those alleged to have committed the acts of vandalism need not be disclosed. However, the locations of those acts, and perhaps other aspects of the records, must in my view be disclosed. In this regard, I offer the following comments.

First, The Court of Appeals, the State's highest court, expressed its general view of the intent of the Freedom of Information Law in a recent decision Gould v. New York City Police Department [87 NY 2d 267 (1996)], stating that:

> "To ensure maximum access to government records, the 'exemptions are to be narrowly construed, with the burden resting on the agency

> to demonstrate that the requested material indeed qualifies for exemption' (*Matter of Hanig v. State of New York Dept. of Motor Vehicles*, 79 N.Y.2d 106, 109, 580 N.Y.S.2d 715, 588 N.E.2d 750 *see,* Public Officers Law § 89[4][b]). As this Court has stated, '[o]nly where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld' (*Matter of Fink v. Lefkowitz*, 47 N.Y.2d, 567, 571, 419 N.Y.S.2d 467, 393 N.E.2d 463)" (id., 275).

Just as significant, the Court in Gould repeatedly specified that a categorical denial of access to records is inconsistent with the requirements of the Freedom of Information Law. In that case, the agency contended that complaint follow up reports, also known as "DD5's", could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g), an exception separate from those cited in response to your request. The Court, however, wrote that: "Petitioners contend that because the complaint follow-up reports contain factual data, the exemption does not justify complete nondisclosure of the reports. We agree" (id., 276). The Court then stated as a general principle that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government" (id., 275). The Court also offered guidance to agencies and lower courts in determining rights of access and referred to several decisions it had previously rendered, directing that:

> "...to invoke one of the exemptions of section 87(2), the agency must articulate 'particularized and specific justification' for not disclosing requested documents (*Matter of Fink v. Lefkowitz, supra*, 47 N.Y.2d, at 571, 419 N.Y.S.2d 467, 393 N.E.2d 463). If the court is unable to determine whether withheld documents fall entirely within the scope of the asserted exemption, it should conduct an in camera inspection of representative documents and order disclosure of all nonexempt, appropriately redacted material (*see, Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 133, 490 N.Y.S. 2d, 488, 480 N.E.2d 74; *Matter of Farbman & Sons v. New York City Health & Hosps. Corp., supra*, 62 N.Y.2d, at 83, 476 N.Y.S.2d 69, 464 N.E.2d 437)" (id.).

In the context of your request, it appears that the records sought have been withheld in their entirety in a manner contrary to the direction provided in Gould.

Second, it appears that several of the grounds for denial are pertinent to an analysis of the matter.

In my view, the names of the alleged perpetrators, the suspects, none of whom has apparently been charged, may be withheld pursuant to §87(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Since there has been no charge, admission or finding of guilt, the Police Department would not be required to disclose the names of those who are the subject of unsubstantiated and unproven allegations. Further, if they were charged, due to their ages, I believe that records pertaining to them would be confidential. Relevant in that situation would be

§720.15 of the Criminal Procedure Law which, provides that:

> "1. When an accusatory instrument against an apparently eligible youth is filed with a court, the court, with the defendant's consent, must order that it be filed as a sealed instrument, though only with respect to the public.
>
> 2. When a youth is initially arraigned upon an accusatory instrument, such arraignment and all proceedings in the action thereafter may, in the discretion of the court and which the defendant's consent, be conducted in private.
>
> 3. The provisions of subdivisions one and two of this section requiring or authorizing the accusatory instrument filed against a youth to be sealed, and the arraignment and all proceedings in the action be conducted in private shall not apply in connection with a pending charge of committing any felony offense as defined in the penal law."

Based upon the foregoing, if an "apparently eligible youth" is charged with anything but a felony, the records and proceedings pertaining to the matter are generally confidential. If names could not be disclosed in that instance, I believe that an agency could justify a denial of access, based on considerations of privacy, to the names of suspects who have not become the subjects of judicial proceedings.

With respect to the names and addresses of the "victims" of the vandalism, the locations of the vandalism would, in my opinion, be accessible. It is likely that the results of the vandalism were visible to any passerby; there would be nothing secret about the events. The names of the victims would also likely be available due to their connection to the addresses. While the nature of certain crimes itself would divulge intimate personal information about a victim, i.e., a victim of a sex crime, disclosure of the identity of a victim of vandalism would disclose nothing intimate or personal. The act would constitute a crime involving property rather than contact with an individual.

With regard to incident reports generally, as well as similar records, the decision cited earlier, Gould, is instructive. That decision dealt with "complaint follow up reports" prepared by police officers, and it was held that a blanket 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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, i.e., provisions dealing with the protection of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief Kevin Nulty
Sgt. Douglas MacDonnell
Charlotte Madigan, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2805
FOIL AO-10398

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 30, 1997

Ms. Eileen Boylan
Attorney at Law
9485 Melinda Drive
Clarence, NY 14031

The staff of the Committee on 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. Boylan:

As you are aware, I have received your letter of September 22.

You have asked that I review the proposed Code of Ethics concerning the Town of Clarence for the purpose of offering advice regarding the extent to which it relates to the Freedom of Information and Open Meetings Laws.

In this regard, having reviewed the Code, there are several circumstances in which I offer a technical, legal response. Nevertheless, in many of those situations, while the proposed Code might in my view misuse a particular term, the impact of the use of that term might be the same as if the Freedom of Information Law and Open Meetings Law applied.

First, there are references in the proposed Code in several instances to confidentiality. 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, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter

or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

It is likely in my view that two the grounds for denial would be particularly relevant with respect to records maintained by a board of ethics.

Section 87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would result in an unwarranted invasion of personal privacy. Although the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Further, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

There may also be privacy considerations concerning persons other than employees who may be subjects of a board's inquiries. For instance, I believe that the name of a complainant or witness could be withheld in appropriate circumstances as an unwarranted invasion of personal privacy.

The other provision of relevance, §87(2)(g), states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Records prepared in conjunction with an inquiry or investigation would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like, I believe that they could be withheld. Factual information would in my view be available, except to the extent, under the circumstances, that disclosure would result in an unwarranted invasion of personal privacy.

In §19-11(b), reference is made to certain "documents considered confidential." Again, I do not believe that a town may render records "confidential." However, the kinds of records falling within the scope of the cited provision of the Code in most instances fall within one or more of the grounds for denial of access appearing in the Freedom of Information Law as described in the preceding commentary.

Second, as in the case of the Freedom of Information Law, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Further, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, §105(1) of the Law includes 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.

In sum, while the use of the term "confidentiality" may be technically inaccurate, the outcome may be equivalent to that when the Open Meetings Law applies. In like manner, as suggested earlier, would conjecture that much of the material characterized as confidential in the city provision could be withheld under the Freedom of Information Law.

Third, subdivision (d) of §19-11 states that:

> "It shall be a violation of this law to inspect or copy a publicly accessible document for any unlawful or commercial purpose including charitable or political solicitation."

In my opinion, if a record is available under the Freedom of Information Law, it would generally be available to any person, notwithstanding the intended use of the record, or one's status or interest [see e.g., Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1986) and M. Farbman & Sons v. NYC Health and Hospitals Corp., 62 NY 2d 75 (1984)]. The only instance in which the purpose for which a request is made bears upon rights of access would involve a request for a list of names and addresses. Section 89(2)(b)(iii) of the Freedom of Information Law provides that an unwarranted invasion of personal privacy includes the sale or release of a list of names and addresses if the list would be used for "commercial or fund-raising purposes." That situation in my view represents the only case in which the use of records may determine rights of access.

Lastly, §19-7(7) pertains to the Ethics Board and states in part that "A majority of the Ethics Board then appointed shall constitute a quorum." In my opinion, which is based upon §41 of the General Construction Law, a quorum must be majority of the total membership, notwithstanding vacancies. 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 dy. 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 one of the persons or officers disqualified from acting."

The language quoted above refers to "the whole number" reflecting the membership of an entity, and that phrase is further described to mean the total number, notwithstanding vacancies, absences or disqualifications, for example.

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-10399

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. John E. Fitzgerald, Jr.
City Attorney
447 Glen Street - P.O. Box 619
Glens Falls, NY 12801-0619

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

Dear Mr. Fitzgerald:

I have received your letter of September 25 in which you sought advice concerning the adoption of a policy concerning sexual harassment by the City of Glens Falls.

Specifically, you asked whether "written reports of an incident of alleged sexual harassment submitted by an employee to the Sexual Harassment Committee could be 'foiled' by an outside interested party." Questions have also arisen concerning whether such a report, "if not initially reachable, could be foiled after any disposition or disciplinary action by the city."

In this regard, I am unfamiliar with other municipalities' sexual harassment policies. However, in conjunction with the ensuing commentary, I believe that the kind of report to which you referred may be withheld in great measure, if not in its entirety.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 pertinent to an analysis of the issue.

First, I believe that a complaint or report an incident of alleged sexual harassment submitted by an employee to another City official or entity would constitute intra-agency material that falls within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

An allegation, in my view, could be withheld, for it would not consist of any of the kinds of information required to be disclosed pursuant to subparagraphs (i) through (iv) of §87(2)(g).

Second, also significant is §87(2)(b), which enables an agency to withhold records insofar as 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. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)].

Again, at the time of the preparation of a complaint or report, there would be neither any indication nor any finding that the claims made are more than unsubstantiated allegations.

I note, too, that the identity of the person making the complaint or allegation could also be withheld, in view of the nature of the allegation, on the ground that disclosure would result in an unwarranted invasion of that person's privacy.

Lastly, if there is a finding or determination that an employee has engaged in misconduct, it is reiterated that judicial determinations indicate that the identity of the employee, the charges that were sustained, and the penalty imposed must be made public. However, that determination is separate from the initial report in which the allegation was made. In my view, it is likely that the initial report would remain beyond the scope of public rights of access, irrespective of the final determination of the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10400

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. Michael Hough
93-R-0725
Sullivan Correctional Facility Annex
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. Hough:

I have received your undated letter, which reached this office on September 24. In brief, you complained that you had received no answer to a request for records maintained at your facility.

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 desigated by the Department of Correctional Services 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:tt

cc: Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1040

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. Alfred Cammisa
Tracker Archaeology Services
P.O. Box 2916
North Babylon, NY 11703

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

Dear Mr. Cammisa:

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

According to your letter, in July of this year, you requested records pertaining to "the Institute for Long Island Archaeology", which operates and maintains its laboratory within the Anthropology Department of SUNY/Stony Brook ("SUNY"). In response to the request, you were informed that the Institute is part of the Research Foundation and that the Foundation is a "private corporation" that is not subject to the Freedom of Information Law.

Attached to your letter is a description of the Institute, which indicates that it is "affiliated with the Department of Anthropology" at SUNY. Among its goals as described in a mission statement are:

> "Train SUNY-Stony Brook students (undergraduate and graduate) in archaeology. This training focuses on local archaeology and providing students with the skills and experience they need to obtain employment and research opportunities...
>
> Provide financial support for Stony Brook students and the Department of Anthropology."

From my perspective, the records of or pertaining to the Institute are subject to the Freedom of Information Law. In this regard, I offer the following comments.

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

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

While the Research Foundation may be a not-for-profit corporation, its corporate status, based on case law, is not determinative of whether it is an agency. In a decision in which the facts were in many ways analogous to those that you presented. It was held that a community college foundation, also a not-for-profit corporation, and its records are subject to the Freedom of Information Law in conjunction with the following:

> "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 Foundation, and, therefore, the Institute, would not exist but for its relationship with SUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the goals of the Institute, I believe that the Foundation and the Institute are subject to the Freedom of Information Law. To suggest otherwise would, in my opinion, exalt form over substance.

There is precedent indicating in other instances that a not-for-profit corporation may indeed 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].

Second, even if the Institute or the Foundation might not constitute an "agency", it appears that their records would nonetheless fall within the coverage of the Freedom of Information Law.

It is reiterated that the Freedom of Information Law pertains to agency records, and I direct your attention to §86(4) of the Law which 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 is "considerable crossover" in the activities of SUNY and the Foundation and its components.

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)].

In this instance, it appears that the documents in question are physically maintained by and in the control and custody of SUNY and its staff. If that is so, I believe that they constitute agency (i.e., SUNY) records. Further, in view of the purposes for which the Institute was formed, which are fully consistent with those of SUNY, it also appears that the documents in question are "kept, held, filed [or] produced...for an agency," SUNY. If that is so, again, I believe that they would constitute agency records.

In short, even if the Institute is not an agency, the information that you supplied suggests that the documents at issue are kept or held by or for SUNY and, therefore, are agency records.

Also pertinent is a determination rendered by the State's highest court in which 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, 87 NY 2d 410, 417 (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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, your request involves records relating to bids that have already been awarded. If that is so, it is unlikely in my view that nay of the grounds for denial could justifiably be asserted.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Matthews
David J. Bernstein
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10402

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Ms. Kathy Kelly
Holiday Inn
2 River Street
Cortland, NY 13045

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

Dear Ms. Kelly:

I have received your communication of September 26, as well as the related documentation.

You have sought advice concerning rights of access to "petitions regarding the requests for county occupancy tax allocations." You indicated that the County Budget Officer has released one petition to you and that when the controversy began, "they renamed the petitions 'worksheets' and are refusing to release them." The County Attorney denied access on the basis of §87(2)(g) 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.

As suggested in the denial, one of the grounds for withholding records clearly relates to the kind of document that is at issue. 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.

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.

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.

More recently, a decision involved ratings relating to requests for proposals (RFP's). The ratings were prepared by staff for the purpose of evaluating criteria used in analyzing the RFP's. Even though the ratings consisted essentially of numerical figures assigned to opinions, it was held that they must be disclosed. The Court was careful to point out, however, that "the subjective comments, opinions and recommendations" prepared by staff need not be disclosed [Professional Standards Review Council of America, Inc. v. NYS Department of Health, 193 AD 2d 937, 930-940 (1993)].

I am unaware of the contents or structure of the records in question. Insofar as they consist of narrative expressions of opinion or recommendations, I believe that they may be withheld. On the other hand, insofar as they consist of statistical or factual information, i.e., numbers and the like, judicial decisions indicate that those portions of the records must generally be disclosed.

Another provision that might be pertinent is §87(2)(c), which permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." I am unaware of whether the County is currently involved in the award of contracts or collective bargaining negotiations. If such negotiations are ongoing, it is possible that some aspects of the records, but in all likelihood not all aspects, could be withheld under §87(2)(c).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John T. Ryan, Jr., County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10493

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. George Rainey
95-A-0978
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. Rainey:

I have received your letter of September 28 and the correspondence attached to it.

According to the materials, you directed a request under the Freedom of Information Law to the Division of Criminal Justice Services on September 6, but you had not received a response as of the date of your letter to this office. You requested "[A] year by year account (relative to White, Black, Hispanic and other ethnicities) of drug sale convictions obtained via superior court informations, filed by the district attorney, in the County of Westchester, State of New York, from the year 1976 through the present year, 1997" (emphasis yours). You also indicated that you are indigent and asked that fees be waived.

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 relevant part that an agency is not required to create a record in response to a request. Therefore, if the Division does not maintain the kind statistical breakdown of data that you are seeking, it would not be required to prepare an "account" in order to satisfy your request.

If indeed the data sought has been prepared, I believe that it would be accessible, 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.

Second, the Freedom of Information Law makes no reference to fee waivers, and it has been

held that an agency may charge its established fees, even though an applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990).

Lastly, notwithstanding the foregoing, 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:tt

cc: Scott Sandman, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10404

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. E. Fred Marasa
97-B-0214
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. Marasa:

I have received your letter of September 23 in which you sought guidance concerning "the procedure to follow in seeking to obtain a complete copy of transcripts of the court minutes in [your] divorce" proceeding.

In this regard, 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."

In view of the foregoing, the courts and court records are not subject to the Freedom of Information Law.

The preceding commentary is not intended to suggest that court records are confidential Although the courts are not subject to the Freedom of Information Law, court records are generally

available under other provisions of law. While I am unaware of the specific procedure that may be involved or your ability to obtain records free or at a reduced rate due to your indigent status, the records of proceedings of matrimonial proceedings are available to a party or that person's attorney pursuant to §235 of the Domestic Relations Law. It is suggested that you review that provision.

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-1095

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. Timothy J. Taylor
94-B-2378
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. Taylor:

I have received your letter of September 19 in which you asked for an opinion regarding issues presented in a letter addressed to the Appellate Division, Fourth Department. In brief, that letter makes reference to "the fact that notall of the hearings in [your] criminal case were transcribed and recorded."

In this regard, the primary function of the Committee on Open Government involves providing advice concerning 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 on the foregoing, the Freedom of Information Law does not apply to the courts or court records. As such, the matter is beyond the jurisdiction of this office.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10406

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

October 31, 1997

Mr. Charles Lunderman
97-B-0701
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. Lunderman:

I have received your letter of September 24. You indicated that you sent a request on June 28 to the Jefferson County Clerk. Although receipt of the request was apparently acknowledged, you received no further response. In addition, you indicated that you are indigent and cannot pay for copies.

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 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.

Second, 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. If the records in question are maintained by the County Clerk in that person's capacity as court clerk, the Freedom of Information Law would not apply.

Lastly, if the Freedom of Information is applicable, I note that it has been held that an agency is not required to waive its established fees, even though a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

Lastly, again, when the Freedom of Information Law is applicable, it 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: JoAnn M. Wilder

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1407

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 3, 1997

Mr. Shri' Beyali Ignitus El
[redacted]

The staff of the Committee 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. Ignitus:

I have received your correspondence of October 19 in which you alleged that Ms. Catherine O'Hagan Wolfe, Clerk of the Appellate Division, First Department, has failed to comply with 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 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. This is not suggest that court records can routinely be withheld from the public. On the contrary, other provisions of law often confer broad rights of access to court records (see e.g., Judiciary Law, §255).

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:tt

cc: Hon. Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1408

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 4, 1997

Mr. Leroy Moore
85-D-0050
Box 338
Napanoch, NY 12458

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

Dear Mr. Moore:

I have received your letter of September 28, as well as the correspondence attached to it. You have sought assistance in obtaining information from the New York City Board of Education relating to your employment with that agency in 1973.

You wrote that it is your understanding that payroll records cannot be destroyed. I am not familiar with the particulars of the requirements pertaining to the retention and disposal of records. While there may be a requirement that some payroll records concerning one's employment as a public employee be retained permanently, I would conjecture that there is no such requirement pertaining to all payroll related records.

I note in this regard that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in relevant 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.

As it applies to existing records, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as the records in question are maintained by the Board of Education and can be located, I believe that they would be accessible, for none of the grounds for denial would be pertinent.

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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Janet Oxendine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1409

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 4, 1997

Mr. Giovanni Nelson
97-A-4781
Marcy Correctional Facility
P.O. Box 3600
Marcy, NY 13403-3600

Dear Mr. Nelson:

I have received your letter of November 1 in which you appealed a constructive denial of access to records that you requested from the Kings County Probation Department. In addition, you asked that all fees be waived.

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

It is also noted that the Freedom of Information Law does not include any provision relating to the waiver of fees. Further, it has been held that an agency may charge its established fees, even though a request may be made by an indigent inmate [see 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-1041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Ms. Patricia Minton
[redacted]

The staff of the Committee on 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. Minton:

I have received your letter of September 30 in which you questioned a "slow...turnaround time" on the part of the Department of Correctional Services in dealing with your request for records.

In this regard, I offer the following comments.

First, for future reference, according to the regulations promulgated by the Department of Correctional Services, requests for records maintained at a correctional facility should be made to the facility superintendent or his designee; requests for records kept at the Department's Albany offices may be made to Mr. Mark Shepard, 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Mr. William Carnfield
Revolutionary Designs, Inc.
263 Verbeck Ave
Schaghticoke, NY 12154

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

Dear Mr. Carnfield:

I have received your letter of October 2 in which you described a series of difficulties in attempting to obtain records from the Town of Stillwater.

You referred initially to your inability to obtain "information pertaining to either copies of or a list of the law suits that the Town is involved in at the present time." In this regard, I believe that the public has the ability to know of litigation in which a government is a party. 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.

It is possible that some records pertaining to litigation fall within the scope of the attorney-client privilege. Here I point out that the first basis for denial in the Freedom of Information Law, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." 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, and Pennock v. Lane, supra 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 or her 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 found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty.,

NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, material prepared for litigation may be confidential under §3101 of the Civil Practice Law and Rules.

Nevertheless, legal papers filed against the Town would not have been prepared by the Town, its officials or its agents. As such, in my opinion, those papers would not be subject to the attorney-client privilege. For similar reasons, the answers prepared by the Town in response to a petition or legal papers, once served upon a plaintiff or legal adversary, would be outside the scope of the attorney-client privilege. In general, when those papers are made available to the Town's adversary, I believe that they become a matter of public record. Moreover, although the Freedom of Information Law does not apply to the courts and court records, such records are generally available under other provisions of law [see e.g., Judiciary Law, §255]. From my perspective, if the records sought are publicly available from a court, they would also be available under the Freedom of Information Law from the Town.

In addition, §50-f of the General Municipal Law provides specific direction concerning the maintenance of certain records pertaining to litigation. That provision states in relevant part that:

> "Wherever a notice of claim is required by section fifty-e of this chapter as a condition precedent to the commencement of an action or proceeding against a municipal corporation or any authority or commission heretofore or hereafter continued or created by the public authorities law, or any officer, appointee or employee thereof, every such municipal corporation and every such authority or commission shall make and keep a record, numbered consecutively and indexed alphabetically according to the name of the claimant, of each notice of claim filed in compliance with such requirement and of the disposition of the claim so noticed...The record shall be made and kept by an officer or employee designated for that purpose by the by the governing body of such municipal corporation or of such authority or commission...The record of each claim shall be preserved for a period of five years after the date of the final disposition thereof."

Second, you referred to requests for building permits and certificates of occupancy, and you were informed that those records were not kept at Town offices, a response that you "found to be very strange." From my perspective, if the records in question exist, and I believe that they must, they would be available, irrespective of where they might be kept.

