STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10523

41 State Street, Albany, New York 12231
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January 5, 1998

Mr. Kevin M. Kearney
Hodgson Russ Andrews
Woods & Goodyear, LLP
1800 One M&T Plaza
Buffalo, NY 14203-2391

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

Dear Mr. Kearney:

I have received your letter of December 1. In your capacity as attorney for the Town of Niagara, you have sought an advisory opinion pertaining to requests for records relating to a disciplinary proceeding conducted pursuant to §75 of the Civil Service Law concerning a police officer.

According to your letter, in brief, charges were brought against a police officer, and the Town Board appointed a hearing officer who presided over a two-day hearing, which was transcribed. The hearing officer submitted a 19 page report and recommendation to the Town Board. Following its review of the report and the transcript of the proceeding, "the Town Board made written findings, which incorporated by reference the hearing officer's report and recommendation, and the officer was discharged." Other than the Town Board's written findings, none of the other documentation to which you referred has been disclosed to the public.

You indicated that the Town has received two requests, one for all documents pertaining to the disciplinary action, which was made by an attorney representing two juveniles who were involved in the officer's misconduct. The attorney has filed a notice of claim against the Town concerning a matter related to but not the subject of the disciplinary proceeding. The second request was made by a member of the news media, who is seeking a copy of the hearing officer's report.

In this regard, 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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. The Court of Appeals, in reviewing the legislative history leading to its enactment, has held that §50-a "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 NY2d 562 568 (1986)]. In another decision, which dealt with unsubstantiated complaints against correction officers, it was held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

From my perspective, since the subject of the records is no longer a police officer, I do not believe that §50-a would be applicable. In short, the rationale for the confidentiality accorded by that provision would no longer be present.

Nevertheless, aside from §50-a, other grounds for denial appearing in the Freedom of Information Law are pertinent.

Particularly relevant to an analysis of rights of access, or conversely, the ability to withhold the records 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, §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 the 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, 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 hearing officer's report and recommendation, as I interpret your commentary, they were essentially adopted by the Town Board, for they were "incorporated by reference" into the Board's findings. If that is so, I believe that those documents, with certain possible exceptions to be considered later, must be disclosed. In a decision in which an investigator's findings were adopted by the decision maker, the Borough President of Staten Island, the Appellate Division, Second Department, found that the record was public. The Court stated that:

> "FOIL protects inter-agency or intra-agency materials which are not '**** final agency policy or determinations'...The exemption for intra-agency materials does not apply to final agency policy or decisions. Here, Molinari not only had relied on and incorporated the findings of the investigator, he expressly adopted them in explaining his actions. Having done so, he is precluded from claiming that the memoranda are exempt from disclosure" [New York 1 News v. Office of the President of the Borough of Staten Island, 647 NYS2d 270, 271 (1996)].

Similarly, in Miller v. Hewlett-Woodmere Union Free School District (Supreme Court, Nassau County, NYLJ, May 16, 1990), the Court determined that a recommendation that became a decision had to be disclosed, finding that:

> "It is apparent that the Superintendent unreservedly endorsed the recommendation...adopting the reasoning as his own, and made his decision based on it. Assuredly, the Court must be alert to protecting 'the deliberative process of the government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers'...but the Court bears an equal responsibility to ensure that final decision makers are accountable to the public. When, as here, a concord exists as to intra-agency views, when deliberation has ceased and the consensus arrived at represents the final decision, disclosure is not only desirable but imperative for preserving the integrity of governmental decision making."

Based on the foregoing, while I believe that the hearing officer's report and recommendation are presumptively public because they represent the Town Board's final determination, it is emphasized that I am unaware of the specific contents of the documentation. If, for example, the officer was the subject of five charges, three of which were sustained and two dismissed, those portions relating to unproven charges or unsubstantiated allegations could in my opinion be withheld on the ground that disclosure would constitute an unwarranted invasion of privacy [see e.g., Herald Company v. School District of the City of Syracuse, 430 NYS2d 460 (1980)]. Based on the decisions cited earlier, reference to findings of misconduct would be accessible; reference to charges that could not be proven could be withheld.