The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to include:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets,

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

The Court of Appeals, the State's highest court, has construed the definition as broadly as its specific language suggests. The first such decision that dealt squarely with the scope of the term "record" involved documents pertaining to a lottery sponsored by a fire department. Although the agency contended that the documents did not pertain to the performance of its official duties, i.e., fighting fires, but rather to a "nongovernmental" activity, the Court rejected the claim of a "governmental versus nongovernmental dichotomy" [see Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581 (1980)] and found that the documents constituted "records" subject to rights of access granted by the Law. Moreover, the Court determined that:

> "The statutory definition of 'record' makes nothing turn on the purpose for which it relates. This conclusion accords with the spirit as well as the letter of the statute. For not only are the expanding boundaries of governmental activity increasingly difficult to draw, but in perception, if not in actuality, there is bound to be considerable crossover between governmental and nongovernmental activities, especially where both are carried on by the same person or persons" (id.).

In a decision involving records prepared by corporate boards furnished voluntarily to a state agency, the Court of Appeals reversed a finding that the documents were not "records," thereby rejecting a claim that the documents "were the private property of the intervenors, voluntarily put in the respondents' 'custody' for convenience under a promise of confidentiality" [Washington Post v. Insurance Department, 61 NY 2d 557, 564 (1984)]. Once again, the Court relied upon the definition of "record" and reiterated that the purpose for which a document was prepared or the function to which it relates are irrelevant. Moreover, the decision indicated that "When the plain language of the statute is precise and unambiguous, it is determinative" (id. at 565).

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, 417 (1995)]. Therefore, if a document is kept for an agency, such as the Town, it constitutes an agency record, even if it is not in the physical possession of the agency.

Lastly, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government topromulgate 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 Town Board, and the governing body of a public corporation is theTown Board, and 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."

More often than not, the records access officer is the town clerk, for the town clerk is the legal custodian of all town records (see Town Law, §30).

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1042

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Mr. Jabbar Collins
95-A-2646
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. Collins:

I have received your letter of September 27 in which you raised three questions relating to the Freedom of Information Law.

The first relates to the sufficiency of a certification, and you asked whether a certification may be "unsworn." From my perspective, there is no legal requirement that a certification be prepared in the form a sworn affidavit. However, it is noted 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)]. From my perspective, the certification attached to your letter was adequate.

Second, you asked whether the Legal Aid Society of New York City is covered by the Freedom of Information Law. As you are aware, the Freedom of Information Law is applicable to agencies. Section 86(3) of that statute defines the term "agency" to include governmental entities. The Legal Aid Society of New York City is a not-for-profit corporation that is separate and distinct from government. As such, I do not believe that it is an agency required to comply with the Freedom of Information Law.

Lastly, you asked whether 9 NYCRR §8000.5 promulgated by the Division of Parole may be characterized as a "statute" that specifically exempts parole records from disclosure under §87(2)(a) of the Freedom of Information Law. In this regard, the Division's regulations pertain to disclosure

of case records maintained by the Division. That provision confers limited rights of access to case records and states in paragraph (2)(ii) that "any record of the division of parole not made available pursuant to this section shall not be released, except by the chairman upon good cause shown." Section 8008.2(a) of the regulations defines the phrase "case record" to include: "...any memorandum, document or other writing pertaining to a present or former inmate, parolee, conditional releasee or other releasee, and maintained pursuant to sections 259-a(1)-(3) and 259-c(3) of the Executive Law."

The statutes and regulations that preceded those cited above and which pertained to the Board of Parole when it was part of the Department of Correctional Services included essentially the same direction. However, insofar as the regulations conflicted with the Freedom of Information Law, they were found more than twenty years ago to be invalid. Specifically, in Zuckerman v. Board of Parole, the court found that:

> "Section 221 of the Correction Law, entitled 'Records', requires the commissioner to keep complete records 'of every person released on parole or conditional release'. The statute also requires the commissioner to make rules as to the privacy of these records. Under the authority of these two statutory mandates (7 NYCRR 5.1 [a], the following regulation was promulgated: 'Department records. Any department record not otherwise made available by rule or regulation of the department shall be confidential for the sole use of the department.' (7 NYCRR 5.10). The minutes of board meetings are *not* 'made available by rule or regulation' and, therefore, Special Term held that the minutes are private.
>
> "It would seem clear that section 29 of the Correction Law exempts from disclosure those specifically enumerated statistics and, further, that section 221 exempts those records dealing with parolees. Minutes of Parole Board meetings are not *specifically* exempted by either of these statutes. Applying the rule of *ejusdem generis* (McKinney's Cons Laws of NY, Book 1, Statutes, §239, subd b), the nonexclusive list contained in subdivision 1 of section 29 of the Correction Law could not be construed to include those minutes.
>
> "It would therefore appear that this regulation, as applied to the minutes of Parole Board meetings, is invalid on two grounds. As shown above, the regulation makes *all* records private initially and is not limited solely to those categories of information specifically set forth or included by reasonable implication in the statutes. Furthermore, by making *all* records initially confidential in a broad and sweeping manner, the regulation violates the clear intention of the Freedom of Information Law (see Public Officers Law, §85). It is established as a general proposition that a regulation cannot be inconsistent with a statutory scheme (see e.g. *Matter of Broadacres*

> *Skilled Nursing Facility v. Ingraham*, 51 AD2d 243, 245-246)...This conclusion is further reinforced by the general rule that public disclosure laws are to be liberally construed..." [53 AD 2d 405, 407(1976); emphasis supplied by the court; see also Morris v. Martin, 440 NYS 2d 1026 (1982)].

In sum, based upon the direction provided judicially, I do not believe that the regulations can be equated with a statute or that they serve to enable the Division to withhold records that would otherwise 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: Anthony D'Angelo
Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Mr. Steven Dickman
95-R-1554
Groveland Correctional Facility Annex
A-2 #15T
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. Dickman:

I have received your letter of September 28 in which you requested an advisory opinion concerning the ability to gain access to:

> "Each and every Directive, Memorandum, or other writing which defines the standards for a parole officer in connection with approving a residence for a "releasee" namely an inmate who has been granted parole release."

From my perspective, the kinds of records that you described, insofar as they exist, would likely be available. In this regard, I offer the following comments.

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

Pertinent to the issue is §87(2)(g), which enables an agency to withhold records that are:

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

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. In my view, the kinds of records that you described would be reflective of either instructions to staff that affect the public that would be available under §87(2)(g)(ii) or final agency policy available under §87(2)(g)(iii).

Second, notwithstanding the foregoing, as inferred earlier, the Freedom of Information Law pertains to existing records. Section 89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if the Division of Parole does not maintain records that contain the information sought, it would not be obliged to prepare new records on your behalf.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Mr. Walter E. Sawyer
[redacted]

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

Dear Mr. Sawyer:

I have received your letter of October 2 in which you questioned the propriety of a denial of your request for a record maintained by the North Colonie School District.

By way of brief background, you have encouraged the District "to change high school course prerequisites in such a way that they can no longer be used to discriminate against certain children." You also indicated that the District "has in fact made changes to approximately five course[s]; these changes are put into effect as they are made and noted in red in course guides available to students in the high school counseling center." Nevertheless, when you requested the a copy of the revised course guide containing all of the changes that had been made by October 15, the request was denied. In rejecting your request, the District's attorney referred to your characterization of the record sought as the "draft program guide" and determined that the record could be withheld because it does not represent "final agency policy." You also noted that in the letter of denial, you were not informed of any right to appeal.

From my perspective, insofar as the District has implemented changes, a record so indicating must be made available, notwithstanding the characterization of the record as a "draft." 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.

In my view, the provision cited by the attorney, §87(2)(g), is determinative of rights of access.

It states that an agency my withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions 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 your assertions are accurate, insofar as the contents of the draft have been implemented by means of their publication in the course guide, I believe that they have become the policy of the District and, therefore, must be disclosed. To continue to deny access despite the fact that students must, according to the course guide, adhere to certain new criteria would represent the placement of form over substance. In short, to the extent that the draft has been implemented and must be followed or is relied upon, it constitutes the policy of the District and must, in my view, be disclosed under §87(2)(g)(iii).

Second, a right to appeal a denial of access to records is conferred by §89(4)(a) of the Freedom of Information Law, which provides in relevant part that:

> "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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: David W. Morris, Esq.
Thomas J. Rybaltowski, Public Information Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1014/5

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 5, 1997

Mr. James P. Drohan
Donoghue, Thomas, Auslander & Drohan
Attorneys and Counselors at Law
Summit Corporate Park
2 Summit Court
Fishkill, NY 12524

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

Dear Mr. Drohan:

I have received your letter of September 30 in which you indicated that your firm represents the Valley Central School District.

Having received copies of correspondence between the District, Walter Greening, myself and others, you asked whether:

> "...the following guidelines can be distilled:
>
> "1. School districts (such as Valley Central) '...have a responsibility to ensure that the custody and integrity of their records is maintained.' (See, Arts and Cultural Affairs Law §57.25). Letter of December 26, 1995;
>
> 2. It is 'reasonable' for Valley Central to continue its '...procedure under which an appointment is made in advance of inspection...so long as the District offers a time or times to review records promptly and in a manner consistent with the intention of the Freedom of Information Law.' Id.;
>
> 3. Once a '...mutually agreeable date and time can be set for the inspection of records, the taxpayer would have the right to inspect them the remainder of that day's business hours.' Id.;

> 4. In light of '1-3' above, it would be reasonable for the District, in determining a mutually agreeable time for the appointment, to predicate that determination upon the availability of a Board employee so that the Board does not abdicate its responsibility as custodian of the records."

In this regard, I offer the following comments.

First, with respect to item 3, merely for purposes of clarity, I note that an applicant for records, based upon the decision rendered in Murtha v. Leonard [620 NYS 2d 101 (1994), 210 AD 2d 411] and the regulations promulgated by the Committee on Open Government [§1401.4(a)], may inspect records on a mutually agreeable date during the entirety of an agency's regular business hours.

Second, with respect to item 4, in view of the history between the District and Mr. Greening in relation to his requests, I would not agree that the District could condition or predicate a determination to enable an applicant to review records solely upon the availability of a District employee who can be present to guarantee the District's custody of records is maintained. As stated in the opinion rendered on July 24 of this year: "there is nothing in the Freedom of Information Law that requires that an agency employee be present while a member of the public inspects records. Similarly, I know of no provision that requires the presence of a public employee as a condition precedent to the review of records." I am not suggesting that the Board cannot attempt to schedule a time for inspection in accordance with its ability to assign an employee to ensure continued custody of records; I am suggesting, however, that the District, in my view, could not limit the public's ability to inspect records based upon its inability to assign staff to perform the function in question on an ongoing or recurring basis. In United Federation of Teachers v. New York City Health and Hospitals Corp. [428 NYS 823 (1980)], it was determined that a shortage of staff did not constitute a valid defense for denying a request, for acceptance of such a defense would "thwart the very purpose of the Freedom of Information Law and make possible the circumvention of the public policy embodied in the act" (id., 824). It is also noted that the Court of Appeals has held that compliance with the Freedom of Information Law is an obligation of government, and "not a gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

To be sure, the District clearly has an interest in maintaining the integrity of its records, and I believe that it is within the District's authority to station an employee with an applicant who is inspecting records. However, if the District simply does not have the staff to carry out that function, the absence of staff, in my opinion, would not justify a denial of access or an unreasonable delay in disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Walter Greening

ND

10416

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 6, 1997

Mr. Bruce T. Reiter
05549-052
A-1, P.O. Box 1000
Montgomery, PA 17752

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

Dear Mr. Reiter:

I have received your letter of October 1. Attached to it is descriptive literature concerning a certain kind of therapy offered by the pastor of a church. Since the pastor listed certain hospitals and agencies as references, you asked whether you can obtain under the Freedom of Information Law contracts with the pastor and "all certifications provided by" the pastor.

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, records maintained by entities of state and local government fall within the scope of the Freedom of Information Law. A private organization, whether it is a hospital, a church or a not-for-profit corporation, would not be subject to that law.

If, however, a person or entity has a contractual relationship with an agency, presumably the contract would be available from the agency pursuant to the Freedom of Information Law. Similarly, if an individual is licensed or certified by an agency, a record of the license or certification would be available from the agency that conferred the license or certification.

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-2007
FOIL-AO-1048

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 6, 1997

Mr. Isidore Gerber
[redacted]

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

Dear Mr. Gerber:

I have received your letter of September 29. You referred to documentation sent to me in July relating to a meeting held on July 6 by the Board of Education of the Liberty Central School District and asked that I "state [my] position on this matter."

The correspondence received consists of a request made under the Freedom of Information Law to obtain "the authorization " for the meeting in question, "whether it was a special or executive session", the purpose of the meeting, the names of those who attended and any decisions that might have been made. Also received was a copy of a response by Anthony C. Pagnucco, who listed those who attended and indicated that a committee of the Board met "to discuss Dr. Richman's pending contract", that he was unaware of any authorization for the meeting, and that no minutes were kept.

From my perspective, it is likely that Mr. Pagnucco's response satisfied the Freedom of Information Law, for it appears that no records exist regarding the meeting in question. Further, I know of no provision that would require that written authorization be prepared as a condition precedent to conducting a meeting.

I note, however, that a meeting of a committee of the Board in my view would have been subject to the requirements of the Open Meetings Law.

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. The phrase "public body" is defined in section 102(2) of the Open Meetings Law 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 of "public body" enacted in 1976 made reference to entities that "transact" public business, the current definition as amended in 1979 makes reference to entities that "conduct" public business and added specific reference to "committees, subcommittees and similar bodies" of a public body.

In view of the definition of "public body", I believe that any entity consisting of two or more members of a public body would fall within the requirements of the Open Meetings Law [see also Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Therefore, a standing committee of Board members in my view constitutes a public body subject to the Open Meetings Law that is separate and distinct from the Board of Education. 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, section 41). As such, in the case of a committee consisting of four, for example, a quorum would be three.

When a committee intends to gather to discuss public business, I believe that it is required to provide notice in accordance with §104 of the Open Meetings Law. Further, if a quorum of the committee is present for that purpose, such a gathering would in my view constitute a meeting of the committee that must be conducted in accordance with the Open Meetings Law.

If members of the Board of Education other than members of a committee attend a meeting of a committee, I do not believe that their presence would necessarily transform the gathering into a meeting of the Board. If those others merely attend, in essence as members of the public, and do not participate in a way different from members of the public, the gathering would remain a meeting of the committee rather than the Board. In the context of the matter at hand, I am unaware of the number of Board members who attended or whether all Board members who did attend were present at the executive session. If a majority of the Board was present, and if each of those individuals was permitted to join the executive session, to the exclusion of others, it is likely in my view that a court would determine that the gathering was, in substance, a meeting of the Board.

It appears that the discussion by the committee could have been held during an executive session pursuant to §105(1)(f) of the Open Meetings Law. That provision permits a public body to enter into executive session to discuss:

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

Lastly, with respect to the absence of minutes, I note that 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 during meetings, technically I do not believe that minutes must be prepared.

As you requested, 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

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent of Schools

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1014/19

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 6, 1997

Mr. Milton Jones
96-A-6680
S.S.C.F.
354 Hunter Street
Ossining, NY 10562-5442

Dear Mr. Jones:

I have received your letter of November 1 in which you requested information concerning a witness in your case.

In this regard, 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 does not maintain records generally, and I cannot provide the records that you requested because this office does not possess them. Nevertheless, I offer the following comments.

First, the docket numbers that you included involve court records. In this regard, I note that the courts and court records are not subject to the Freedom of Information Law. They are, however, frequently available under other provisions of law (see e.g., Judiciary Law, §255). As such, a request for court records should 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.

Second, with regard to "rap sheets" or criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1042O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 6, 1997

Mr. Nathan McBride
95-A-6015
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. McBride:

I have received your letter of September 27. You have sought assistance in obtaining records from the Office of the New York County District Attorney. That agency denied your request on the ground that the records had been made available through your attorney.

In this regard, in Moore v. Santucci [151 AD 2d 677 (1989)], it was held 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 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:tt
cc: Maureen O'Connor, Assistant District Attorney
Gary J. Galperin, Chief, Special Projects Bureau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1042

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 7, 1997

Mr. Eddie James Ward
83-A-3894
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070

Dear Mr. Ward:

I have received your letter of October 2 in which you sought assistance concerning an unanswered appeal made under the Freedom of Information Law for records of the Division of Parole.

In this regard, having contacted the Division to learn more of the matter, I was informed that a determination of your appeal was rendered on September 29.

For future reference, I note that §89(4)(a) of the Freedom of Information Law requires that an agency determine an appeal within ten business days of the receipt of the 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."

In addition, since you requested a waiver or reduction of fees, I point out that the federal Freedom of Information Act includes provisions concerning fee waivers. The New York Freedom of Information Law, however, includes no such provisions. Further, it has been held that an agency may charge its established fees, even though the applicant is an indigent inmate [see Whitehead v. Morgenthau, 550 NYS2d 518 (1990)].

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10422

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 7, 1997

Ms. Claudia Cinquanti
[redacted]

The staff of the Committee on 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. Cinquanti:

I have received your letter of September 30, as well as the materials attached to it. You have questioned whether Tompkins County properly denied access to an appraisal that was later disclosed to you.

Having reviewed the correspondence, it appears that many aspects of the appraisal could justifiably have been withheld. 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 is a statute that may require agencies to disclose existing records. Similarly, §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. In several elements of your requests, you sought information by asking questions. In short, an agency is not required to answer questions. Again, an agency's obligation is to disclose existing records.

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

Section 87(2)(c) permits an agency to withhold records to the extent that disclosure would "impair present or imminent contract awards or collective bargaining negotiations." As it relates to the impairment of "contract awards", §87(2)(c) is, in my opinion, generally cited and applicable in two types of circumstances.

One involves a situation in which an agency is involved in the process of seeking bids or proposals concerning the purchase of goods and services. If, for example, an agency seeking bids or proposals has received a number of bids, but the deadline for their submission has not been reached, premature disclosure for the bids to another possible submitter might provide that person or firm with an unfair advantage vis a vis those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, after the deadline for submission of bids or proposals are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2d 951, 430 NYS 2d 196, 198 (1980)].

The other situation in which §87(2)(c) has successfully been asserted to withhold records pertains to real property transactions where appraisals in possession of an agency were requested prior to the consummation of a transaction. Again, when premature disclosure would have enabled the public to know the prices the agency sought, thereby potentially precluding the agency from receiving an optimal price, an agency's denial was upheld [see Murray v. Troy Urban Renewal Agency, 56 NY 2d 888 (1982)].

In both of the kinds of the situations described above, there is an inequality of knowledge. More specifically, in the bid situation, the person who seeks bids prior to the deadline for their submission is presumably unaware of the content of the bids that have already been submitted; in the appraisal situation, the person seeking that record is unfamiliar with its contents. As suggested above, premature disclosure of bids would enable a potential bidder to gain knowledge in a manner unfair to other bidders and possibly to the detriment of an agency and, therefore, the public. Disclosure of an appraisal would provide knowledge to the recipient that might effectively prevent an agency from engaging in an agreement that is most beneficial to taxpayers.

When there is no inequality of knowledge between or among the parties to negotiations, or if records have been shared or exchanged by the parties, it is questionable and difficult to envision how disclosure would "impair present or imminent contract awards", (see Community Board 7 of Borough of Manhattan v. Schaffer, Supreme Court, New York County, NYLJ, March 20, 1991). Further, if an agreement has been reached or a lease or contract has been signed, presumably negotiations have ended, and any impairment that might have existed prior to the consummation of an agreement would essentially have disappeared.

The other provision of relevance is §87(2)(g), which pertains to the authority to withhold "inter-agency or intra-agency materials." If an appraisal or survey is prepared by agency officials, it could be characterized as "intra-agency material." Further, the Court of Appeals has held that appraisals and other reports prepared by consultants retained by agencies may also be considered as intra-agency materials subject to the provisions of §87(2)(g) [see Xerox Corporation v. Town of Webster, 65 NY 2d 131 (1985)].

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

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

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

It has been held that factual information appearing in narrative form, as well as those portions appearing in numerical or tabular form, is available under §87(2)(g)(i). For instance, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v. Yudelson, 68 A2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert it into an expression of opinion' (Matter of Polansky v. Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial [i.e., §87(2)(c)] could properly be asserted. In the context of your inquiry, if an appraisal includes reference to comparable properties and their assessed value, that kind of material would, in my view, consist of statistical or factual information.

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:tt

cc: Scott Heyman, County Administrator
Stuart Stein, Board of Representatives

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 7, 1997

Ms. Linda Pew
[redacted]

The staff of the Committee on 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. Pew:

I have received your letter of October 3 in which you sought assistance in obtaining certain records from the Town of Brookhaven.

As I understand the matter, on previous occasions, you had received copies of "budget formance reports." However, in the case of your most recent request, you were informed by the wn's Freedom of Information Officer that the reports that you requested "are no longer in print." owing your appeal, the Town Clerk wrote that he had investigated the matter and was informed he Commissioner of Finance that the "trial balance and budget performance reports are working rs used to prepare an annual financial report." On that basis, he upheld the initial denial, stating "[w]ork papers and work products, as well as internal documents are not subject to FOIL."

While some elements of work papers and similar materials might be beyond the scope of rights cess, for the following reasons, I believe that the records sought must be disclosed in great re, if not their entirety. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records. Section 86(4) of that 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, whether documentation is characterized as a draft or as "work papers" is not determinative of rights of access; the documentation would constitute a "record" that falls within the framework 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.

Pertinent to an analysis of the issue is a provision that deals with internal documents, such as work papers or work products. While that provision represents a potential basis for a denial of access, due to its structure, it frequently requires substantial disclosure. Due to the nature of the records sought, I believe that would be so in the context of your request.

Specifically, §87 (2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

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

One of the contentions offered by the New York City Police Department in a recent decision rendered by the State's highest court was that certain reports could be withheld because they are not final and because they relate to incidents for which no final determination had been made. The Court of Appeals rejected that finding and 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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that the records are work papers, are internal, or do not represent any final outcome or determination would not represent an end of an analysis of rights of access or an agency's obligation to review the entirety of their contents.

The Court also dealt with the issue of what constitutes "factual data" that must be disclosed under §87(2)(g)(i). In its consideration of the matter, the Court found that:

> "...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" (id., 276-277)."

Based on the description of the records sought, I would conjecture that they consist largely of "statistical or factual tabulations or data" that must be disclosed, even though they may be internal work papers.

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: Hon. Stanley Allan
Carlo Fumai, Commissioner
R. Russello, Executive Assistance

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC 1884

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 7, 1997

Mr. Larry G. Mack
Cattaraugus County Legislator
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 of October 1 in which you sought guidance concerning a request made under the Freedom of Information Law to Cattaraugus County.

As I understand the matter, a County employee was convicted of DWI and serves time on weekends at the County jail. Your request involves rumors or allegations that he was "caught sneaking contraband into the jail." From my perspective, if the person in question has not been arrested, charged or convicted in relation to the allegations, records pertaining to the matter may be withheld. 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. It is likely that three of the grounds for denial would be pertinent to an analysis of rights of access.

First and perhaps most importantly, §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, if allegations or rumors regarding misconduct on the part of an individual are unsubstantiated, an agency may deny access to protect his or her privacy. If and when an individual is arraigned or found to have engaged in misconduct or guilt, certainly his or her identity would be public.

Second, §87(2)(e) permits an agency to withhold records 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."

It is possible that disclosure of the records in question would interfere with an investigation, deprive a person of a right to fair trial or perhaps identify a confidential source. To that extent, §87(2)(e) would also serve as a basis for a denial.

The remaining provision of significance, that cited in response to your appeal, §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.

In sum, to the extent that any of the grounds for denial described above would be applicable, I believe that the request could properly have been denied.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Furman
County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 7, 1997

Mr. Matthew Matagrano
[redacted]

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

Dear Mr. Matagrano:

I have received your letter of September 30 in which you sought guidance concerning your ability to obtain records pertaining to yourself from child care agencies as well as the Office of Child Abuse and Maltreatment. You indicated that you were a victim in the context of a request for records.

Although the Freedom of Information Law pertains to government records generally, I do not believe that it would be pertinent in the instances 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.

Relevant is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." The kinds of record to which you referred would be exempted from disclosure by statute. In other words, the public would ordinarily not have the ability to obtain those records. However, in the statutes that I believe would be relevant, there are provisions which authorize disclosure under certain circumstances.

With regard to records maintained by a children's or youth facility, whether public or private, it appears that the applicable statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

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

Based on the foregoing, I do not believe that records maintained by entities having duties relating to the classes of children described at the beginning of §372 of the Social Services Law can be disclosed, unless authorization to disclose is conferred by a court, by the Department of Social Services or, where appropriate, by the Division for Youth.

Under the circumstances, it is suggested that you write to the appropriate social services agencies, explain your situation, and seek authorization to disclose as described in §372 of the Social Services Law.

Section 422 of the Social Services Law is the 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. I am not an expert with respect to the provisions of §422. As such, I am unaware of the extent to when you may have the ability to obtain records pertaining to yourself under that section. It is suggested that guidance on the subject can be acquired by calling 1-800-342-3720. Staff at that number are experts involving access to child abuse records.

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- 1920

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Raymond Thom
96-A-5985
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. Thom:

I have received your letter of October 2. In brief, you sought assistance in relation to a request for records of the New York City Police Department that was not answered.

In this regard, the Freedom of Information Law provide 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

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

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

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1427

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. James McCoy
96-A-3717 E 262
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. McCoy:

I have received your letter of October 2 in which you sought assistance in obtaining a record from the Office of the Rockland County District Attorney. As I understand the matter, the staff of that agency indicated that additional information is needed to locate the record of your interest.

In this regard, it appears that the issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. In considering that standard, the State's highest court has found that requested records need not be "specifically designated", that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the

> requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency']" (id. at 250).

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

In the context of your request, I am unaware of the means by which the Office of the District Attorney maintains the kind of record that you are seeking.

It is noted that when a request reasonably describes a record and an agency indicates that it does not maintain or cannot locate the 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, if indeed the Office of the District Attorney cannot locate the record, it is likely, since it was submitted into evidence, it would likely be maintained by the court in which the proceeding was conducted. Although the courts and court records are not subject to the Freedom of Information Law, court records are generally accessible under other laws (see e.g., Judiciary Law §255).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1428

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Ruben Rivera
[redacted]

Dear Mr. Rivera:

I have received your recent letter in which you asked for forms or information that might aid you in seeking files pertaining to police officers. You referred to records indicating, for example, an officer's years of service, the duties performed during his or her employment, training, etc.

In this regard, there is nothing in the Freedom of Information Law that refers to or requires that a particular form be completed when requesting records. Under §89(3) of the Law, an agency may require that a request be made in writing, and that provision also requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, an applicant should provide sufficient detail to enable agency staff to locate and identify the records sought. Enclosed for your review is "Your Right to Know", which summarizes the Freedom of Information Law and includes a sample letter of request.

It is also 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." The records access officer has the duty of coordinating the agency's response to requests, and a request should be directed to the records access officer at the agency that maintains the records of your interest.

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

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 for records indicating the days and dates of sick leave claimed by a particular police officer, the Court granted access, stating 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1099

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Peter Ko
90-A-1730
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. Ko:

I have received your letter of October 5 in which you sought assistance concerning your request for records of the New York City Police Department.

According to your letter, you requested records in March, appealed a denial of access to the records in May, and in August, you were informed by the Department's appeals officer that she had "overturned the negative determination" and directed the records access officer to search for the records and disclose them to the extent required by law. Having received no additional reply, you "sent a reminder" to the Department in September, but you had received no further response as of the date of your letter to this office.

In this regard, based on a literal reading of the Freedom of Information Law, I believe that the Department should have disclosed the records to you when the appeal was determined. Specifically, §89(4)(a), which pertains to the right to appeal a denial of access to records, states in relevant part that:

> "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 two options: to make the records available, or to fully explain in writing the reasons for further denial. It is noted that a failure to respond to an appeal in a manner consistent with the statute has been determined to constitute a constructive denial of an appeal, and that in that circumstance, the applicant has exhausted his administrative remedies and may initiate an Article 78 proceeding to attempt to compel disclosure [see Floyd v. McGuire, 87 AD 2d 389, appeal dismissed, 57 NY 2d 774 (1982)].

In an effort to negate any necessity to engage in litigation and to attempt to encourage compliance, a copy of this response will be forwarded to the appeals officer, Ms. Susan Petito.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-909
FOIL-AO-1030

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Ms. Marijane Knudsen-Hunlock
[redacted]

The staff of the Committee on 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. Knudsen-Hunlock:

I have received your letters of October 2 and October 10 in which you expressed concern with regard to the implementation of the Freedom of Information and Open Meetings Laws by the Accord Fire District and its Board of Commissioners.

You have asked that the Committee on Open Government "conduct an investigation" based on a description of your difficulties, which are as follows:

> "I requested copies of the minutes of the Board of Fire Commissioner meetings from August, 1995 - August, 1997. I have concerns regarding the circumstances in which the Board of Fire Commissioners went into 'executive session'. From the copies of the minutes I received, it appears this board motioned to enter executive session whenever they wanted the public excluded. Although I did Freedom of Information request this fire district, I was not given copies of the summary of any executive sessions. Additionally, it is my belief many of the motions made for the board to enter into executive session were not in compliance with the Open Meetings Law."

It is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information and Open Meetings Laws. The Committee has neither the jurisdiction nor the resources to "conduct an investigation." In the following commentary, however, I will offer an opinion and guidance pertaining to the issues that you have raised. While opinions rendered by this office are not binding, it is my hope that they are educational and persuasive.

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

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

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

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

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

Second, as a general matter, the 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.

Third, 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.

Insofar as a discussion involves a particular person in relation to one or more of the subjects described in §105(1)(f), an executive session may justifiably be held. On the other hand, to the extent that issues involve consideration or review of budget matters, the allocation of public monies, policies or practices, or the functions of an office or certain positions, irrespective of who might hold those positions, I do not believe that there would be a basis for discussion in executive session. Even though those kinds of subjects might be reflective of "personnel" issues, they would not focus on any particular person and, therefore, in my opinion, should be discussed in public.

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 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, Supreme Court, Ulster Cty., August 5, 1993; modified, 207 AD 2d 55 (1994); reversed on other grounds, 87 NYS 2d 124 (1995)].

Lastly, with respect to minutes of meetings, I direction your attention to §106 of the Open Meetings Law, which provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that, as a general rule, a public body may take action during a properly convened executive session [see Open Meetings Law, §105(1)]. If action is taken during an executive session, minutes reflective of the action, the date and the vote must be recorded in minutes pursuant to §106(2) of the Law. If no action is taken, there is no requirement that minutes of the executive session be prepared.

It is noted that minutes of executive sessions need not include information that may be withheld under the Freedom of Information Law. From my perspective, even when a public body makes a final determination during an executive session, that determination will, in most instances, be public. For example, although a discussion to hire or fire a particular employee could clearly be discussed during an executive session [see Open Meetings Law, §105(1)(f), a determination to hire or fire that person would be recorded in minutes and would be available to the public under the Freedom of Information Law. On other hand, if a public body votes to initiate a disciplinary proceeding against a public employee, minutes reflective of its action would not have include reference to or identify the person, for the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted personal privacy [see Freedom of Information Law, §87(2)(b)].

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-1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Dale A. Desnoyers
Public Defender
Office of Columbia County Public Defender
610 State Street
Hudson, NY 12534

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

Dear Mr. Desnoyers:

I have received your letter of October 6 and the materials attached to it. You referred to three requests made recently under the Freedom of Information Law to the Columbia County Sheriff. The Sheriff wrote in response that: "It is our policy and will always be our policy to deny any requests by foil pertaining to an open case before convictions." You have asked whether the "blanket denial policy regarding disclosure [is] violative of the FOIL statute", and whether it is appropriate that the Sheriff respond initially to a request and also be designated to decide an appeal.

From my perspective, which is based on the language of the Freedom of Information Law and its judicial interpretation by the State's highest court, the blanket policy of withholding all records until there may be a conviction is clearly inconsistent with law. In this regard, I offer the following comments.

First, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 the exceptions that follow. In my view, the phrase quoted in the preceding sentence evidences a recognition on the part of the Legislature that a single record or report, for example, might include portions that are available under the statute, as well as portions that might justifiably be withheld. That being so, I believe that it also imposes an obligation on an agency to review records sought, in their entirety, to determine which portions, if any, might properly be withheld or deleted prior to disclosing the remainder.

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, in a decision recently rendered by the Court of Appeals pertinent to the situation that you described, the primary issue involved the practice of the New York City Police Department of engaging in blanket denials of access to "complaint follow up reports" prepared by police officers.

The provision upon which the Department relied, §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 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).

"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. Axelrod, 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, 89 NY2d 267, 276-277 (1996) emphasis added by the Court].

Based on the foregoing, I believe that those portions of the records that you requested consisting of factual information must be disclosed, unless a different basis for withholding can justifiably be asserted. In addition, again, a categorical denial of access would be inappropriate.

It is noted that 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.

In sum, while certain aspects of records relating to an open case might justifiably be withheld, blanket denials of access fail to comply with law.

Lastly, when a person is denied access to records, that person has the right to appeal. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

The last sentence quoted above is intended to ensure that a meaningful review of a denial occurs when there is an appeal. That would not occur if the initial denial and the appeal are determined by the same individual.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: James E. Bertram, Sheriff
William Better, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1032

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Patrick J. Starace
[redacted]

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

Dear Mr. Starace:

I have received your letter of October 6 in which you asked that I "tell " Senator Owen Johnson and Assemblyman Robert Sweeney to disclose to you "how many campaign contributions and the amounts of each contribution [they] have received from the Teachers Union." You wrote that it is your understanding that they are required to disclose the information in question pursuant tot he federal Freedom of Information Act.

In this regard, it is noted at the outset that the federal Freedom of Information Act applies only to federal agencies. An equivalent statute, the New York Freedom of Information Law, applies to records of state and local government in New York.

The Committee on Open Government is authorized to offer advice concerning the Freedom of Information law. The Committee is not empowered to compel a person or governmental entity to disclose records. Nevertheless, in an effort to clarify your understanding of that statute, I offer the following comments.

First, each entity subject to the Freedom of Information Law is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating the entity's response to requets for records, and requests should generally be made to that person. In the Senate, the records access officer is Mr. Stephen Sloan, Secretary of the Senate, and a request for records maintained by the Senate may be directed to him. In the Assembly, a request may be made to Ms. Sharon Galarneau, Public Information Officer.

Second, it is emphasized that the Freedom of Information Law pertains to existing records maintained by or for an entity subject to that statute. I am unaware of whether the Senate or Assembly maintains records regarding campaign contributions. Perhaps a more appropriate source

of the information in question would be the New York State Board of Elections, and it is suggested that you request the records at issue from that agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Owen Johnson, Member of the Senate
Hon. Robert Sweeney, Member of Assembly

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10433

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Hon. Larry G. Mack
Legislature - District #6
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 or October 3. You referred to a "rumor" that a certain public employee was "paid twice", and you have asked whether canceled checks must be disclosed.

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

Relevant to the matter 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 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, the amount paid to a public employee is clearly relevant to the performance of that person's official duties. 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, references to deductions and the like. It also noted that although the front side of canceled checks have been found to be public, it has been held that the back of the checks may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: County Administrator
County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10434

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Joseph Fournier
#203285 Unit 6
P.O. Box 150
Delmont, NJ 08314-0150

The staff of the Committee on Open 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 October 5. You referred to a situation in which a records access officer denied a request "and then proceeds to act as appeals officer and denies your appeal when you submit the appeal."

In this regard, the regulations promulgated by the Committee on Open Goverment (21 NYCRR Part 1401), which have the force and effect of law, specify that the records access officer cannot be the appeals officer. Specifically, §1401.7 of the regulations provide in relevant part that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer."

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-10435

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 10, 1997

Mr. Jeff Blocker
93-A-0989
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. Blocker:

I have received your letter of October 5 in which you referred to an opinion addressed to you on September 29 and raised additional questions.

First, with respect to the retention and disposal of records, there are various provisions of law that indicate that records may be destroyed after certain periods of time (see e.g., Arts and Cultural Affairs Law, Articles 57 and 57-A). In some instances, certain records might be required to be kept permanently; in others, they may be destroyed, depending upon their legal, fiscal or historical value, after prescribed periods. I am unaware of the length of time that the records to which you referred must be maintained. I admit, however, to a typographical error in the correspondence of September 29. In wrote that if a certain record "does exist, the Freedom of Information Law would not apply." The first phrase should have stated: "If it does not exist..."

Also with respect to the existence of records, 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, you referred to your ability to obtain "travel orders" issued when you went to court. If indeed those kinds of records continue to exist, it appears that they would be available, for none of the grounds for denial would likely be pertinent.

Lastly, you asked that I send a copy of my letter to the Interstate Compact Administrator. It is not my function to do so. However, you can forward copies as you see fit.

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-1436

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. Wade Dixon
92-A-4694
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0104

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

Dear Mr. Dixon:

I have received your letter of October 4, as well as the correspondence attached to it. The materials include a response to your request indicating that "[t]he Nassau County Probation Department is exempt from the Freedom of Information Act, and our files are considered confidential pursuant to CPL 390.50."

In this regard, certain records, specifically pre-sentence reports and related records are exempt from disclosure under the Freedom of Information Law. Nevertheless, the Probation Department, as an agency of Nassau County government, is clearly subject to and required to comply with that statute.

Although the Freedom of Information Law provides broad rights of access to records, the first ground for denial, §87(2)(a), states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Relevant to the response that you received 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) 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.

With regard to other records maintained by a probation department, I recognize that there are regulations that deal with their records; nevertheless, those regulations do not constitute a "statute" that would exempt records from disclosure under §87(2)(a) of the Freedom of Information Law. Section 348.1 (b) of the regulations promulgated by the State Division of Probation and Correctional Alternatives states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the courts of other agencies become the responsibility of the court or other agencies as records."

Further, §348.4(k) of the regulations provides that: "Case records shall be accessible, in whole or in part, only to those authorized by law or court order." It appears that the quoted provision to represents the basis upon which the County relied withholding the records.

In my view, however, regulations cannot 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.

Without knowledge of the contents of the records sought, I could not conjecture as to rights of access. However, when records relate to a person other than yourself, it is possible that §87(2)(b) may be relevant. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

In an effort to offer clarification, copies of this response will be sent to the Nassau County Probation Department and the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Edward J. Schenk
Owen Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1437

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. Thomas Brown
86-C-0800
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 13311

The staff of the Committee on Open 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 8 addressed to William Bookman. Please be advised that your letter did not reach this office until October 9 and that Mr. Bookman has retired. In brief, you have requested an investigation of the Orleans Correctional Facility concerning its failure to "explain why [your] Low Cholesterol Diet has any restriction against Soy."

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the staff nor the jurisdiction to conduct investigation of agencies' actions or practices.

From my perspective, the issue involves the principle that the Freedom of Information Law pertains to existing records. Further, §89 (3) of that statute provides in part that an agency is not required to create a record in response to a request. Similarly, the Freedom of Information Law does not require that agency officials answer questions by creating new records. In short, it appears that much of the information that you requested does not exist in the form of a record or records. If that is so, the facility's response would have been consistent with the Freedom of Information Law, for it would not be required to prepare records on your behalf in order to satisfy your request for information or answers to questions.

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:tt

cc: Anthony Annucci
Karen Brown

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. Norman W. Frey
93-A-2032
Bare Hill Correctional 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. Frey:

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

In brief, as I understand the matter, you requested records from the Department of Correctional Services kept at its Albany offices. In response, you were informed that the request involved 49 pages and that you would be required to pay the requisite fee for copies. You have contended that you have the right to inspect the records at your facility free of charge.

In this regard, the Department's regulations, §5.20, specify that an inmate has the ability to inspect accessible records made available at a facility by the facility superintendent or his designee. Section 5.15 states in part that the superintendent is the custodian of records located at a facility. From my perspective, while you may have the ability to inspect records free of charge at your facility, I know of no provision that would require that records be transferred from their usual locations to accommodate an applicant at a site convenient to him. In short, although an inmate may be indigent or unable to travel, I do not believe that an agency is required to make records available at other than at the locations where records are customarily kept.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Mark Shepard
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2222
FOIL-AO-10439

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. James P. Coleman, Esq.
Village Attorney
Village of Montour Falls
408 West Main Street
Montour Falls, NY 14865

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

Dear Mr. Coleman:

I have received your letter of October 6. You wrote that the Village of Montour Falls operates a marina/campground in which space is leased for a fee, and that the Village is considering requiring lessees to provide their social security numbers to be used, if necessary, "to undertake collection action." You have asked whether the Village may require that social security numbers be provided, and if so, whether the numbers may be "redisclosed for collection/credit actions."

In this regard, I offer the following comments.

First, due to the provisions of the federal Privacy Act (5 USC §552a), I do not believe that the Village could require lessees to furnish their social security numbers. 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.

Second, assuming that lessees voluntarily submit their social security numbers to the Village, the Village, based on case law, could choose to disclose them. Unlike a state agency which is required to comply with the Personal Privacy Protection Law (Public Officers Law, Article 6-A) and which, therefore, would be prohibited from disclosing or disseminating social security numbers in most circumstances, a municipality, which is not subject to that statute, would not be prohibited from disclosing the numbers. In Seelig v. Sielaff [200 AD2d 298], 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 and could be withheld under §87(2)(b) of the Freedom of Information Law, 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).

In short a local government may opt to disclose personal information, even when disclosure would result in an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. Bart Lucido
[redacted]

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

Dear Mr. Lucido:

I have received your letter of October 8. In brief, you have questioned the propriety of the refusal by the Village of Elmsford building inspector to provide a copy of building plans. You wrote that "[t]he building harbors no uniqueness nor does it fall within the categories listed in the law to withhold disclosure."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" expansively to mean:

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

Based on the foregoing, architects plans and similar or related documents in my view clearly constitute "records" subject to rights conferred by the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, it is unlikely that any of the grounds for denial could be asserted to withhold the records in question. Further, §87(2) of the Freedom of Information Law states that accessible

records must be made available for inspection and copying, and §89(3) indicates that an agency is obliged to make a copy of an accessible record if the applicant pays the appropriate fee for copying. In my opinion, whether the owner of property consents to permit access to a building plan is irrelevant; if a record is available under the Freedom of Information Law, the subject of the record does not have the ability to control disclosure.

Second, access to plans and surveys that are marked with the seal of an architect or engineer has been the subject of several questions and substantial research. Professional engineers and architects are licensed by the Board of Regents (see respectively, Articles 145 and 147 of the Education Law,). While §7307 of the Education Law requires that an architect have a seal, and that state and local officials charged with the enforcement of provisions relating to the construction or alteration of buildings cannot accept plans or specifications that do not bear such a seal, I am unaware of any statute that would prohibit the inspection of such records under the Freedom of Information Law. Some have contended that an architect's seal, for example, represents the equivalent of a copyright. Having discussed the matter with numerous officials, including officials of the appropriate licensing boards, the seal does not serve as a copyright, nor does it restrict the right to inspect and copy.

Third, additional considerations become relevant if the records in question bear a copyright, and the question, in my view, involves the effect of a copyright appearing on a document. In order to offer an appropriate response, I have discussed the matter with a representative of the U.S. Copyright Office and the Office of Information and Privacy at the U.S. Department of Justice, which advises federal agencies regarding the federal Freedom of Information Act (5 U.S.C. §552), the federal counterpart of the New York Freedom of Information Law.