Further, the documentation might identify persons other than the officer, such as Town employees, the two juveniles, or perhaps others. To the extent that disclosure of those identifying details would result in an unwarranted invasion of their personal privacy, portions of the documentation could justifiably be deleted prior to disclosure of the remainder.

With respect to the transcript of the proceeding, the same kind of analysis would be apt. Depending on the nature of testimony or evidence, there may be privacy considerations relative to the officer, as well as others named or otherwise identified in the transcript.

Lastly, since the first request involves "all documents pertaining to the disciplinary action", investigative records and other documentation created in preparation for or in conjunction with the proceeding would in my view constitute intra-agency materials. Insofar as they consist of opinions, advice, conjecture, recommendations and the like offered by public officers or employees, I believe that they could be withheld. Records of interviews with others, such as the juveniles or witnesses, might be withheld based on considerations of personal privacy. Also among the documents sought might be memoranda or similar documents in which counsel for the Town offered legal advice or strategy. Those kinds of records could in my opinion be withheld not only as intra-agency material, but also pursuant to the attorney-client privilege. When records fall within the scope of the privilege, I believe that they are confidential under §4503 of the Civil Practice Law and Rules and, therefore, exempt from disclosure under §87(2)(a) of 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10524

41 State Street, Albany, New York 12231
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January 5, 1998

Mr. John Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

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

Dear Mr. Sheehan:

I have received your letter of November 24 and the correspondence attached to it. In response to your requests for an accident report, a representative of the Buffalo Police Department merely wrote "$10.00 fee." You have questioned the propriety of the response.

In this regard, I believe that the response was inadequate and that the reference to a fee of ten dollars for a copy of an accident report represents an inconsistency with law.

From my perspective, unless a statute, an act of the State Legislature, authorizes an agency to charge a different fee, an agency can charge no more than twenty-five cents per photocopy up to nine by fourteen inches, nor can it charge a fee for search or administrative costs.

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 was confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In addition, in a case in which you were involved, Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)], a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, a provision of a county code authorizing a fee of twenty dollars for an accident report was struck down, and it was determined that the agency could charge no more than twenty-five cents per photocopy [Gordon Schotsky & Rappaport v. Suffolk County, 221 AD 2d 339 (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 states in relevant part that:

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

As such, the Committee's regulations specify that no fee may be charged for inspection of or search for records, except as otherwise prescribed by statute. Therefore, absent statutory authority to do so, I do not believe that the Department could validly charge a fee other than a maximum fee of twenty-five cents per photocopy.

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

Lastly, confusion has arisen on occasion concerning fees for accident reports due perhaps to the provisions of §202 of the Vehicle and Traffic Law, which was recently amended. Section 202(3) authorizes a copying fee of $15.00 for accident reports obtained from the Department of Motor Vehicles and one dollar per page for copies of other records. Section 202 also authorizes the Department to collect certain fees for searching for records. However, since the provisions of the Vehicle and Traffic Law pertain to particular records in possession of the Department of Motor Vehicles only, in my opinion, other agencies, such as municipal police or sheriff's departments, cannot unilaterally adopt policy or regulations authorizing fees in excess of twenty-five cents per photocopy or other fees without specific statutory authority to do so.

In an effort to enhance compliance with and understanding of applicable law, copies of this response will be forwarded to City of Buffalo officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, City of Buffalo Police Department
Catherine O'Hara, Office of Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10525

41 State Street, Albany, New York 12231
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January 5, 1998

Mr. David Steinberg
Chief Assistant Public Defender
22 Market Street
Poughkeepsie, NY 12601

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

Dear Mr. Steinberg:

I have received your letter of December 3, as well as the correspondence relating to it.