It is noted that the Federal Copyright Act, 17 U.S.C. §101 et seq., appears to have supplanted the early case law concerning the Act prior to its amendment in 1976. Further, I am unaware of any judicial decisions rendered in New York concerning the relationship between the Copyright Act and the New York Freedom of Information Law.

Useful to the inquiry is a federal court decision in which the history of copyright protection was discussed, and in which reference was made to notes of House Committee on the Judiciary (Report No. 94-1476) referring to the scope and intent of the revised Act. Specifically, it was stated by the court that:

> "The power to provide copyright protection is delegated to the Congress by the United States Constitution. Article 1, section 8, clause 8, of the Constitution grants to Congress the power 'to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'
>
> Copyright did not exist at common law but was created by statute enacted pursuant to this Constitutional authority. See Mazer v. Stein, 347 U.S. 201, 74 S.Ct. 460, 98 L.ed. 630 (1954); see also MCA,

> Inc., v. Wilson, 425 F.Supp. 443, 455 (S.D.N.Y. 1976); Mura v. Columbia Broadcasting System, Inc., 245 F.Supp. 587, 589 (S.D.N.Y. 1965), and cases cited therein.
>
> Prior to January 1, 1978, the effective date of the revised Copyright Act of 1976, there existed a dual system of copyright protection which had been in effect since the first federal copyright statute in 1790. Under this dual system, unpublished works enjoyed perpetual copyright protection under state common law, while published works were copyrightable under the prevailing federal statute. The new Act was intended to accomplish 'a fundamental and significant change in the present law by adopting a single system of Federal statutory copyright... (to replace the) anachronistic, uncertain, impractical, and highly complicated dual system.' H.R. Rep. No. 94-1476; 94th Cong. 2d Sess. 129-130, reprinted in [1976] 5 U.S. Code Cong. & Ad. News 5745. This goal was effectuated through the bed-rock provision of 17 U.S.C. subsection 301, which brought unpublished works within the scope of federal copyright law and preempted state statutory and common law rights equivalent to copyright. Id. at 5745-47. Thus, under subsection 301(a), Congress provided that Title 17 of the United States Code, the Federal Copyright Act, preempts all state and common law rights pertaining to all causes of action which arise subsequent to the effective date of the 1976 Act, i.e., January 1, 1978:
>
> (a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified in sections 102 and 103, whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." [Meltzer v. Zoller, 520 F.Supp. 847, 853 (1981)]

Based upon the foregoing, "common law" copyright appears to be a concept that has been rejected and replaced with the current statutory scheme embodied in the revised Federal Copyright Act.

In view of the language of the Copyright Act, case law and discussions with a representative of the Copyright Office, it is clear in my opinion that architectural plans and similar documents may be copyrighted.

To be copyrighted, 17 U.S.C. §401(b) states that a work must bear a "notice", which:

> "shall consist of the following three elements:

> (1) the symbol c (the letter C in a circle), or the word 'Copyright,' or the abbreviation 'Copr.'; and
>
> (2) the year of the first publication of the work; in the case of compilations or derivative works incorporating previously published material, the year date of the first publication of the compilation or derivative work is sufficient. The year date may be omitted where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles; and
>
> (3) the name of the owner of copyright in the work, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner."

If those elements do not appear on a work, I do not believe that it would be copyrighted, and that it could be reproduced in response to a request made under the Freedom of Information Law.

Assuming that a work is subject to copyright protection, such a work that includes the notice described above is copyrighted. It is noted that such a work may "at any time during the subsistence of copyright" [17 U.S.C. §408(a)] be registered with the Copyright Office. No action for copyright infringement can be initiated until a copyright claim has been registered. As I understand the Act, if a work bears a copyright and is reproduced without the consent of the copyright holder, the holder may nonetheless register the work and later bring an action for copyright infringement.

In terms of the ability of a citizen to use an access law to assert the right to reproduce copyrighted material, the issue has been considered by the U.S. Department of Justice with respect to copyrighted materials, and its analysis as it pertains to the federal Freedom of Information Act is, in my view, pertinent to the issue as it arises under the state Freedom of Information Law.

The initial aspect of its review involved whether the exception to rights of access analogous to §87(2)(a) of the Freedom of Information Law requires that copyrighted materials be withheld. The cited provision states that an agency may withhold records that are "specifically exempted from disclosure by state or federal statute." Virtually the same language constitutes a basis for withholding in the federal Act [5 U.S.C. 552(b)(3)]. In the fall 1983 edition of FOIA Update, a publication of the Office of Information and Privacy at the U.S. Department of Justice, it was stated that:

> "On its face, the Copyright Act simply cannot be considered a 'nondisclosure' statute, especially in light of its provision permitting full public inspection of registered copyrighted documents at the Copyright Office [see 17 U.S.C. 3705(b)]."

Since copyrighted materials are available for inspection, I agree with the conclusion that records bearing a copyright could not be characterized as being "specifically exempted from disclosure...by...statute."

The next step of the analysis involves the Justice Department's consideration of the federal Act's exception (exemption 4) analogous to §87(2)(d) of the Freedom of Information Law in conjunction with 17 U.S.C. §107, which codifies the doctrine of "fair use". Section 87(2)(d) permits an agency to withhold records that "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise." Under §107, copyrighted work may be reproduced "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" without infringement of the copyright. Further, the provision describes the factors to be considered in determining whether a work may be reproduced for a fair use, including "the effect of the use upon the potential market for or value of the copyrighted work" [17 U.S.C. §107(4)].

According to the Department of Justice, the most common basis for the assertion of the federal Act's "trade secret" exception involves "a showing of competitive harm," and in the context of a request for a copyrighted work, the exception may be invoked "whenever it is determined that the copyright holder's market for his work would be adversely affected by FOIA disclosure" (FOIA Update, supra). As such, it was concluded that the trade secret exception:

> "stands as a viable means of protecting commercially valuable copyrighted works where FOIA disclosure would have a substantial adverse effect on the copyright holder's potential market. Such use of Exemption 4 is fully consonant with its broad purpose of protecting the commercial interests of those who submit information to government... Moreover, as has been suggested, where FOIA disclosure would have an adverse impact on 'the potential market for or value of [a] copyrighted work,' 17 U.S.C. §107(4), Exemption 4 and the Copyright Act actually embody virtually congruent protection, because such an adverse economic effect will almost always preclude a 'fair use' copyright defense...Thus, Exemption 4 should protect such materials in the same instances in which copyright infringement would be found" (id.).

Conversely, it was suggested that when disclosure of a copyrighted work would not have a substantial adverse effect on the potential market of the copyright holder, the trade secret exemption could not appropriately be asserted. Further, "[g]iven that the FOIA is designed to serve the public interest in access to information maintained by government," it was contended that "disclosure of nonexempt copyrighted documents under the Freedom of Information act should be considered a 'fair use'" (id.).

In my opinion, due to the similarities between the federal Freedom of Information Act and the New York Freedom of Information Law, the analysis by the Justice Department could properly be applied when making determinations regarding the reproduction of copyrighted materials maintained by entities of government in New York. In sum, if reproduction of copyrighted architectural plans and similar records would "cause substantial injury to the competitive position of the subject enterprise," i.e., the holder of the copyright, in conjunction with §87(2)(d) of the Freedom of

Information Law, it would appear that an agency could preclude reproduction of the work. On the other hand, if reproduction of the work would not result in substantial injury to the competitive position of the copyright holder, it appears that the work would be available for copying under the Freedom of Information Law.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor
Building Inspector

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10411

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 12, 1997

Mr. Washington Davis
84-A-6907
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. Davis:

I have received your letter of September 30, as well as the materials attached to it.

Your initial area of inquiry involves a request directed to the Office of the New York City Comptroller, and you questioned whether you have erred in some way by submitting an appeal to the Comptroller. In this regard, having reviewed the correspondence, as I understand it, the Office of the Comptroller does not maintain the records you are interested. In general, it would appear unlikely that the Office of the Comptroller would maintain records regarding particular criminal proceedings. From my perspective, the response was not a denial of access to records, because the records in question apparently are not maintained by the agency.

You requested the name and address of the "records appeals officer" for the Office of the Bronx County District Attorney. That person is Peter Coddington and his address is 198 161st Street, Bronx, NY 10451.

Finally, if a request made under §255 of the Judiciary Law is ignored or denied, you have asked what the "correct procedures" may be "to compel disclosure." Since the courts and court records are not subject to the Freedom of Information Law, I am not an expert on the subject. However, when a person seeks to challenge a government officer or governmental entity on the ground that the officer or entity failed to carry out a duty that is required to be performed by law, the person may 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 13, 1997

Mr. Thomas J. McClane
[redacted]

Dear Mr. McClane:

I have received your letter of November 11, which pertains to your requests for records made over the course of years to the Departments of Civil Service and Environmental Conservation.

You asked that this office "request that the Dep't of Civ. Serv. and its associated Commission make it clear what information they have and release all information, including telephone logs and document log in whatever form related to the activity they participated in with Envt'l Conserv. and the N.Y. Inspector General which occurred between June 15, 1993 and July 1994 with regard to Thomas J. McClane."

In this regard, the primary function of the Committee on Open Government involves offering advice and guidance concerning public access to government records, primarily under the Freedom of Information Law. The Committee's functions do not include carrying the kind of request that you have suggested. Further, there is nothing in the Freedom of Information Law that requires an agency to prepare an inventory of records, i.e., a list of all "information they have" on a certain subject. Moreover, as you are likely aware, that statute pertains to existing records [see §89(3)]. Therefore, an agency need not create a record in response to a request for information. Similarly, if records no longer exist, the Freedom of Information Law does not apply.

You also requested from this office "any records that show any of Secretary of State or Governor Mario Cuomo's involvement in record's [sic] policy while he was Secretary of State or later." I believe that the only records maintained by this office that reflect Mr. Cuomo's involvement in the development of records policy are annual reports of the Committee prepared from 1977 to 1982. During that period, he served as Secretary of State and later as Lieutenant Governor. The reports include no references to Mr. Cuomo directly; rather his name appears on the reports as a member of the Committee. If you are interested in obtaining copies, please so inform me. I believe that the reports are also maintained by the State Library.

Lastly, you referred to the Committee as "one of the steps required in the administrative process." The meaning of your assertion is unclear. The only participation of the Committee in the administrative process relating to requests for records pertains to agencies' responsibility to forward copies of appeals and their determinations thereon to this office pursuant to §89(4)(a) of the Freedom of Information Law. The Committee plays no necessary role in determining to grant or deny access to records. That function is carried out by agencies in receipt of requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Assemblyman Richard L. Brodsky
Kathryn Guadagnino
Daniel Wall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1043

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 13, 1997

Mr. Anthony G. Stanzoni
94-A-8464
Bare Hill Correctional Facility
P.O. Box 20 Cady Road
Malone, NY 12953

Dear Mr. Stanzoni:

I have received your letter of October 11. You complained that you requested records from the Office of the Kings County District Attorney and that the receipt of the request was acknowledged with an indication, in your words, that "it would take some time" to determine to grant or deny your request. More than six months have passed, however, since the submission of your request, and you wrote that you have received no further response.

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

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

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

Robert J. Freeman
Executive Director

RJF:tt

cc: Yuriy Kogan
Keith Dolan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 13, 1997

Mr. M. Bhagat
97-A-0820
Altona Correctional Facility
555 Devils Den Road
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. Bhagat:

I have received your letter of October 8. You have asked that this office "facilitate...obtaining the logged information regarding complaints and threats against" a particular judge, as well as biographical data concerning that judge since being admitted to the bar.

In this regard, first, requests for records should be directed to the records access officers at the agencies that you believe maintain the records of your interest. A 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.

It is likely in my view that complaints made against a judge would be maintained by the Commission on Judicial Conduct. However, I believe that any such records would be confidential. 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". One such statute, §45 of the Judiciary Law, pertains to the Commission on Judicial Conduct and provides in 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..."

With regard to threats against and biographical data pertaining to judges, the primary source of such records would be the Office of Court Administration. From my perspective, two of the

grounds for denial would be relevant to a request for those records. 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 would be pertinent to records of threats as well as biographical information. I note that §89(2)(b)(i) states that disclosure of one's employment history would result in an unwarranted invasion of personal privacy. In my view, while one's government employment is clearly public, references to private employment may be withheld under that provision. The other ground for denial of possible significance, §87(2)(f), authorizes an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." The extent to which that exception would apply would be dependent on the content of records and the effects of disclosure.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2812
FOIL-AO-1045

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 13, 1997

Mr. Kevin A. Denton
Denton & mcLaughlin, P.C.
Main street & Memorial Ave
Drawer 5
Pawling, NY 12564

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

Dear Mr. Denton:

I have received your letter of October 20 in which you sought my views concerning certain actions of the Beekman Town Supervisor.

According to your letter, cable television franchise in your area makes camera equipment available to individuals for the purpose of taping Town Board meetings. The tapes are then made available to the cable company, which runs them several times in their entirety. A meeting recently taped included "a spirited question and answer period which was not a pleasant one for the Supervisor." It is your understanding that the Supervisor "called the company to advise that the tape could not be shown without first being reviewed by him" and cited the "Sunshine Law" as the basis for his claim. He then demanded that the tape be given to him for review prior to the broadcast, and the tape was indeed given to him.

From my perspective, the Supervisor had no legal control over the use or broadcast of the tape. In this regard, I offer the following comments.

First, as I understand the matter, the tape was not prepared by or at the direction of the Town. If that is so, I believe that the tape constituted private property over which the Supervisor had no claim.

Second, judicial decisions indicate that any person who attends an open meeting of a public body may record the proceedings and do with the recording as he or she sees fit. In perhaps the leading case on the issue, 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).

Most pertinent to the issue, the court in Mitchell specified that:

> "[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...
>
> "Nor are we persuaded by the appellants' contention that since recordings can be edited, altered, or used out of context, the board was justified in forbidding their use altogether. Clearly if the Board were to prohibit the use of pen, pencil and paper, because of the potential for misquotation, such a restriction would be unreasonable and arguably violative of the 1st Amendment. A comtemporaneous recording of a public meeting is undoubtedly a more reliable, accurate and efficient means of memorializing what is said at the proceeding. Once the ifnormation and comments are conveyed to the public, it should be of no consequence that they may subsequently be repeated, by means of replay, to those who were unable to attend" (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. Further, that person may use the tape without restriction.

The same conclusion was reached in Peloquin v. Arsenault [616 NYS 2d 716 (1994)], which cited Mitchell, as well as opinions rendered by this office. In that case, a village board of trustees, by resolution, banned the use of video recording devices at its meetings. In its determination, the court held that:

> "Hand held audio recorders *are* unobtrusive (*Mitchell*, supra); camcorders may or may not be depending, as we have seen, on the circumstances. Suffice it to say, however, in the fact of *Mitchell*, the Committee on Open Government's (Robert Freeman's) well-reasoned opinions supra and the court system's pooled video coverage rules/options, a blanket ban on all cameras and camcorders when the sole justification is a distaste for appearing on public access cable television is unreasonable. While 'distraction' and 'unobtrusive' are subjective terms, in the face of the virtual presumption of openness contained in Article 7 of the Public Officers Law and the insufficient justification offered by the Village, the 'Recording Policy' in issue here must fall" (id., 718).

Again, once a member of the public in attendance at meeting open to the public records the meeting, the tape is his or her property. Consequently, I do not believe that the government has any control over its use.

Even if the tape had been prepared by or for the Town, the result would have been the same. In this regard, 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."

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 would apply, for any member of the public could have been present. Moreover, case law indicates that a tape recording of an open meeting is accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Town Supervisor
Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044/6

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 13, 1997

Mr. Brian W. Raum
The American Center for Law and Justice
1000 Regent University Drive
P.O. Box 64429
Virginia Beach, VA 23467

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

Dear Mr. Raum:

I have received your letter of October 10 in which you requested an advisory opinion concerning your right to obtain certain data from the Village of Southampton.

You have questioned "whether the New York State Department of Health has the authority to prevent Village Registrars from releasing non-identifiable, statistical information about abortions." You also asked whether a village registrar has the authority to "mandate the destruction of abortion information after one month."

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information does not address the issue of retention or disposal of records, and I am unaware of the length of time that the information in question must be retained. Provisions concerning the retention and disposal of records are found in Articles 57 and 57-A of the Arts and Cultural Affairs Law and implemented by the State Archives and Records Administration, which is a unit of the State Education Department. It is suggested that you contact that agency to ascertain the scheduled period regarding the retention of the records.

Second, although the Freedom of Information Law provides broad rights of access, pertinent in this instance in my view is §87(2)(a), which relates to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you may be aware, is §4174 of the Public Health Law, which deals specifically with records of deaths. Paragraph (a) of subdivision (1) of that statute indicates that death records may be disclosed only under specified circumstances and states

in part that "no...death record shall be subject to disclosure under article six of the public officers law", which is the Freedom of Information Law.

Also pertinent is subdivision (1)(e), which provides that: "The commissioner or any person authorized by him shall...furnish non-identifiable statistical information in tabular or machine readable format for research activities if satisfied that the same is required for a proper purpose..." Since a local registrar is "a person authorized by the commissioner", it would appear that disclosures made by a registrar would be subject to the standard imposed by the cited provision.

It is also noted that §4163 of the Public Health Law provides that: "Any person who shall release information which might disclose the identity of the woman in connection with a certificate of fetal death or report of fetal death in violation of the provisions of this article shall be subject to a civil penalty not to exceed five thousand dollars for each such release." As such, there is a statutory prohibition against disclosure not only of an item that would disclose the identity of the mother, but of information that *might* divulge her identity.

Lastly, since you attached an advisory opinion prepared by this office in 1986, I point out that the provisions within §4174 of the Public Health Law quoted above were enacted after the issuance of that opinon.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Clerk, Village of Southampton

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 14, 1997

Ms. Roberta Stellato
[redacted]

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

Dear Ms. Stellato:

I have received your correspondence of October 20. You have sought assistance concerning a denial of access by the Ellenville Central School District to a report prepared following a complaint involving alleged mistreatment of your child. The District denied access pursuant to the Freedom of Information Law on the ground that disclosure would result in an unwarranted invasion of personal privacy and because it consists of intra-agency material.

If only the Freedom of Information Law governed rights of access, I would agree in great measure with the District's response. However, it appears that a different statute would likely require the District to disclose the report to you.

Specifically, the Family Educational Rights and Privacy Act ("FERPA"; 20 U.S.C. §1232g), in brief, 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." The federal regulations define the phrase "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). 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. I note that the regulations promulgated by the U.S. Department of Education define the term "education record" broadly to include "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..." Based on the foregoing, insofar as the District maintains records pertaining to your child, I believe that they would constitute "education records" available to you pursuant to rights conferred by FERPA.

I note that the federal 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..."

If the report at issue pertains to the treatment of your child, it would not appear to be a personnel record primarily relating to an employee that is made and maintained in the ordinary course of business. Again, if that is so, and if the report pertains to your child, it appears that it would be available under FERPA.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Peter J. Ferrara
Linda Geiselhart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1048

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 14, 1997

Mr. Peter L. Rattley
[redacted]

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

Dear Mr. Rattley:

I have received your letter of October 15. In brief, you have sought assistance is relation to a request for records of the New York City Police Department that was not answered.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee has neither the jursidiction nor the resources to conduct investigations. Nevertheless, in conjunction with the situation that you described, 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 to determine appeals is Susan Petito, Special 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-0449

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 14, 1997

Mr. Richard L. Gumo
Attorney and Counselor at Law
363A Hempstead Avenue
Malverne, NY 11565

The staff of the Committee 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. Gumo:

I have received your letter of October 16 in which you sought an advisory opinion concerning a request made under the Freedom of Information Law to the Village of Malverne.

Your inquiry focuses on a response by the Village that certain records that you requested were "not available at Village Hall." During our telephone discussion of the matter, I referred to the definition of "record" appearing in §86(4) of the Freedom of Information Law. That term is defined 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 a record is kept, held, produced or reproduced "for" an agency, such as a village, it would fall within the scope of the Freedom of Information Law, irrespective of the location at which it is maintained.

In the context of your request, if, for example, a contract between the Village and its attorney, is kept not at Village Hall but rather at the office of the attorney, I believe that the contract would constitute a Village record that must be disclosed under the Freedom of Information Law. In that kind of situation, I believe that the Village's records access officer, in carrying out his or her duty to

coordinate the agency's response to requests for records (see 21 NYCRR Part 1401), would either direct the attorney to disclose the contract directly or acquire the record for the purpose of disclosing it.

Notwithstanding the foregoing, it is my understanding that there is no contract. Having spoken with the current attorney for the Village, I was informed that no written contract exists. If that is so, since the Freedom of Information Law pertains to existing records, that statute would have no application. I note, too, that §89(3) of the Law provides that an agency is not required to create or prepare a record in response to a 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: Board of Trustees
Elliot Claus, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1045

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 17, 1997

Mr. Carlos Vara
94-A-6877
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

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

Dear Mr. Vara:

I have received your letter of October 19, as well as a copy of an appeal that you have directed to the New York City Police Department. You asked that I review the appeal and offer "constructive criticism and/or advice."

First, 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 of the Civil Rights Law 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 to records that fall within the coverage of §50-b, and that statute 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.

Second, 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].

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 that do not fall within the coverage of §50-b of the Civil Rights 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:tt

cc: Susan Petito, Special Counsel
Sgt. Louis Lombardo, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1451

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 25, 1997

Mr. C. Ruth
90-T-1733
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. Ruth:

I have received your letter of October 7, which reached this office on October 21. As I understand the matter, you have had difficulty in obtaining records from the courts.

In this regard, 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."

In view of the foregoing, the office of a district attorney or a police department would clearly fall within the coverage of the Freedom of Information Law; the courts and court records, however, are not subject to that statute.

The foregoing is not intended to suggest that court records cannot be obtained. Although the courts are not subject to the Freedom of Information Law, court records are generally available under other provisions of law (see e.g., Judiciary Law, §255).

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-10452

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 26, 1997

Mr. Henry C. Young
[redacted]

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

Dear Mr. Young:

I have received your letter of October 23 in which you questioned whether your rights are "being infringed" by the Town Clerk of the Town of Conquest through her actions in relation to your requests made under the Freedom of Information Law.

Having read the clerk's response, due to the unusual circumstances, it appears that her response and the delay in disclosure are justifiable. In this regard, I offer the following comments.

First, it has been held that an agency may require payment in advance of photocopying records (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

The second issue appears to involve the timeliness of the disclosure of records by the Town. Here 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

I note that although an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgment 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.

In the context of your inquiry, the Town Clerk specified that the reason for the delay pertained "to the packing and moving taking place over the next few weeks. Re: New Town Hall." In view of that unusual event, the transfer of records to a new location in a different building, again, it appears that the delay in disclosure would have been justifiable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Cindy L. Lamphere, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2814
FOIL-AO- 10453

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 26, 1997

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 October 17, as well as the materials attached to it. You have questioned whether a request made under the Freedom of Information Law is "completely appropriate." According to the materials, you requested "a listing including dates, times and location of the various Sub-Committee Meetings of the Masterplan Update Committee."

From my perspective, if such a "listing" exists, it would clearly be available. That kind of document would consist of factual information that must, in my view, be disclosed pursuant to §87(2)(g)(i) of the Freedom of Information Law. I note, however, that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute indicates that an agency is not required to create a record in response to a request. Therefore, if, for example, no "listing" has been prepared, the Town would not be obliged to create such a record on your behalf.

You also asked whether you may seek minutes of subcommittee meetings. While any records kept by or for the Town would fall within the scope of the Freedom of Information Law, it is possible that the committees and subcommittees to which reference is made in the materials may not be subject to the Open Meetings Law. This is not to suggest that they cannot hold open meetings; many citizens advisory bodies are designated to encourage input from the public and conduct their meetings fully open to the public. Rather, I am suggesting that such entities might not constitute "public bodies" that are required to comply with the Open Meetings Law.

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.

However, when a committee consists solely of members of a public body, such as a town board, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board, Town of Chili
Hon. Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10454

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 26, 1997

Mr. Jeffery Benjamin
81-B-2293
Elmira Correctional Facility
Box 500
Elmira, NY 14902

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

Dear Mr. Benjamin:

I have received your letter of October 17 in which you sought assistance in obtaining the sentencing minutes of a material witness in your case. The sentencing, according to your letter, occurred in May of 1980.

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."

If the records in which you are interested are maintained by a court or can be characterized as court records, the Freedom of Information Law in my opinion would not apply.

Second, in the case of Moore v. Santucci [151 AD 2d 677 (1989)] it was held 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, 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.

Lastly, the foregoing is not intended to suggest that court records need not be disclosed. Although the Freedom of Information Law may not apply, other provisions of law often grant substantial rights of access to court records (see e.g., Judiciary Law, §255). Under the circumstances, it is suggested that you confirm the indictment number and resubmit your request to the clerk of the court in which the sentencing occurred, citing an applicable provision as the basis for the request and using an identifier that enables court staff to locate the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1045

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

November 26, 1997

Mr. Barry Berman
96-B-1851
Bar 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. Berman:

I have received your letter of October 10, which reached this office on October 23.

According to your letter, you requested a record from the Department of Correctional Services consisting of two pages. Nevertheless, you indicated that the Department sought to charge $18 rather than twenty-five cents per page. Consequently, you appealed, but as of the date of your letter to this office, you had received no response. You have asked that the Committee "intervene" on your behalf.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. This office 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, 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 up to nine by fourteen inches. If indeed the record in question consists of two pages, the maximum that fee that could be charged would be fifty cents. I would conjecture, however, that there may be some misunderstanding with respect to the length of the document, for Department officials, in my experience, are familiar with the amount that may be assessed for photocopies.

Second, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and states in relevant part that:

> "... any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body who shall within ten business days of the receipt of 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 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) if the Freedom of Information Law , the appellate has exhausted his or her administrative remedies an may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 [1982)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1456

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 1, 1997

Ms. Rose M. Bonacci
[redacted]

The staff of the Committee on 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. Bonacci:

I have received your letters of October 21, as well as related materials. You have complained that your requests made under the Freedom of Information Law directed to an automobile manufacturer and an insurance company have not been answered.

From my perspective, that law would not be applicable. For future reference, 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 applies only to entities of state and local government; it does not apply to private entities.

With regard to medical records, § 18 of the Public Health Law, generally grants rights of access to medical records maintained by a physician or hospital in New York .

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 Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

I hope that the preceding commentary has enhanced 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-104/59

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 1, 1997

Mr. Ronald J. Hall
96-A-5973
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. Hall:

I have received your letter of October 20, as well as the materials attached to it. You have asked that I review and comment on your request to Rockland County and the County's responses.

In this regard, I offer the following comments.

First, you cited 5 USC §§552 and 552a. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts, which pertain only to records maintained by federal agencies.

Second, the request to the County includes records of two town police departments. Towns are governmental entities separate from the County, and the County would have neither custody nor control over records maintained by a town.

Third, as indicated in the correspondence, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. In that vein, there is no provision in the New York Freedom of Information Law or judicial decision of which I am aware that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any

decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

Fourth, since you cited provisions appearing in 7 NYCRR, I note that those provisions were promulgated by the Department of Correctional Services and pertain to its records and facilities. They do not apply to counties or other municipalities.

Fifth, although there are provisions in the federal Freedom of Information Act concerning free waivers, there are none in the Freedom of Information Law . Further, it has been held that an agency may charge its established fees, even if a request is made by an indigent inmate [see Whitehead v. Morgenthau, 518 NYS 2d 552 (1990)].

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. Since I am unaware of the contents of all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph E. Suarez, Counsel to the Sheriff

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1058

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 1, 1997

Mr. Miguel Rodriguez
81-A-5915
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990-0900

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

Dear Mr. Rodriguez:

I have received your letter of October 27 and the materials attached to it. You have sought assistance in obtaining records from the New York City Police Department.

You referred to the decision rendered in Gould v. New York City Police Department [89 NY2d 267 (1996)] in which the State's highest court focused on a blanket denial of access to complaint follow up reports and police officers' memo books. In brief, the court indicated that those kinds of records could not be withheld in their entirety under §87(2)(g), and that factual information found within those records must be disclosed, unless some other basis for denial of access could be asserted. As stated in the decision: "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" (id., 267

Based on the foregoing, the agency could not claim that the complaint reports 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.

Having reviewed the response to your request, the Department did not rely upon §87(2)(g) as the basis for its denial. Rather, it cited different provisions. Specifically, the Department referenced §87(2)(e), which permits an agency to withhold records that:

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

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e).

The other possible ground for denial cited 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.

With respect to a claim that a certain aspect of your request was too broad, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, an applicant for records should provide sufficient detail to enable agency staff to locate and identify the records.

Lastly, the Freedom of Information Law pertains to existing records. Insofar as the records of your interest have been destroyed and no longer exist, the Freedom of Information Law would no longer 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: SPAA Joseph Desiderio
Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10459

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 2, 1997

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 unless otherwise indicated.

Dear Mr. Reninger:

I have received your note, which appears on copies of a request made under the Freedom of Information Law to the New York State Insurance Department on October 24. As of the date of your communication with this office, you had received no response.

In this regard, I have contacted the Department's records access officer, Mr. Sidney Glaser, on your behalf in order to learn more of the matter. In brief, Mr. Glaser indicated that the Department moved to a new location in August and that your request, which was addressed to its former location, was never received. For future reference, the new address of the Department is 25 Beaver Street, New York, NY 10004.

Second, with respect to the records sought, 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.

According to Mr. Glaser, proposed changes submitted by insurance carriers are typically withheld pursuant to §87(2)(d) of the Freedom of Information Law until they are approved. That provision permits an agency to deny access to 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..."

If indeed disclosure prior to approval by the Department would be injurious to the competitive position of the carrier, the Department's position would be justified.

Mr. Glaser also indicated that the person at the Department with whom you had communicated concerning the matter, Mr. Dennis F. Dineen, will send you the documentation when it is approved.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sidney Glaser
Dennis F. Dineen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1060

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 2, 1997

Mr. Wallace S. Nolen
94-A-6723
Sullivan Correctional Facility
P.O. Box AG
Fallsburg, NY 12733-0116

Dear Mr. Nolen:

I have received your letter of October 23. As in the case of your previous correspondence, the matter involves access to records of boards of elections that include digital or facsimile signatures.

In this regard, I do not believe that any opinions have been prepared by this office that pertain specifically to access to records that include signatures, other than the response to you of September 24. Further, having reviewed that opinion, I do not believe that I can add anything of substance to it in relation to your letter.

It is suggested that you contact the New York State Board of Elections to attempt to obtain the basis for the promulgation of §6212.5 of its regulations relating to facsimile signatures. It is likely, in my view, that the provision in question was adopted to prevent a recipient of an electronic record containing facsimile signatures from having the ability to generate what appear to be original and authentic signatures. From my perspective, a disclosure that would permit a recipient of the record to create or generate what appears to be an original signature is distinguishable from a disclosure of a photocopy or the ability to inspect a record containing a signature.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1046

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 2, 1997

Mr. James H. Gage
97-0645
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. Gage

I have received your letter of October 24, as well as the materials attached to it. You have asked that I review and comment on your request for records of various governmental entities in Schenectady County.

In this regard, I offer the following comments.

First, you cited 5 USC §§552 and 552a. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts, which pertain only to records maintained by federal agencies.

Second, the request to the County includes records of two town police departments. Towns are governmental entities separate from the County, and the County would have neither custody nor control over records maintained by a town.

Third, as indicated in the correspondence, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency is not required to create a record in response to a request. In that vein, there is no provision in the New York Freedom of Information Law or judicial decision of which I am aware 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)].

Similarly, there is no requirement that an agency prepare a "master index" or similar document that refers to all records pertaining to a particular person or case.

Fourth, although there are provisions in the federal Freedom of Information Act concerning free waivers, there are none in the Freedom of Information Law . Further, it has been held that an agency may charge its established fees, even if a request is made by an indigent inmate [see Whitehead v. Morgenthau, 518 NYS 2d 552 (1990)].

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. Since I am unaware of the contents of all 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.

Section 87(2)(g) of the Freedom of Information Law enables an agency to withhold records that:

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

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

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

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.

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).

Also relevant 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, §190.25(4) of the Criminal Procedure Law deals with grand jury proceedings and provides 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 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.

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).

The Court in Moore also specified that an agency "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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert D. McAvoy
Joseph Parillo, Jr.
Carolyn Friello
Alfred D. Chapleau

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1046

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 2, 1997

Mr. Bruce E. Baker
[redacted]

The staff of the Committee 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. Baker:

I have received your letters of October 23 and 30, as well as a variety of related correspondence. In brief, the issue involves the timeliness of responses to requests for records requested from the Hoosick Falls Central School District.

In this regard, I offer the following comments.

First, part of the reason for the delay in response was expressed in a letter addressed to you by the Superintendent, Nancy B. Chase, on October 20 and which I discussed with her on November 3. She explained that correspondence addressed to the Board President is delivered to him "bimonthly", and that, consequently, your requests might not have been delivered or opened until a substantial period of time had passed. As Ms. Chase suggested, and I concur, rather than directing a request for records to the President or even a person in possession of records, it would be preferable to transmit requests to her in her capacity as "records access officer."

Pursuant to regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the Board of Education, as the governing body of the 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 for records. As such, it is recommended that future requests be made to the records access officer.

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..."

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. Further, 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: Board of Education
Nancy B. Chase

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10463

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 2, 1997

Mr. Dennis D. Curtin
Stafford, Trombley, Purcell Owens & Curtin, P.C.
P.O. Box 2947
Plattsburgh, NY 12901-0269

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

Dear Mr. Curtin:

I have received your letter of October 24 in which you requested an advisory opinion concerning the Freedom of Information Law on behalf of a school district. Specifically, you asked whether charges initiated by the Board of Education against a public employee, the Superintendent, "would be subject to disclosure under the Freedom of Information Law."

From my perspective, the charges could be withheld until there is a determination to sustain them. 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, two of the grounds for denial are pertinent to an analysis of the issue.

First, I believe that charges or allegations prepared by an agency relating to one of its employees would constitute intra-agency material that falls within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

Charges, in my view, could be withheld, for they would not consist of any of the kinds of information required to be disclosed pursuant to subparagraphs (i) through (iv) of §87(2)(g).

Second, also significant is §87(2)(b), which enables an agency to withhold records insofar as 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. Further, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Several of the decisions cited above, for example, Farrell, Sinicropi, Geneva Printing, Scaccia and Powhida, dealt with situations in which determinations indicating the imposition of some sort of disciplinary action pertaining to particular public employees were found to be available. However, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, according to case law, 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1014

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1997

Mr. Alfredo Lugo
82-A-0306
Orleans Correctional Facility
3531 Gains Basin Road
F-1/28-T
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. Lugo:

I have received your letter of October 27 in which you sought assistance in relation to your requests made to the Department of Correctional Services under the Freedom of Information Law.

One aspect of the requests pertains to a transcript of a Tier III hearing, and you were informed that the tape of the hearing had not yet been transcribed. A second involves a particular urinalysis testing form, and you were told that no such form could be found. Further, you referred to requests that had not been answered.

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 the hearing has not been transcribed, the Freedom of Information Law would not require the Department to prepare a transcript on your behalf. While I am not an expert on the matter, there may be other provisions that would require the preparation of a transcript within a certain time, and it is suggested that you discuss that issue with your attorney or a representative of Prisoners' Legal Services.

Second, I believe that records pertaining to inmates are generally transferred with the inmate to his new facility when he is transferred. 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)].

Lastly, 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 acknowledgment of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1044

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1997

Mr. Herbert Washington
88-A-2845 10-3-63-B
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. Washington:

I have received your letter of October 27. In brief, you complained that the Office of the Bronx County District Attorney has delayed determining to grant or deny your request for records in a manner inconsistent 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..."

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 by the District Attorney to determine appeals is Peter D. Coddington.

In an effort to assist you further, a copy of this response will be forwarded to Assistant District Attorney Jacqueline M. Vernon.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jacqueline M. Vernon

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1046

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1997

Mr. Derrick M. Luchey
93-B-1715
Sing Sing Correctional Facility
Ossinging, 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. Luchey:

I have received your letters of October 27 and November 24 in which you asked that this office "take action on [your] behalf" to obtain records from the Division of State Police. According to the correspondence that you forwarded, the records were withheld because they consist of intra-agency materials and were compiled for law enforcement purposes and would, if disclosed, "reveal investigative techniques and procedures and identify confidential information relating to a criminal investigation."

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 "take action" on behalf of an applicant or otherwise compel an agency to grant or deny access to records. Nevertheless, in an effort to provide assistance and clarification concerning the matter, I offer the following comments.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers and police officers' memo books in which it was held that a blanket 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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.

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).

Since the response to your request referred to investigative techniques and procedures, perhaps of primary significance would be §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.

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 §87(2)(f) would be applicable.

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 assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Inspector Timothy B. Howard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 3, 1997

Mr. Brian J. Skidmore
90-T-3034
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. Skidmore:

I have received your letter of October 29. You have questioned "the legality of a recent FOIA/PA/Sec 18 P.H.L. request" that you made to the State Department of Health for records relating to your complaint concerning alleged misconduct on the part of a physician. The request was denied pursuant to §230 of the Public Health Law.

From my perspective, the Department's response was consistent with law. In this regard, I offer the following comments.

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

Second, under the circumstances, notwithstanding rights granted by the Freedom of Information Law, the Personal Privacy Protection Law or §18 of the Public Health Law, I believe that the records in which you are interested may generally be kept confidential.

Here I direct your attention 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 regard, §230 of the Public Health Law pertains specifically to the State Board of Professional Medical Conduct. Subdivision (6) of the cited provision makes reference to committees that investigate, and subdivision (9) states that:

> "[N]otwithstanding any other provisions of law, neither the proceedings nor the records of any such committee shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided. No person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat. The prohibition relating to discovery of testimony shall not apply to the statements made by any person in attendance at such a meeting who is a party to an action or proceeding the subject matter of which was reviewed at such meeting."

Based upon the language quoted above, it appears that testimony, reports and patient records of any committee must remain confidential, unless specific direction is given to the contrary.

In addition, the Court of Appeals has held that records in possession of the Board, including medical records and patient interviews, are confidential and must be withheld under § 87 (2) (a) of the Freedom of Information Law as well as Article 31 of the Civil Practice Law and Rules [see John P. v. Whalen, 75 Ad 2d 1021 (1980) ; aff'd 54 NY 2d 89 (1981)].

In short, I believe that §230 of the Public Health governs access, rather than the statutes upon which you based your request.

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:tt

cc: Agnes M. Larson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1468

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Ms. Laury L. Dowd
Town Attorney
Town of Southold
P.O. 1179
Southold, NY 11971

The staff of the Committee on 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. Dowd:

I have received your letter of October 30 in which you sought guidance in relation to a request made under the Freedom of Information Law.

According to your letter, the requests involves "all grants, grant applications, grant information - federal, state, county, private or other relating to police, law enforcement, traffic control, police headquarters, cells, imprisonment, civilian, personnel and so on - all information from 1968." Your efforts in attempting to convince the applicant "to focus her request" have failed and you noted that:

> "The police department grant information cannot be easily retrieved, since it is not cataloged as grants. The request, as formulated, would require hand review of thirty years worth of police department files to find the requested items."

From my perspective, the 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 recordkeeping systems of the Town, 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 hundreds or even 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 Town officials might begin to look for records. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within Town, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding grants, since the beginning of its existence, in a single file, it may be a simple task to locate the records. If, however, records are not maintained by subject, but rather are kept chronologically, locating the records might involve a search, in essence, for the needle in the haystack. Based on the holding by the State's highest court, an agency is not required to engage in that kind of effort.

In short, insofar as the request fails to meet the standard of reasonably describing the records, I believe that it may be rejected by the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Jody Adams

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1041

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Mr. Frederick J. Gorman
[redacted]

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

Dear Mr. Gorman:

I have received your letter of October 30 and the materials relating to it. You have sought advice relating to your requests made to the Sachem School District for records pertaining to District elections held in May. It appears that the primary issue involves the delays by the District in responding 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)].

I note that although 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)].

If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, a delay beyond five business days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure. 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol Adelberg
Patricia Goldrek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1070

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

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 October 31` in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, "[f]or the third year in a row, Donald Peck of the Hilton Central Schools has responded to [your] Freedom of Information salary request with correspondence stating that he will *either approve or deny [your] request in approximately 45 business days*" (emphasis yours). You added that the Superintendent has failed to "acknowledge that any difficulty exists."

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 note that although 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 a 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, a delay beyond five business 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. 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 and understanding of the Freedom of Information Law, copies of this response will be forwarded to the Superintendent and Mr. Peck.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Christopher A. Bogden
Donald C. Peck

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1042/

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Mr. Nathan McBride
95-A-6015
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. McBride:

I have received your letter of October 27 in which you sought assistance in obtaining a record from the office of a district attorney.

According to your letter, the records was withheld because "it was provided to [you] through [your] attorney." You indicated that you then submitted a notarized letter indicating that you no longer possess the record.

In this regard, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states 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).

Based on the foregoing, it is suggested that you contact your attorney to determine whether he or she continues to possess the record. If the attorney no longer maintains the record, he or she should prepare an affidavit so stating that can be submitted to the office of the district 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-10472

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Ms. Maureen T. Entwistle
Town of Greenville
96 Rutgers Road
Port Jervis, NY 12771

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

Dear Ms. Entwistle:

I have received your letter of October 29 and the material attached to it.

The material consists of a letter distributed to voters in the Town of Greenville, and you highlighted portions that refer to your earnings as a Town employee and the hours that you worked. You have questioned whether your personnel records are available under the Freedom of Information Law.

From my perspective, the Town was required to disclose the information at issue. In this regard, I offer the following comments.

First, 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.

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 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 at issue.

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, as well as attendance records, must be disclosed.

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).

Lastly, 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.

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: Hon. May Natalizio

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Mr. Willie Williams
96-A-2779
Eastern Correctional Facility
P.O. 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. Williams:

I have received your letter of October 31. You complained that the New York City Police Department has delayed responding to your request for records, and you asked that I intercede on your behalf.

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that 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.

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 Susan Petito, Special Counsel.

To attempt to enhance compliance, copies of this letter will be sent to the Department's records access officer and to Ms. Petito.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Louis Lombardi
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 8, 1997

Mr. Stuart F. Mesinger
President
Multiple Choice Real Estate Mapping Services
55 Bay Street - Suite 210
Glens Falls, NY 12801

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

Dear Mr. Mesinger:

I have received your letter of October 31 in which you sought an advisory opinion.

By way of brief background, you wrote that your firm specializes in GIS applications and that you frequently acquire government maps and databases that are maintained electronically. You indicated that the Director of Real Property Tax Services in Chemung County informed you that the County "had copyrighted its electronic parcel maps" and that they "would be unavailable to [you] for [y]our purpose", which is to reproduce them in your product. The Director's reason for his response involved, in your words, "the cost to the county to create electronic maps and the county's desire to recoup these costs."

You have asked "whether a county may prohibit the commercial reproduction or resale of its tax parcel maps and/or real property data in a product such as [y]ours by filing a copyright (or by any other mechanism)".

From my perspective, a copyright asserted by an agency with respect to records that it produces cannot validly conflict with any provision of the Freedom of Information Law. In this regard, I offer the following comments.

First, I know of no judicial decision that deals with the relationship between the Freedom of Information Law and a work produced by a governmental entity for which there is a copyright claim. In my opinion, particularly in view of the expansive interpretations of the Freedom of Information Law by the States's highest court, the Court of Appeals, a claim of copyright regarding a government

produced record would be superseded by the Freedom of Information Law. In general, the status or interest of a person seeking records is irrelevant to that person's rights of access, and the recipient may do with a record disclosed under the Freedom of Information Law as he or she sees fit [see M. Farbman & Sons v. NYC Health and Hosps. Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Further, the fees for copies of records made available under the Freedom of Information Law must be based on the standards appearing in §87(1)(b)(iii), unless a different statute authorizes a higher fee, and there would be none in this instance.

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 Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (1996); 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 or disk) to which data is transferred.

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

Lastly, I note that the definition of the term "record" appearing in §86(4) of the Freedom of Information Law includes specific reference to computer tapes and discs, and it was held nearly two decades 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)]. Szikszay in fact pertained to a request for assessment rolls maintained on computer tape by a county department of real property services, and the court found that the assessment roll was required to be disclosed, irrespective of the format (paper or electronic) in which it was maintained and the applicant's intention to use the data for commercial purposes. Another aspect of that decision involved the fee charged for tax maps, and the court determined that the basis for the fee must be, as indicated in the preceding commentary, the actual cost of reproduction.

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 Real Property Tax Director.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Real Property Tax Director, Chemung County

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Ms. Terri Schmitt
c/o Citizens for Terri Schmitt
121 East Avenue
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 Ms. Schmitt:

I have received your letter of November 3 in which you sought a "ruling" concerning Monroe County's response to a request made under the Freedom of Information Law for records pertaining to the office of the County Clerk.

According to your letter, a request was made on September 17, and in response, the applicant for the records received a postcard acknowledging the receipt of the request and indicating that the County would determine to grant or deny the request "within 36 business days." You added that "Monroe County issues this same response to every request for information in this manner, regardless of the complexity of the request."

In this regard, to avoid any misinterpretation of its functions, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to issue a "ruling" or render a determination that is binding on an agency. When rendering advisory opinions, it is our hope that they are educational and persuasive.

Notwithstanding the absence of the ability to issue a ruling, I believe that the County's responses are inconsistent with law, and I offer the following comments on the matter.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 although 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 a 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, a delay beyond five business 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. 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 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer
County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-223
FOIL-AO-10476

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Mr. Darryl Morgan
88-A-3526
Elmira Correctional Facility
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. Morgan:

I have received your letter of November 2. You have asked where to request records pertaining to a parole revocation hearing.

In this regard, I would conjecture that the source of such records would be the New York State Division of Parole, which is located at 97 Central Avenue, Albany, NY 12206. It is suggested that any such request be directed to the Division's records access officer. The records access officer has the duty of coordinating the agency's response to requests for records.

Since you are interested in obtaining records concerning a person other than yourself, the extent to which you have a right to obtain records is questionable. From my perspective, it is likely that the primary issue in terms of rights of access involves the extent to which disclosure would constitute "an unwarranted invasion of personal privacy" with respect to both the subject of the hearing and perhaps others, such as victims, witnesses, sources, etc.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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) enables an agency to withhold records insofar as disclosure would result in an unwarranted invasion of personal privacy. While that standard is not defined, §89(2)(b) provides a series of examples of such invasions of privacy.

Also relevant is the Personal Privacy Protection Law, which 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 involves when a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter". It is noted, too, that §89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter". Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Section 96(1) of the Personal Privacy Protection Law limits the circumstances under which state agency may disclose personally identifiable information. The only provision in my opinion that would permit the Division of Parole to disclose information identifiable to an inmate would involve §96(1)(c), which authorizes disclosure when personal information is available under the Freedom of Information Law, i.e., when disclosure would not constitute an unwarranted invasion of personal privacy.

While I am unfamiliar with the contents of the records, information regarding a person's medical or mental condition would in my view constitute an unwarranted invasion of personal privacy if disclosed [see Freedom of Information Law, §89(2)(b)(i) and (ii)]. There may be other intimate details concerning the subject of the hearing that could be withheld in accordance with the privacy provisions.

Those provisions would also be applicable with respect to references to victims, their families and others affected by a crime. The extent to which they would apply would in my opinion be dependent on the specific nature of the information.

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. If, for example, a district attorney offered an opinion or recommendation to the Parole Board consisting of advice or opinion, such a record could in my view be withheld under §87(2)(g).

In addition, records identifying sources of information obtained upon a promise of confidentiality could likely be withheld under §87(2)(b) or (e)(iii); information which if disclosed would endanger the life or safety of any person could be withheld pursuant to §87(2)(f); and pre-sentence reports and memoranda are exempt from disclosure pursuant to §390.50 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law.

In short, while it appears that the Division of Parole would maintain the records of your interest, your right to obtain them may be minimal.

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-2817
FOIL-AO-10499

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Mr. Lee G. Austin
Ms. Nancy B. Reynolds
[redacted]

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

Dear Mr. Austin and Ms. Reynolds:

I have received your correspondence of November 5 in which you sought assistance in obtaining records from the Town of Halcott.

According to the materials, you had twice requested records from the Town without receiving a response. The records sought include a resolution and two letters read at meetings of the Town Board. In this regard, I offer the following comments.

First, since your requests were directed to the Town Supervisor, I note that §30 of the Town Law provides in part that the Town Clerk is the custodian of all Town records. Further, in view of that role, in most towns, the town clerk is designated as records access officer. In accordance with the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating the agency's response to requests for records. It is suggested that you contact the Town Clerk in an effort to ascertain the identity of the records access officer in order to learn of the status of your request.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be pertinent in relation to the records that you requested. A resolution would clearly be public, as would letters read at an open meeting, for any member of the public could have attended, heard or even recorded their content.

It is also noted that §106 of the Open Meetings Law requires that minute include reference to all resolutions and action taken during meetings of public bodies. Further, that provision specifies that

minutes of open meetings be prepared and made available within two weeks of a meeting. In addition, §30 of the Town Law states that the town clerk is responsible for preparing the minutes of town board meetings.

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 Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Town Board
Town Supervisor
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1041/98

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Mr. Tyrone Frazier
93-R-4552
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. Frazier:

I have received your letter of November 2 in which you sought assistance in obtaining a copy of an x-ray done at your facility. You indicated that a request was made in October, but that you had received no response as of the date of your letter to this office.

In this regard, I offer the following comments.

First, from my perspective, an x-ray pertaining to yourself would be available from the facility under either the Freedom of Information Law, §87(2)(g)(i), or §18 of the Public Health Law.

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

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

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Mr. Willie Haslip
96-B-0168
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

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

Dear Mr. Haslip:

I have received your letter of November 2. I hope that you will accept my apologies for the delay in response and understand that, as a matter of policy and fairness, responses to inquiries are prepared in the chronological order of their receipt.

You have asked how you might demonstrate that you have exhausted your administrative remedies in your attempts to obtain records from a county sheriff.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1047

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 9, 1997

Mr. Willie Haslip
96-B-0168
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601-0168

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

Dear Mr. Haslip:

I have received your letter of November 2. I hope that you will accept my apologies for the delay in response and understand that, as a matter of policy and fairness, responses to inquiries are prepared in the chronological order of their receipt.

You have asked how you might demonstrate that you have exhausted your administrative remedies in your attempts to obtain records from a county sheriff.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2819
FOIL-AO-1048

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 10, 1997

Ms. Carol J. Keller
Secretary, Scotia Fire Department
604 Riverside Ave.
Scotia, NY 12302

The staff of the Committee on 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 reviewed the materials delivered to this office on November 7 pertaining to the Scotia Fire Department, which you serve as Secretary. Your question is whether meetings of the Department are subject to the Open Meetings Law.

Based on the documentation that you provided, the Department is, in my view, somewhat unique. Section 31-1 of the Village Code indicates that the Department "shall consist of a full-time staff of paid firefighters and associated volunteer firefighters." The combination of paid and volunteer firefighters is, in my experience, rare in the area proximate to Scotia. As I understand the situation, most unusual is the absence of a board of directors or similarly designated governing body. Based on the Constitution of the Scotia Fire Department, which was adopted in 1986 and revised in 1993, the Department's governing body consists of its "active members", and the Department has the authority to act at meetings of the active members.

In consideration of the relationship between the Village and the Department and in conjunction with the following analysis, I believe that Department meetings of its active members fall within the coverage of the Open Meetings Law.

First, §29-2(A) of the Scotia Code states in part that:

> "...the Board of Fire Commissioners shall have full and complete operational and administrative control over the Fire Department and its volunteer and paid members and officers, and all matters relating thereto shall be dealt with solely and exclusively by the Board of Fire Commissioners..."

In addition, the Village Board of Trustees has certain responsibilities and duties regarding the Department, for the same provision states in part that:

> "There shall be consultation between the Board of Fire Commissioners and Board of Trustees upon the annual Fire Department budget, the purchase of fire trucks or equipment outside budget appropriations and the erection and construction for Fire Department use of buildings outside budget appropriations"

and that:

> "The employment of paid personnel of the Fire Department shall be reserved to the Board of Trustees, after solicitation and screening by the Board of Fire Commissioners and the submission of recommendations to the Board of Trustees..."

In short, two clearly governmental entities, the Village Board of Trustees and the Board of Fire of Commissioners, maintain essentially full control over the operation of the Department.

Second, with specific respect to 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."

By reviewing the components in the definition, I believe that each would be present in relation to meetings of the Department, specifically meetings of its decision making body, the active members. The active members, who collectively act by means of votes at Department meetings, comprise more than two members. The Constitution indicates that business must be conducted with the presence of a quorum. And finally, in view of the Department's functions and duties, in my opinion, it clearly conducts public business and performs a governmental function for one and perhaps two public corporations, the Village and the Fire District. Since each of the elements in the definition of "public body" can apparently be met, the meetings that are the subject of your inquiry must in my view be held in accordance with the Open Meetings Law.

Although perhaps tangential to the matter, I point out that the status of volunteer fire companies had long been unclear. Those companies are generally not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was difficult to determine whether or not they conducted public business and performed a governmental function. Nevertheless, in 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 be accountable. That decision, S.W. Pitts Hose Company et al. v. Capital Newspapers (Supreme Court, Albany County, January 25, 1988), dealt with the issue in terms of government control over volunteer fire companies. In its analysis, the Court stated that:

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

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

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

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

In sum, based on the documentation that you provided and the judicial decisions rendered under its statutory companion, I believe that Department meetings are subject to the requirements of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Mayor Denny
Board of Trustees
Board of Fire Commissioners

FOIL AO 10481

December 10, 1997

Mr. Dennis D. Michaels
Deputy Town Attorney
Town of Orangetown
Town Hall
Orangeburg, NY 10962

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

Dear Mr. Michaels:

I have received your letter of November 4 and the Town of Orangetown's proposed new Code of Ethics. You indicated that issues have arisen concerning the proposed Code in relation to both the Freedom of Information and Open Meetings Law and asked that I comment on those portions of the proposal that pertain to those statutes.

Your interest in compliance with those statutes is much appreciated, and enclosed are several opinions rendered by this office dealing with issues that have arisen concerning municipal codes of ethics. However, in addition to those opinions, I would like to offer the following comments.

First, there are references in the proposed Code in several instances to confidentiality. 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, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY 2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my opinion guarantee or require confidentiality.

Moreover, it has been held by several courts, including the Court of Appeals, that an agency's regulations or the provisions of a local enactment, such as an administrative code, local law, charter or ordinance, for example, do not constitute a "statute" [see e.g., Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 Ad 2d 965, reversed 55 NY 2d 1026 (1982); Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976); Sheehan v. City of Syracuse, 521 NYS 2d 207 (1987)]. For purposes of the Freedom of Information Law, a statute would be an enactment of the State Legislature or Congress. Therefore, a local enactment cannot confer, require or promise confidentiality. This not to suggest that many of the records used, developed or acquired in conjunction with an ethics code must be disclosed; rather, I am suggesting that those records may in some instances be withheld in accordance with the grounds for denial appearing in the Freedom of Information Law, and that any local enactment that is inconsistent with that statute would be void to the extent of any such inconsistency.

Similarly, insofar as a local enactment is more restrictive concerning access than the Open Meetings Law, I believe that it would be invalid. Section 110 of the Open Meetings Law, entitled "Construction with other laws," states in subdivision (1) that:

> "Any provision of a charter, administrative code, local law, ordinance, or rule or regulation affecting a public body which is more restrictive with respect to public access than this article shall be deemed superseded hereby to the extent that such provision is more restrictive than this article."

Further, although the Open Meetings Law is based upon a presumption of openness and meetings of public bodies must generally by conducted open to the public, §105(1) of the Law includes 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.

In those instances in which the Board of Ethics is engaged in a quasi-judicial proceeding, such a proceeding would be outside the coverage of the Open Meetings Law [see Open Meetings Law, §108(1)].

In short, while I do not believe that the use of the term "confidential" is technically appropriate, the ability to cite grounds for denial in the Freedom of Information Law or grounds for entry into executive session or exemptions from the Open Meetings Law would frequently result in the same outcome as in the proposed Code.

Second, however, an area in which I believe the concept of confidentiality may be inconsistent with the Freedom of Information Law pertains to financial disclosure statements.

Reference is made in the Code to the New York State Temporary Commission on Local Government Ethics. Although the Commission no longer exists, various provisions concerning its former role are in my view relevant to an analysis of the issue. 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.

By way of legislative history, 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.

Under §813(18)(a)(1) of the General Municipal Law, 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 was 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)]. Rather than being "confidential", I believe that financial disclosure statements would be accessible, except to the extent that disclosure would result in an unwarranted invasion of personal privacy in accordance with the preceding commentary.

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 findings of misconduct or 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.

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.

The foregoing in my view is consistent in substance with the provisions of the proposed Code that you highlighted relating to functions of the Board regarding its investigation of conflicts of interest or misconduct. For example, in §9(B)(5), reference is made to a situation in which an officer or employee is essentially given an admonition, and if he or she rectifies the situation, records regarding the matter remain beyond public rights of access. In that situation, no final determination reflective of a finding of misconduct would yet have been made, and I agree that the records could be withheld. I believe that the obligation to disclose exists only after a final determination has been made to the effect that a public officer or employee has been found to have engaged in some sort of misconduct. Unless and until that occurs, records may in my opinion be withheld to protect against an unwarranted invasion of privacy.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1982

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1997

Mr Harry Kovsky
[redacted]

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

Dear Mr. Kovsky:

I have received your letter of November 7 concerning the obligation of the Irvington Union Free School District to disclose a fact finders' report. You wrote that the District has contended that the report, in your words, "must be made public by the fact finder, not them" (emphasis yours).

From my perspective, the if the fact finders' report is public, and if the District has a copy, it is required to disclose it in response to a request made under the Freedom of Information Law. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to all agency records, and §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, if the District maintains a copy of the report, the report constitutes a "record" that falls within the coverage of the Freedom of Information Law.

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

Third, Article 14 of the Civil Service Law, commonly known as the "Taylor Law", pertains specifically to a fact finders' report. Section 209(3) provides in relevant part that:

> "On request of either party or upon its own motion, as provided in subdivision two of this section, and in the event the board determines that an impasse exists in collective negotiations between such employee organization and a public employer as to the conditions of employment of public employees, the board shall render assistance as follows...
>
> (c) if the dispute is not resolved at least eighty days prior to the end of the fiscal year of the public employer or by such other date determined by the board to be appropriate, the fact-finding board, acting by a majority of its members, (i) shall immediately transmit its findings of fact and recommendations for resolution of the dispute to the chief executive officer of the government involved and to the employee organization involved, (ii) may thereafter assist the parties to effect a voluntary resolution of the dispute, and (iii) shall within five days of such transmission make public such findings and recommendations..."

As I interpret the language quoted above, the "fact-finding board...shall make public such findings and recommendations." Once the fact-finding board makes public its report, the District, in my view, would be required to disclose it on request for the reasons noted earlier: because it constitutes a District record once it comes into the District's possession, and because none of the grounds for denial appearing in §87(2) of the Freedom of Information Law could be asserted to deny access.

As you requested, a copy of this opinion will be forwarded to the President of the Board of Education.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Penny Delaney, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1483

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1997

Ms. Linda Green
[redacted]

Dear Ms. Green:

I have received your recent correspondence, which relates to our conversation earlier this week. You have asked, in essence, whether it is unusual for a person other than a town clerk to be designated as "records access officer" by a town board.

In my experience, due in particular to the statutory functions of town clerks, it is rare for anyone other than a town clerk to be designated as records access officer. I note, too, that the duties of the records access officer, although perhaps related to other functions, pertain only to the implementation of the Freedom of Information Law.

As you are aware, pursuant to subdivision (1) of §30 of the Town Law, the town clerk "Shall have the custody of all the records, books and papers of the town." In addition, § 57.19 of the Arts and Cultural Affairs Law confers certain powers and duties upon and specifies that a town clerk is the "records management officer." That statute states in relevant part that:

> "The governing body, and the chief executive official where one exists, shall promote and support a program for the orderly and efficient management of records, including the identification and appropriate administration of records with enduring value for historical or other research. Each local government shall have one officer who is designated as records management officer. This officer shall coordinate the development of and oversee such program and shall coordinate legal disposition, including destruction of obsolete records. In towns, the town clerk shall be the records management officer."

Based on the foregoing, it is clear that a town clerk is not only the legal custodian of all town records, for he or she also has statutory responsibilities regarding the management of those records. In view of those functions, again, I believe that the town clerk is also designated as the "records access officer" in nearly all towns. In terms of that position, by §89(1) of the Freedom of Information

Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401). In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

Section 1401.2(b) of the regulations describes the duties of a records access officer and states in part that:

> "The records access officer is responsible for assuring that agency personnel:
>
> (1) Maintain an up-to-date subject matter list.
> (2) Assist the requester in identifying requested records, if necessary.
> (3) Upon locating the records, take one of the following actions:
> (i) make records promptly available for inspection; or
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor.
> (4) Upon request for copies of records:
> (i) make a copy available upon payment or offer to pay established fees, if any; or
> (ii) permit the requester to copy those records.
> (5) Upon request, certify that a record is a true copy.
> (6) Upon failure to locate the records, certify that:
> (i) the agency is not the custodian for such records; or
> (ii) the records of which the agency is a custodian cannot be found after diligent search."

I hope that I have been of 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-1048

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 12, 1997

Mr. Edgar Ramos
82-B-0882
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. Ramos:

I have received your letter of November 3 in which you sought advice regarding how you might obtain police reports concerning your case.

The reason for your inquiry is unclear based upon the correspondence attached to your letter. As I understand the matter, you requested the same records and received many of them pursuant to the Freedom of Information Law in 1991.

I point out that, based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was made available to you or your attorney, there must be a demonstration that neither you nor your attorney possesses the record in order to successfully obtain a second copy. Specifically, the decision states 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).

Based on the foregoing, if you or your attorney had received any of the records at issue previously, I believe that you and your attorney would be required to prepare an affidavit or similar certification indicating that you no longer have possession of the records in order to seek them again.

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 1065

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 15, 1997

Ms. Marian Dent
President, Delhi Preservation and
Economic Renewal
P.O. Box 341
Delhi, NY 13753

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

Dear Ms. Dent:

I have received your letter of November 10, as well as related materials. The issue involves "whether the Mayor of Delhi can communicate as a private citizen with the Rite Aid Corporation, its lawyers and developers regarding the proposed construction of a Rite Aid superstore in this village."

Among the materials is an article that included the content of a letter addressed to Rite Aid by the Mayor " just as a private citizen." In the letter, he referred to a "need to know" certain information "to start toward any type of working relationship in the future." The information sought " just as a private citizen" included the number of part time and full time employees, the amount of the construction budget "so that the real property tax base issue can be addressed", the basis for "some type of an agreement as to not hold the village of Delhi responsible for the potential failure of this business in the future", " a firm offer for the village property", and "some kind of a long term commitment to stay in Delhi..."

Certainly the Mayor or anyone else has the ability as a private citizen to communicate with Rite Aid or any other business entity. Many people, some of whom may be government officers or employees, write to businesses to offer complaints or to seek information as consumers. In that context, it would be unlikely that the correspondence would fall within the Freedom of Information Law. However, based on the content of the letter in question, I do not believe that a court would find that the Mayor could separate his role as Mayor from that of a private citizen.

The key provision in an analysis of the matter is §86(4) of the Freedom of Information Law which 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, 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 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 is especially relevant, for the Mayor's letter reflects "considerable crossover" between his activities as Mayor and those in which he may be involved as a private citizen. Again, in view of the content of the letter, I believe that it would be reasonable to conclude that the letter was written in part because of his status and stature as Mayor, and I would conjecture that the recipient considered it as a letter from the Mayor.

Further, in the same decision as that cited earlier, the Court emphasized that the Freedom of Information Law must be construed broadly in order to achieve the goal of government accountability, for the court found that:

> Key is the Legislature's own unmistakably broad declaration that, '[a]s state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible' (emphasis added; Public Officers Law, §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].

In short, based on the considerations referenced in the preceding commentary, I believe that this letter in question, as well as similar documentation, would constitute a "record" that falls within the scope of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Norman Warden, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1486

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 15, 1997

Mr. Harry Maples
96-A-8007
Downstate Correctional Facility
Box F
Red School House Road
Fishkill, NY 12524-0445

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

Dear Mr. Maples:

I have received your letter of September 15, which did not reach this office until November 10. You have sought assistance in obtaining a record indicating "the move of an unidentified corpse which the Office of the Chief Medical Examiner of the City of New York issued a death certificate."

In this regard, 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.

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." Since the death certificate was issued in New York City by the Office of the Chief Medical Examiner, I note that 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 disclosure under 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 point out that in Mitchell, the court found that autopsy reports and related records maintained by the Medical Examiner were not subject to the Freedom of Information Law. It was determined in that case 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 the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1089

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 15, 1997

Ms. Sherry J. Kiselyak
[redacted]

The staff of the Committee on 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. Kiselyak:

I have received your letter of November 7 in which you asked whether a certain practice of the Village of Sag Harbor is "legal."

According to your letter, having recently attempted to obtain real estate tax information by phone from the Village, you were "informed that such information would not be given over the phone unless [you] paid a $15.00 fee first" (emphasis yours). You expressed the view that "this practice is a violation of the Freedom of Information Law." You also asked if you would be "entitled to a list of those people who have paid that fee and to know where all the money is going."

In this regard, I offer the following comments.

First, although many agencies provide information in response to telephone inquiries, I know of no law that requires that they do so. Further, pursuant to §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. It is also noted that the title of the Freedom of Information Law may be some what misleading, for it is not an information law per se; rather, it is a vehicle under which the public may seek records. In short, there is nothing in the Freedom of Information Law that would require agencies to supply information by phone. That being so, I do not believe that the Village would be prohibited from charging a fee for the service provided by phone to which you referred.

If a record is requested, as you may be aware, §87(1)(b) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per copy up to nine by fourteen inches, or the actual cost of reproducing other records (i.e., computer tapes or disks).

Second, §89 (3) also indicates that the Freedom of Information Law pertains to existing records and states that an agency need not create a record in response to a request. If a list of those who paid the fee does not exist, the Village would not be required to create such a list on your behalf.

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

The only pertinent ground for denial, if such a list exists, would be §87 (2)(b), which enables an agency to withhold records when disclosure would result in " an unwarranted invasion of personal privacy." Section 89 (2)(b) includes examples of unwarranted invasions of privacy, one of which involves the ability to withhold a list of names and addresses if the list would be used for commercial or fund-raising purposes. Assuming that a list exists and that you can certify that you would not use it for commercial or fund-raising purposes, I believe that it would be accessible.

Lastly, again assuming that records exist indicating "where all this money is going", they would be available in my opinion, for none of the grounds for denial could properly be asserted.

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:tt

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1488

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 15, 1997

Mr. William L. Edwards
[redacted]

Dear Mr. Edwards:

As you are aware, your letter of December 2 addressed to the Office of the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the New York Freedom of Information Law.

You have asked " to what Freedom of Information Unit you may seek copies of minutes of a jury trial pursuant to the Freedom of Information Act, 5 U.S.C. 552."

In this regard, the statute to which you referred pertains to records maintained by federal agencies. That Act does not include courts within its coverage. Similarly, the New York Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, neither the state nor the federal Freedom of Information laws apply to the courts.

This is not to suggest however, that court records may be withheld, for other statutes frequently grant broad rights of access to court records (see e.g., Judiciary Law, §255). It is suggested that any request for court records be directed to the clerk of the court in which the proceeding was conducted, citing an applicable law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1089

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 15, 1997

Mr. Steven A. Naples
[redacted]

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

Dear Mr. Naples:

I have received your letter of November 8 in which you sought assistance in obtaining records pertaining to yourself from the Greenlawn Fire Department.

In this regard, as you are aware, it has been held that volunteer fire companies, despite their status as not-for-profit corporations, are required to comply with the Freedom of Information Law. If you have not shared a copy of the advisory opinion attached to your letter with the President of the Department, which refers to judicial determinations on the subject, it is suggested that you transmit a copy to him.

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)].

With respect to rights of access, it is likely that most, if not all of the records in question, must be made 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.

Relevant to the matter is §87(2)(b), which authorizes an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy." Insofar as records pertain to you, you could not engage in an invasion of your own privacy, and the exception would not apply. To the extent that records about you might identify others, those portions pertaining to those other than yourself could be withheld if disclosure would constitute an unwarranted invasion of their privacy.

The other ground for denial of significance, §87(2)(g), often requires disclosure due to its structure. 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 an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the President of the Department.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Paul Bunyon, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1490

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Mr. Charles E. Lunderman
97-B-0701
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-034

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

Dear Mr. Lunderman:

I have received your letter of November 10. You have questioned whether an agency can charge you $99 for a copy of your file.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy. Therefore, if the fee in question is based on that standard, I believe that it would be consistent with law.

It is also noted that there is nothing in the Freedom of Information Law pertaining to the waiver of fees. Moreover, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Ms. Miriam Mckenzie
89-G-0487, Unit 113A-21
P.O. Box 1000
Bedford Hills, NY 10507

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

Dear Ms. Mckenzie:

I have received your letter of November 11 in which you sought guidance in obtaining various records pertaining to your case under 5 USC §§ 552 and 552a.

In this regard, the statutes that you cited are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The statute of general application would appear to be the New York Freedom of Information Law, which pertains to records maintained by agencies of state and local government in New York.

To seek records under the Freedom of Information Law, 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. 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 contain sufficient detail to enable agency staff to locate and identify the records.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by police officers 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. Axelrod, 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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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). Therefore, if, for example, a search warrant was displayed to you prior to a search, I do not believe that there would be any basis for a deinal of access.

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 relevant 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 §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 or other records described in §677, for the ability to obtain such records is based solely on §677(3)(b). In my view, only a district attorney and the next of kin of the deceased have a right of access to records subject to §677; any others would be required to obtain a court order based on demonstration of substantial interest in the records.

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).

The Court in Moore also specified that an agency "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).

While court records are not subject to the Freedom of Information Law, they are frequently available under other provisions of law (see e.g., Judiciary Law, §255). A request for court records should be made to the clerk of the court in possession of the records, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1892

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Mr. Ronald J. Hall
96-A-5913
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. Hall:

I have receive your letter of November 10 and the correspondence attached to it. It appears that you have questioned the propriety of a response to your request for records by Rockland County.

If that is so, I agree with the County's response. In this regard, I offer the following comments.

First, Rockland County, as an agency, is separate and distinct from towns in the County, each of which would constitute an agency. Further, the County would not have custody or control of records maintained by another agency, nor would it be obliged to obtain records from another agency on your behalf. In short, if you are interested in obtaining records maintained by town police departments, your requests should be directed to the appropriate towns.

As you may be aware, 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. If you believe that certain towns maintain records of your interest, requests should be directed to the records access officers at those towns.

Lastly, I note that the Freedom of Information Law is silent with respect to the waiver of fees. Moreover, it has been held that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

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:tt

cc: Robert J. Winzinger

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1693

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Mr. Giles Richards
97-A-2625
Eastern NY Correctional Facility
Box 338
Napanoch, NY 12458-0338

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

Dear Mr. Richards:

I have received your letter of November 10. You referred to a request for records relating to your arrest and conviction sent to the Office of the Westchester County District Attorney that had not been answered as of the date of your letter to this office. As such, you asked that I "intervene on [your] behalf."

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 "intervene" in the legal sense or otherwise compel an agency to grant or deny access to records.

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

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

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

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

In an effort to assist you, a copy of this response will be forwarded to the records access officer at the Office of the District Attorney.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Mr. Charles E. Lunderman
97-B-0701
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. Lunderman:

I have received your letter of November 10 in which you sought assistance concerning your ability to obtain inpatient mental health records from a hospital.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

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

Dear Obosix:

Your e-mail addressed to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department, is authorized to provide advice concerning the Freedom of Information Law.

You indicated that you have attempted without success to obtain records from a New York City agency. You have asked how one might "pursue civil litigation" and "where...you begin."

In this regard, I offer the following comments.

First, pursuant to regulations promulgated by the Committee that have the force and effect of law (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 generally be directed to that person. While I believe that 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 agency's records access officer, it is suggested that, if you have not already done so, you submit a request to the records access officer.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond t 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 point out that a judicial proceeding cannot be initiated until one's administrative remedies have been exhausted. In the context of the Freedom of Information Law, a person initially denied access to records, either in writing or by virtue of a failure to respond, must appeal and be denied on appeal in order to exhaust administrative remedies.

An Article 78 proceeding is the vehicle used when a government agency or officer has acted unreasonably or has failed to perform a duty required to be carried out by law. Such a proceeding would be brought in the Supreme Court in the county in which the act complained of occurred. As a general matter, a member of the public has the burden of proof in an Article 78 proceeding. However, §89(4)(b) of the Freedom of Information Law specifies that an agency has the burden of justifying a denial of access to records in a suit brought under that statute. It is suggested that a local law library should have materials regarding Article 78 proceedings, particularly "form books" that can be used when initiating such proceedings.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1496

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Hon. Mary Ann Smith
Deputy Mayor, City of Amsterdam
Common Council
61 Church 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 Deputy Mayor Smith:

I have received your letter of November 12. You have sought a "ruling" concerning whether you, as an elected official, can be required to seek records under the Freedom of Information Law when you are engaged in efforts "to make informed decisions for the voters."

In this regard, it is noted at the outset that the Committee on Open Government has the authority to provide advice and opinions concerning the Freedom of Information Law. The Committee cannot render "rulings" that are binding, nor is it empowered to compel an agency to grant or deny access to records. As such, the ensuing comments should be viewed as advisory in nature.

From my perspective, as a general matter, 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 rule or policy to the contrary, I believe that an elected official 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 city council, as the governing body of a

public corporation, generally acts by means of motions carried by an affirmative vote of a majority of its total membership (see General Construction Law, §41). In my view, in most instances, a member acting unilaterally, without the consent or approval of a majority of the total membership of the council, has the same rights as those accorded to a member of the public, unless there is some right conferred upon a 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.

In short, there is nothing in the Freedom of Information Law or any other law of which I am aware that deals directly with rights of access to records by elected officials. In some instances, there may be local enactments, such as a city charter or municipal code, that specify elected officials' rights of access. It is suggested that you attempt to ascertain whether any such provision exists in the City of Amsterdam. In the absence of such provision, you could propose a policy or rule on the matter before the City Council.

As you requested, copies of this response will be sent to the Mayor and the City Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. John Duchessi, Mayor
Hon. Jane DiCaprio, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Ms. Juanita R. Bryant
[redacted]

The staff of the Committee on 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. Bryant:

I have received your letter of November 12, as well as the correspondence attached to it. You indicated that you requested a variety of information from the Department of Correctional Services on four occasions, but that, as of the date of your letter to this office, you had received no response.

Having reviewed the materials, I offer the following comments.

First, it appears that you may misunderstand the Freedom of Information Law. From my perspective, the title of that statute may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather it is vehicle that may require an agency to disclose records. I point out, too, that §89(3) of the Freedom of Information Law states in part that the Law pertains to existing records and that an agency need not create a record in response to a request.

Many aspects of your requests are framed by means of questions. In short, an agency is not required by the Freedom of Information Law to answer questions or create new records in response to requests for information. In the future, rather than attempting to elicit information by raising questions, it is suggested that you seek existing records.

Second, notwithstanding the foregoing, 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 by the Department of Correctional Services to determine appeals is Counsel to the Department, Anthony J. Annucci.

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

A key element of your request involves a "health policy and procedure manual." In my view, it is likely that such a manual, if it exists, would be available in great measure. Relevant would be §87(2)(g), which authorizes an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. A statement of policy or a manual would be available under subparagraphs (ii) or (iii) of §87(2)(g), except to the extent that a different ground for denial might apply.

The other ground for denial of possible significance might be §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Some elements of a manual might if disclosed jeopardize the safety of Department staff, and those portions of such a record could, in my opinion, be withheld.

A second area of focus involves information pertaining to medical personnel. In this regard, §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].

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, 218 AD 2d 494 (1996)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Pam Barto

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1698

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 16, 1997

Mr. Frederick J. Gorman
Sachem Community Watch
Box 372
Neosconset, NY 11767-0372

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

Dear Mr. Gorman:

I have received your letter of November 11. You have questioned various requirements imposed and procedures adopted by the Ronkonkoma Fire District Board of Fire Commissioners in relation to its implementation of the Freedom of Information Law.

Having reviewed your remarks, the Board's response to your request, and its application form used to request records, I offer the following comments.

First, by way of background, §89(1) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of that statute (21 NYCRR Part 1401).. In turn, §87(1) requires the governing body of a public corporation to adopt rules and regulations consistent those promulgated by the Committee and with the Freedom of Information Law. Further, §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."

As stated above, the records access officer must "coordinate" an agency's response to requests. In my opinion, when an official receives a request, he or she, in accordance with the direction provided by the records access officer, must respond in a manner consistent with the Freedom of Information Law, or forward the 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)].

I note that although 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.

Third, unless a statute, an act of the State Legislature, authorizes an agency to charge a fee for personnel time, 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. In this instance, I know of no statute that would authorize the Board to do so.

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

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

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute [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 personnel time, 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, I do not believe that an agency can require an applicant for records to supply a social security number. 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.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1049

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 17, 1997

Ms. Marijane Knudson-Hunlock
[redacted]

The staff of the Committee on 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. Knudsen-Hunlock:

I have received your letter of November 5, which reached this office on November 17. Please note the new address of the Department of State on our letterhead.

You complained that your requests for records of the Accord Board of Fire Commissioners have not been answered.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 response will be forwarded to the Chairman of the Board of Fire Commissioners.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Ed McGirr, Chairman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1060

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 17, 1997

Mr. Ricky Owens
94-B-0651
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. Owens:

I have received your letter of November 10. You have asked that I "look over" certain documents relating to your request to the City of Rochester in order to advise whether they are consistent with the Freedom of Information Law.

Based on your comments in your appeal, it appears that an 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 recordkeeping systems of the City, 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 numerous 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.

It is also noted that §89(3) of the Freedom of Information Law provides in part that an agency is not required to create a record in response to a request. When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency 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, the City 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.

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 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1050

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 17, 1997

Ms. Jean A. Black
Certified Public Accountant
24 West Avenue
Spencerport, NY 14559

The staff of the Committee on 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 November 13, as well as the materials attached to it. You have sought my views concerning your request for payroll information directed to the Wayland-Cohocton Central School. In response to the request, you were informed that names of employees are "confidential."

From my perspective, it is clear that records indicating payments to public employees 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, 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 operational information. The identity of the employees and their salaries are vital statistics kept in the proper recordation of departmental functioning and are the primary sources of protection against employment favoritism. They are subject therefore to inspection" Winston v. Mangan, 338 NYS 2d 654, 664 (1972)].

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

In addition, 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. The same conclusion has been reached judicially, and the court cited an advisory opinion rendered by this office (Day v. Town of Milton, Supreme Court, Saratoga County, April 27, 1992).

As you are aware, a 1996 amendment to the Education Law specifies that records must be prepared indicating the total compensation, including benefits, that accrue to superintendents and other administrators. That information is required to be appended to the annual statement of estimated expenditures required to be disclosed under §1716 of the Education Law.

Lastly, since there appears to be a question concerning the fee charged by the School, I point that the only fee that may be charged involves the reproduction of records; no fee may be assessed for administrative or personnel costs. Under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy or the actual cost of reproducing records that cannot be photocopied (i.e., computer tapes or disks).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Robert J. Cownie, Superintendent
David Mastin, Business Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1050

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 17, 1997

Mr. Larry E. Peterson
[redacted]

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

Dear Mr. Peterson:

I have received your letter of November 12, as well as the materials attached to it. You have asked that I review your request to the State Board of Elections "for release of the affidavits associated with [your] complaint and take any appropriate action."

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 has neither the jurisdiction nor the resources to conduct an investigation, and it is not empowered to compel an agency to grant or deny access to records.

In brief, the materials indicate that you submitted a complaint to the Board of Elections, that the Board received allegations refuting your allegation, and that, therefore, the Board closed the complaint. Thereafter, your request for the affidavits was denied.

From my perspective, the denial of access was consistent with 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. I believe that two of the grounds for denial are pertinent to an analysis of the matter.

First, §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Second, §87(2)(e) permits an agency to withhold records compiled for law enforcement purposes under certain

circumstances, one of which includes disclosures that would "identify a confidential source or disclose confidential information relating to a criminal investigation."

In either instance, I believe that the Board could withhold the records insofar as disclosure would identify those who offered the affidavits. Those persons might be characterized as witnesses or confidential sources who, under the law, merit protection of privacy. If personal privacy could not be protected in this and similar instances, many would choose not to come forward, and government would be unable to carry out its duties effectively on behalf of the public.

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:tt

cc: Todd D. Valentine
Lee Daghlian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10503

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 18, 1997

Mr. Raymond Polanco
Reg. No. 30187-048
U.S.P. Beaumont
P.O. Box 26030
Beaumont, TX 77720-26030

Dear Mr. Polanco:

Your letter of December 10 addressed to the Secretary of State of New York has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer guidance concerning the New York Freedom of Information Law. Please note that the current Secretary of State is Alexander F. Treadwell.

Having reviewed your request, I offer the following comments.

First, the statutes upon which you based your request are the federal Freedom of Information and Privacy Acts. Those provisions pertain only to records maintained by federal agencies. The statute that generally deals with rights of access to records maintained by entities of state and local government in New York is this state's Freedom of Information Law.

Second, since the Department of State is not a criminal law enforcement agency, it would not maintain the kinds of records that you are seeking. Consequently, there are no records to be made available that fall within the scope of your request.

Third, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. From my perspective, it is unlikely that your request would meet that standard, for you have merely sought records pertaining to yourself. Additional detail would be needed, such as categories of records, dates, files, identification or similar numbers, etc., in order to locate any such records.

Lastly, you referred to your request for a Vaughn Index identifying each record that might be withheld. Although this agency does not maintain any records pertaining to you, I note that the New York Freedom of Information Law does not require the preparation of that kind of an index.

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-1050

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 18, 1997

Mr. Paul N. Prentice
[redacted]

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

Dear Mr./Ms. Prentice:

I have received your letter of November 17 in which you sought assistance in obtaining records from the Hyde Park Central School District relating the "alleged need" to engage in the construction of new facilities. Having reviewed your correspondence with the District, 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, it is emphasized 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. Certain elements of your request involve "lists." If the lists exist, they would be subject to rights of access conferred by the Law; if, however, no such lists have been prepared, the District would not be required to create new records on your behalf. In the future, rather than seeking lists, it is suggested that you request existing records, unless it is known that a list has been prepared.

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.

It is unclear whether your request involving the school census it intended to include the identities of students or children who are not yet enrolled. For reasons to be discussed later, I believe that statistics or raw data would clearly be public; however, identifying details pertaining to children may be withheld. 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." From my perspective, disclosure of the identification of people by means of an age group, i.e., as children, would result in an unwarranted invasion of personal privacy.

More significant, however, is §87(2)(a), which pertains that records that "are specifically exempted from disclosure by state or federal statute. One such statute is the federal Family Educational Rights and Privacy Act (20 USC §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.

An exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education to include:

> "....information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to the student's name,address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended."

Prior to disclosing directory information, educational agencies must provide notice to parents of students or students in order that they may essentially prohibit any or all of the items from being disclosed. Therefore, if an educational agency or institution has adopted a policy on directory information, those items designated as directory information would be available to any person. If, however, an educational agency or institution has not adopted a policy on directory information, it would in my view be prohibited from disclosing records identifiable to students without the written consent of the parents of the student, or the students as the case may be.

The remaining records that might be included within or be pertinent to your request would likely have been prepared by District staff. If that is so, they would fall within the scope of §87(2)(g). Although that provision potentially serves as a basis for a denial of access, due to its structure, it often requires disclosure. 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. I would conjecture that portions of the records of your interest would consist of statistical or factual information available under §87(2)(g)(i).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Superintendent
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1085

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 19, 1997

Mr. Frank L. Gennuso
85-C-0127
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. Gennuso:

I have received your letter of November 10 in which you complained with respect to a fee of $1.00 per page imposed by the Department of Motor Vehicles. The record sought involved the Department's subject matter list. You have asked whether the Freedom of Information Law or the Vehicle and Traffic Law is applicable under the circumstances.

In most instances, I believe that the Department of Motor Vehicles may charge fees in accordance with the provisions of §202 of the Vehicle and Traffic Law. In those cases, since the fees are prescribed by statute, they would supersede and prevail over the provisions pertaining to fees appearing in the Freedom of Information Law. However, as I understand §202 of the Vehicle and Traffic Law, that provision would not serve as the basis for the fee regarding a request for the Department's subject matter list. The introductory language of §202 states that:

> "Except in those cases in which it is provided by law that no fee shall be charged, the fees for searching the records of the department of motor vehicles kept pursuant to the provisions of this chapter and for furnishing copies of documents in said department kept pursuant to the provisions of this chapter shall be provided in this section."

Pertinent in my view is the clause in the sentence quoted above that refers to records of the Department of Motor Vehicles "kept pursuant to the provisions of this chapter." The "chapter" is the Vehicle and Traffic Law. The subject matter list in my opinion is kept pursuant to the Freedom of Information Law. The reference to the list appears in §87(3) of the Freedom of Information Law, which states that:

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

Based upon the foregoing, the requirement to maintain the subject matter list emanates from the Freedom of Information Law, not the Vehicle and Traffic Law. That being so, I believe that the Department could charge up to twenty-five cents per photocopy in response to a request for the subject matter list.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alexandra Sussman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10506

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 19, 1997

Mr. Edmond Roy
96-B-2446
Watertown Correctional Facility
P.O. Box 168
Watertown, NY 13601

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

Dear Mr. Roy:

I have received your letter of November 14, as well as the materials attached to it. You referred to a request for records maintained by the Broome County. The County indicated that the records would be disclosed following a payment based upon a fee of $.25 per photocopy, for a total of $17.50. You wrote that you are impoverished and sought a waiver of the fee. You have asked that this office grant such a waiver.

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 make determinations concerning rights of access to records or direct an agency to waive a fee.

I note that there is nothing in the New York Freedom of Information Law pertaining to the waiver of fees. Moreover, it has been held judicially that an agency may charge its established fee, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS 2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Richard R. Blythe, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1050?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 22, 1997

Ms. Barbara R. Joshi
[redacted]

The staff of the Committee on 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. Joshi:

I have received your letter of November 19. You have asked whether it is "acceptable for the Livingston County Industrial Development Agency to first release documents for public viewing under FOIL, then refuse to provide xerox duplicate copies of some of these same documents."

In this regard, as a general matter, when records are available for inspection under the Freedom of Information Law, I believe that they are available for copying and that an agency must provide copies upon payment of the requisite fee [see Freedom of Information Law, §89(3)]. Therefore, assuming that the disclosure was not inadvertent and was made "intelligently and voluntarily" [see McGraw-Edison v. Williams, 509 NYS 2d 285, 287 (1986)], it would appear that the Agency would have waived it right to prohibit a person who inspected a record from copying a record that was previously disclosed for the purpose of inspection.

In the case cited in the preceding paragraph, among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld. It was held that an inadvertent disclosure of an exempt records did not create a right to copy the record (McGraw-Edison Co. v. Williams, supra). If indeed records may justifiably be withheld, but they were inadvertently made available for inspection, it would appear that the Agency could properly deny a request that the records be copied.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Patrick Rountree

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10508

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 22, 1997

Mr. Kevin J. Smyth
93-B-1546
P.O. Box 1245
Beacon, NY 12508-8245

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

Dear Mr. Smyth:

I have received your letter of November 17 and the materials relating to it. You have sought assistance concerning your requests for information directed to the Department of Correctional Services. The information sought pertains to investigations allegedly carried out by that agency and others regarding your activities, particularly with respect to its alleged seizure of your "papers and other property."

Having reviewed the materials, I offer the following comments.

First, it is emphasized at the outset that the Freedom of Information Law pertains to existing records, and that under §89(3) of the Law, an agency is not required to create a record in response to a request. Some aspects of your requests appear to seek information rather than records. Insofar as the Department does not maintain the information in question in the form of records, the Freedom of Information Law would not apply.

In a somewhat related vein, the same provision requires that an applicant "reasonably describe" records sought. As such, an applicant must supply sufficient detail to enable agency staff to locate and identify the records. It is questionable in my view whether every element of your requests meets that standard. For example, you requested any records maintained by the Department pertaining to certain named individuals. I am unaware of the manner in which the Department maintains or files its records, and it is possible that providing a name alone would not meet the standard prescribed by the law.

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.

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)].

It is noted that in a 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." 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.

Since I am unaware of the contents of all 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.

A provision of primary significance, §87(2)(g) of the Freedom of Information Law, enables an agency to withhold records that:

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

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

I point out that a decision rendered in 1989 might have dealt with certain records that may be similar to some of those of your interest. 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.

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.

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

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 - 10509

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 22, 1997

Mr. Jeff Blocker
93-A-0989
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. Blocker:

As you are aware, I have received your letter of November 10, as well as a variety of related materials.

You have sought an advisory opinion concerning access to the so-called "Mead letter", which was sent by a clergyman to your facility. You were apparently informed that the letter could be withheld because it is "evaluative."

In this regard, the term "evaluative" is generally used in the context of the Freedom of Information Law to describe certain aspects of the contents of records prepared by the staff of an agency. Those kinds of records could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g), and those portions that are indeed evaluative could in my view be withheld. A clergyman, however, would not be an agency employee, and his correspondence with the facility would not fall within §87(2)(g), even if the contents are evaluative in nature.

Nevertheless, there may be a different ground for denial that might apply. While I am unaware of the content of the letter, of possible significance is §87(2)(b), which authorizes an agency to deny access to records insofar as disclosure would result in "an unwarranted invasion of personal privacy." I would conjecture that that provision may be relevant to an analysis of rights of access.

Lastly, having reviewed your correspondence, I note that the Freedom of Information Law does not apply to the courts or court records [see definitions of "agency" and "judiciary" in §86(1) and (3) of the Freedom of Information Law]. This is not to suggest that court records are not accessible, for other provisions of law frequently require broad disclosure of those records (see e.g., Judiciary Law, §255).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Timothy J. Murray, Superintendent
Anthony J. Annucci, Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1051O

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 22, 1997

Mr. Robert K. Murphy
Senior Claims Representative
CIGNA Property & Casualty
P.O. Box 201
Thompson Ridge, NY 10985

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

Dear Mr. Murphy:

I have received your letter of November 17. You have questioned the propriety of a charge of $25 by the Mombasha Fire Department for a copy of a report relating to a fire. In conjunction with the foregoing, you asked that this office intervene, investigate and indicate whether it "can sanction or penalize" the Department for its actions.

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 penalize an agency for noncompliance. It is our hope, however, that opinions rendered by this office are educational and persuasive, and that they serve to encourage compliance with law. With that goal, I offer the following comments.

By way of historical and legislative 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, (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, the only fee that an agency may charge involves the duplication of records, and that fee is limited to twenty-five cents per photocopy, unless an act of the State Legislature authorizes a different fee. I know of no statutes that would enable the Department to charge other than twenty-five cents per photocopy.

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 Department 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 Chief Carl.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Carl, Chief

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1051

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Kenneth Moore
Sheet Metal Workers' International Association
11 Ontario Road
Bellerose Village, NY 11001

Dear Mr. Moore:

I have received your letter of December 19 in which you requested "copies of the certified payrolls for Powerhouse Sheet Metal", which is a subcontractor on a project of the William Floyd Union Free School District. According to the correspondence attached to your letter, the District Superintendent indicated that the neither the District nor the prime contractor maintains the payrolls in question, and he suggested that you could appeal to this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning the State's Freedom of Information Law. The Committee does not maintain possession or control of the records at issue, and it is not empowered to compel an agency to grant or deny access to records or to determine an appeal. In an effort to clarify your understanding of the matter, I offer the following comments.

First, the provision concerning 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. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal

and the ensuing determination thereon."

Therefore, in the case of a denial of access by a school district, an appeal would be determined by the governing body, the board of education, or by a person or body designated by the board.

Second, it does not appear that the Freedom of Information Law would be applicable. That statute pertains to agency records, and §86(3) defines 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 school district clearly is an "agency" subject to the Freedom of Information Law.

Section 86(4) of the Law defines the term "record" to include:

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

If the records in question are not maintained by or for the District, they would not constitute agency records, and, again, the Freedom of Information Law would not apply.

Even if the records were maintained by or for the District, portions of the records could, in my opinion, 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.

Assuming that payroll records include a contractor's or subcontractor's employees' names, addresses, social security numbers and their wages, I believe that portions of those records could properly be withheld pursuant to §87(2)(b). That provision permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Section 89(2)(a) authorizes an agency to delete identifying details to protect against an unwarranted invasion of personal privacy when it makes records available. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, one of which pertains to:

> "disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such

> information is not relevant to the work of the agency requesting or maintained it...[§89(2)(b)(iv)].

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

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

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: Richard J. Hawkins, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1052

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Ms. Linda Pew
[redacted]

The staff of the Committee on 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. Pew:

I have received your letter of November 19, as well as the materials attached to it.

You have questioned the propriety of a denial of your request by Suffolk County for copies of "Civil Service Classification Questionnaires" completed by certain County Employees. The Office of the County Attorney sustained the denial based on its contention that the questionnaires are "used for evaluation purposes." You enclosed a copy of the same questionnaire, which you completed and apparently submitted to the Civil Service Department.

Having reviewed the questionnaire, I believe that some elements of its contents must be disclosed, while others may be withheld. In this regard, I offer the following comments.

As you are aware, the records in question fall within §87(2)(g) of the Freedom of Information Law, the exception to rights of access pertaining to "inter-agency or intra-agency materials." That provision, however, due to its structure often requires disclosure of some aspects of the kinds of records at issue. In the context of your request and as explained in the response addressed to you on November 7, the essential dividing line in terms of portions of the records that must be disclosed and portions that may be withheld is between factual information and opinions.

From my perspective, substantial portions of the questionnaire consist of factual information. Items 1 through 12, 14 to 17, 22 and 23, and 27 and 28 appear to consist of factual information that must be disclosed. Other items appear to consist of opinions that may be withheld. For example, item 21 involves a ranking by an employee in which he or she offers an opinion concerning the relative importance of duties performed. In some instances, it is unclear whether a response reflects facts or opinions. For instance, in item 19, the employee is asked to "indicate knowledge required for this position." If certain degrees, certifications or courses are required to hold the position, the

response would, in my view, involve factual information. On the other hand, if the response indicated what kind of knowledge an employee believes to be necessary or beneficial to hold the position, the response would be reflective of his or her opinion.

Lastly, that a record is used for the purpose of evaluation is not determinative of rights of access or an agency's ability to withhold a record. Frequently statistical or factual information is used for the purpose of evaluation. In this instance, again, while the questionnaire may be used for purposes of evaluation, much of it consists of factual information which I believe must be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the Office of the County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Derrick J. Robinson

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1513

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Scott Snyder
[redacted]

Dear Mr. Snyder:

I have received your letter of December 21 in which you requested records from this office pertaining to an officer of the Town of Greece Police Department.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have possession and control of records in general. As such, this office does not maintain any of the records in which you are interested.

To seek records under the Freedom of Information Law, a request should be made to the agency that possesses the records. Under the circumstances, insofar as the records sought exist, they would be maintained by the Town of Greece. It is also noted that the regulations promulgated by the Committee (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 a request should ordinarily be directed to that person. In most towns, the town clerk is designated as records access officer, and it is suggested that you contact the clerk to ascertain the identity of the records access officer.

Lastly, I note that §50-a of the Civil Rights Law provides that personnel records pertaining to police officers that are used to evaluate performance toward continued employment or promotion are exempt from disclosure.

I hope that I have been of assistance. If you have questions on 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-10514

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Kevin Smyth
93-B-1546
P.O. Box 1245
Beacon, NY 12508-8245

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

Dear Mr. Smyth:

I have received your letter of November 19. You referred to a request for records of the Division of State Police and your contention that it can retrieve the records of your interest.

In this regard, the issue involves a matter to which reference was briefly made in earlier correspondence. Specifically, the matter in my view involves the extent to which a 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 recordkeeping systems of the Division, 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 numerous 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce M. Arnold, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1015

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. David J. Decker
Taconic Newspapers
7 Livingston Street
Rhinebeck, NY 12572

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

Dear Mr. Decker:

I have received your letter of November 13, which reached this office on November 24. You have sought advice concerning your efforts in obtaining information from the State University College at New Paltz. Having reviewed the correspondence, I offer the following comments.

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

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

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

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

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

Second, it appears that you may misunderstand the Freedom of Information Law. From my perspective, the title of that statute may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather it is a vehicle that may require an agency to disclose records. I point out, too, that §89(3) of the Freedom of Information Law states in part that the Law pertains to existing records and that an agency need not create a record in response to a request.

Some aspects of your requests are framed by means of questions. For instance, in your letter to the President of the College, you wrote: "tell me why Philip Schmidt is not longer Dean..." In short, an agency is not required by the Freedom of Information Law to answer questions or create new records, except in specified circumstances, in response to requests for information. In the future, rather than attempting to elicit information by raising questions, it is suggested that you seek existing records.

Third, 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.

Relevant to an analysis of rights of access is a provision cited in the determination of your appeal, §87(2)(g), which authorizes an agency to withhold records that:

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

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

While I am not familiar with the contents of any records that might exist on the matter, also of potential significance is §87(2)(b). That provision permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy."

Lastly, I believe that the College must maintain and make available a "subject matter list." 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. 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: Martin T. Reid
Karen L. Summerlin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1516

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Walter Zivkovich
95-R-6944
Hudson Correctional Facility
P.O. Box 576
Hudson, NY 12534-0576

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

Dear Mr. Zivkovich:

I have received your letter of November 18 in which you sought guidance concerning a request for records of the Nassau County Police Department's Internal Affairs Unit.

As I understand the matter, you are interested in obtaining a record that indicates "exactly what was furnished to the prosecutor" in response to a subpoena. One response to the request stated that the record could be withheld as an unwarranted invasion of personal privacy; a day later, however, you were informed that the record does not exist. You added that "[t]he matter is recorded as part of a criminal proceeding, a matter of public record" and referred to the document "as an inter-agency record of transaction."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of the Law provides in part that an agency is not required to create a record in response to a request. Therefore, if there is no record, 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, assuming that the record in question does exist and can be found, I point out as a general matter that the Freedom of Information Law is based.... Without knowledge of the content of any such record, I could not conjecture as to the applicability of §87(2)(b), which states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

Also relevant is §87(2)(g), which authorizes an agency to withhold records that:

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

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

Lastly, in the case of 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. 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." I emphasize, 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

cc: Records Access Officer, Nassau County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1057

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Damon Saez
94-A-5743
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. Saez:

I have received your undated letter in which you sought assistance in obtaining information from the Clerk of the Queens County Court and records from the New York City Police Department.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law. That statute excludes the courts from its scope. Therefore, I cannot offer meaningful guidance concerning your request for information from the court. It is suggested that you contact the Clerk again or that you discuss the matter with a representative of Prisoners' Legal Services.

Insofar as your inquiry relates to records of the Police Department, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) states in relevant part that an agency is not required to create a record in response to a request. Consequently, if, for example, there is no "itemized list" of records or reports concerning your case, the Department would not be required to prepare such a list on your behalf.

Second, your correspondence indicates that you were informed that The Department does not maintain the records sought in the manner in which you requested them. In this regard, §89(3) also states that an applicant must "reasonably describe" the records sought. Therefore, when making a request, an applicant must include sufficient detail to enable agency staff to locate and identify the records.

Lastly, assuming that an appropriate request is made, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

As you requested, the documentation that you sent is being returned to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

1057B
FOIL-AO

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Joaquin Winfield
97-A-5399
Downstate Correctional Facility
Box F
Red Schoolhouse Road
Fishkill, NY 12524-0445

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

Dear Mr. Winfield:

I have received your letter of November 11 and the correspondence attached to it, which reached this office on November 24. You have asked whether there is "any legal reason" that would justify a denial of access records pertaining to your closed criminal case by the Suffolk County Police Department.

In this regard, I offer the following comments.

First, the statutes that you cited are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The statute of general application would appear to be the New York Freedom of Information Law, which pertains to records maintained by agencies of state and local government in New York.

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 all 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.

In considering the records falling within the scope of your request, relevant is a recent decision by the Court of Appeals concerning "complaint follow up reports" prepared by 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. Axelrod, 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, 89 NY2d 267, 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports 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). Therefore, if, for example, a search warrant was displayed to you prior to a search, I do not believe that there would be any basis for a denial of access.

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.

Next, 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).

The Court in Moore also specified that an agency "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, since you requested a waiver of fees, I note that there is nothing in the Freedom of Information Law pertaining to fee waivers. Moreover, in Whitehead v. Morgenthau [552 NYS2d 518 (1990)], it was held that an agency may charge its established fees, even when a request is made by indigent inmate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Suffolk County Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

10519
FOIL-AO

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Anthony Isaacs
85-A-1147
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. Isaacs:

I have received your letter of November 20 in which you described difficulties in your attempts to obtain records from the New York City Police Department. Having reviewed the correspondence, I offer the following comments.

First, it appears that you may misunderstand the Freedom of Information Law. From my perspective, the title of that statute may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather it is a vehicle that may require an agency to disclose records. I point out, too, that §89(3) of the Freedom of Information Law states in part that the Law pertains to existing records and that an agency need not create a record in response to a request. Several aspects of your request are framed by means of questions. In short, an agency is not required by the Freedom of Information Law to answer questions or create new records in response to requests for information. In the future, rather than attempting to elicit information by raising questions, it is suggested that you seek existing records.

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)].

Lastly, you focused on a portion of the Department's denial of access based on a contention that the records sought would if disclosed reveal non-routine criminal investigative techniques or procedures pursuant to §87(2)(e)(iv) of the Freedom of Information Law. 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)."

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, if they exist, as the Court of Appeals has suggested, a denial of access under the provision in question would be proper only to the extent that the records include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, Freedom of Information Law, §87(2)(f)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

10520
FOIL-AO-

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Mr. Anthony Browne
95-A-8281
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. Browne:

I have received your undated letter, which reached this office on November 26. You described a situation in which the Office of the New York County District Attorney has indicated that certain records that you requested could not be found, and you asked what your "next proper course of action" might be.

In this regard, insofar as the matter involves the Office of the District Attorney, there may not be any additional meaningful course of action. As you are apparently 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)].

In many instances, duplicate records may be maintained in other locations. For instance, copies of records typically maintained by an office of a district attorney may be kept by a police

department, and a request might be made to the New York City Police Department for the records in question. Another possible source is the court in which the proceeding was conducted. While the courts and court records are not subject to the Freedom of Information Law, court records are generally available under other statutes (see e.g., Judiciary Law, §255). If you believe that a court might possess the records of your interest, it is suggested that you write to the clerk of the appropriate court, citing an applicable provision of law as the basis for your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Allison Lee Turkel, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10521

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 29, 1997

Ms. Nancy G. Groenwegen
Counsel for Policy and Employee Relations
NYS School Boards Association
119 Washington Avenue
Albany, NY 12210-2292

The staff of the Committee 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. Groenwegen:

I have received your letter of November 20. You wrote that the NYS School Boards Association "is in the process of reviewing [its] suggested policy concerning the dissemination of information received by school districts from law enforcement authorities on paroled sex offenders." You have sought the Committee's position on the matter.

You referred to earlier opinions rendered on the subject by this office. From my perspective, they are no longer fully valid due to the enactment of the "Sex Offender Registration Act" (hereafter "the Act"), Article 6-C of the Correction Law, also known as "Megan's Law." Prior to the enactment of the Act, it was my view that the Freedom of Information Law governed public rights of access and the obligations of agencies, including school districts. Based on discussions with Christine Morrison, the assistant attorney general who has been involved in the implementation of and litigation commenced under the Act, as well as the opinion of the former director of the Division of Criminal Justice Services, the Freedom of Information Law does not govern with respect to records generated pursuant to the Act; rather, issues involving the disclosure of those records are governed by the Act itself.

By way of brief background, subdivision (1) of §168-b of the Act directs the Division of Criminal Justice Services to "establish and maintain a file of individuals required to register" under the Act and includes guidelines concerning the content of what is characterized as the "registry." Subdivision (2) states that:

> "The division is authorized to make the registry available to any regional or national registry of sex offenders for the purpose of sharing information. The division shall accept files from any regional or national registry of sex offenders and shall make such available when requested pursuant to the provisions of this article. *The division shall require that no information included in the registry shall be made available except in the furtherance of the provisions of this article*" (emphasis added).

Based on the sentence highlighted above, it is the position of both the Department of Law and the Division of Criminal Justice Services, and I concur, that information contained in the registry is to be disclosed only pursuant to the provisions of the Act, "only in the furtherance of the provisions of this article", which, again, is Article 6-C of the Correction Law.

While the Freedom of Information Law deals generally with access to records, agencies' obligations to disclose records, and their ability to deny access, according to the rules of statutory construction (see McKinney's Statutes, §32), the different or "special" statute prevails when such a statute pertains to particular records. Since information contained in the registry may be disclosed only in furtherance of the Act, the Freedom of Information Law, in my view, does not apply to that information.

Certain aspects of the contents of the registry are forwarded to local government agencies in conjunction with notification requirements imposed upon the "Board of Examiners of Sex Offenders" pursuant to §168-l of the Act. In subdivision (6) of that provision, reference is made to "three levels of notification...depending upon the degree of the risk of re-offense by the sex offender."

Paragraph (a) of §168-l(6) provides that "[i]f the risk of repeat offense is low, a level one designation shall be given to such sex offender." In that instance, certain law enforcement agencies are notified. Since there is no statement in that provision regarding the further dissemination of information concerning the level one offender, it is assumed that school districts will not receive that category of information within the registry.

Paragraph (b) states that "[i]f the risk of repeat offense is moderate, a level two designation shall be given..." Pursuant to paragraph (c), "[i]f the risk of repeat offense is high and there exists a threat to the public safety, such sex offender shall be deemed a 'sexually violent predator' and a level three designation shall be given..." In both of those instances, local law enforcement agencies are authorized to disclose various kinds of information pertaining to sex offenders to entities, such as school districts. Those entities "may disclose or further disseminate such information at their discretion." Therefore, a school district in receipt of information derived from the registry that has been supplied by a law enforcement agency has the discretionary authority to disseminate any or all of the information.

It is emphasized that if a school district acquires records regarding a sex offender (or any other person convicted of a crime) from a source other than the registry, it is my view and that of Assistant Attorney General Morrison that those records are subject to the Freedom of Information

Law. For example, if a school district obtained a copy of a mugshot from a local police department or a court that is maintained independent of the requirements of the Act, such a record would be available from the District under the Freedom of Information Law [see Planned Parenthood of Westchester, Inc. v Town Board of Town of Greenburgh, 587 NYS2d 461 (1992)].

In sum, information contained within the registry that is disseminated pursuant to the Act to a school district may be disclosed by the district in its discretion. Records acquired by a district from a source other than the registry are subject to rights conferred by the Freedom of Information Law.

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-AD- 1052

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927

December 31, 1997

Mr. Jay Scott-Friedman
Three Village Central School District
200 Nicolls Road
Box 9050
East Setauket, NY 11733-9050

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

Dear Mr. Scotto-Friedman:

I appreciate your transmission of a determination of an appeal rendered under the Freedom of Information Law in response to a request made by the president of the Three Village Teachers' Association. In short, while I agree that the addresses of substitute teachers may be withheld, the names of those persons must, in my view, be disclosed.

In this regard, I offer the following comments.

First, the purpose for which the request was made or the intended use of the records are generally irrelevant to rights of access. 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 the use of the records, is in my opinion irrelevant.

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

From my perspective, there is nothing secret about the names of substitute teachers; their identities are made known to students and, indirectly to parents and perhaps others. Further, payroll records required to be maintained by all agencies must include reference to the name, public office address, title and salary of every officer or employee of the agency [see Freedom of Information Law, §87(3)(b)]. While substitute teachers may not be "employees", they are paid by the District, and records of payments are public. For those reasons, I do not believe that disclosure of substitute teachers' names would constitute an unwarranted invasion of personal privacy.

With respect to home addresses, §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure of the home address of a public employee. Again, a substitute teacher may not be an employee; nevertheless, based on the direction provided by the cited provision and the fact that the home address is largely irrelevant to the performance of one's duties, your denial of access to the home addresses of substitute teachers was, in my opinion, appropriate.

I hope that the foregoing serves to clarify your understanding of the Freedom of Information Law and 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:tt

cc: Sheila MacFadyen