You have sought an advisory opinion concerning the denial of access by the Division of State Police to the "NYSP Field Manual", "any and all directives addressing procedures to be followed for searches, search warrants and arrests" insofar as those items are not included in the Manual, and a "list of documents" in possession of the Division that are "discoverable under the Freedom of Information Law." The request was made on July 21, its receipt was acknowledged on August 1, at which time it was estimated that the request would be granted or denied "in approximately 30 business days." On September 25, the first two aspects of your request were denied in their entirety on the ground that the records sought were compiled for law enforcement purposes and disclosure would interfere with law enforcement investigations, because they are "also intra-agency materials for which an exemption from disclosure is provided", and on the ground that "disclosure would endanger the life and safety of others." With respect to the third element of your request, you were informed that no records responsive to your request could be found. You appealed the denial on October 6, and in a determination of October 20, the denial was affirmed for the reasons previously expressed.

From my perspective, while some aspects of the records might justifiably have been withheld, it is likely in my view that the blanket denial of access was inappropriate and that others must be disclosed. 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 cited 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). 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, the Manual and perhaps other records have been withheld in their entirety. Rather than citing only §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 alluding to two other 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).

There is no question but that the records sought constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial 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 basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records sought would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

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

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

> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

The denials appear to allude subparagraph (i), for they contend that disclosure would interfere with investigations. Again, a blanket denial of access is in my opinion inconsistent with the direction provided by the State's highest court. While I am not familiar with the contents of the records at issue, it seems unlikely that every aspect of the records would, if disclosed, interfere with an investigation or that the Division could meet the standard of articulating a "particularized and specific justification" for such a broad denial. I would conjecture that many aspects of the records sought are routine and that the effects of disclosure would not be damaging.

Perhaps more relevant 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)."

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).

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 contained in the records sought 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.

The other provision to which the Division alluded as a basis for denial is §87(2)(f). Again, that provision permits an agency to withhold records insofar as disclosure "would endanger the life or safety of any person." As suggested with respect to the other exceptions, I believe that the Division is required to review the documentation at issue to determine which portions fall within this or the other exceptions.

Second, with respect to the portion of your request involving a list of available records, it appears that you were referring to a "subject matter list." 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 that categorizes the records maintained by an agency. Section 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.

Lastly, since you "protest[ed] the sixty-six (66) day delay in responding to the FOIL application which grossly exceeds the 'five business days' statutory time", I note the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in part that:

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

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 substantial time to determine rights of access might be reasonable. On the other hand, if a record can be found easily, there would appear to be no rational basis for delaying disclosure for a lengthy period. 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 attempt to avoid litigation, copies of this opinion will be forwarded to Division officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Col. James A. Fitzgerald, Chief Inspector
Lt. Col. Bruce M. Arnold, Assistant Deputy Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10526

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

January 5, 1998

Mr. Louis G. Steve
[redacted]

Dear Mr. Steve:

I have received your letter of December 29 in which you sought "information on proper procedure" for obtaining records under the Freedom of Information Law from insurance carriers.

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

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

Based on the foregoing, the Freedom of Information Law pertains only to records maintained by entities of state and local government; it does not apply to private companies, such as insurance carriers. Further, I know of no law that would generally provide the public with rights of access to records of insurance carriers.

There may be rules or regulations on the subject promulgated by the State Insurance Department, and it is suggested that you seek guidance by calling the Department's toll-free Consumer Services number at 1-800-342-3736.

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-10527

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

January 6, 1998

Mr. Anthony Cook
90-T-1693
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. Cook:

I have received your letter of November 1, which reached this office on December 1. You complained that officials at the Sullivan Correctional Facility have failed to enable you to inspect records or explain the reasons for denial in a manner consistent with the Freedom of Information Law, and you asked that this office "intervene" on your behalf.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to intervene in the legal sense or otherwise compel an agency to grant or deny access to records.

With respect to the inspection of records, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, there may often be situations in which some aspects of a record, but not the entire record, may properly be withheld in accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. When accessible and deniable information must, of necessity, appear on the same page, the practice preparing a redacted copy and charging the established fee, in my opinion, is fully justifiable.

With regard to the sufficiency of a denial of a request, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) govern the procedural aspects of the Freedom of Information Law. Section 1401.2(b)(3) states that an agency's records access officer is

responsible for assuring that agency personnel make records available or "deny access to the records in whole or in part and explain in writing the reasons therefor." Similarly, §1401.7(b) of the regulations provides in relevant part that:

> "Denial of access shall be in writing stating the 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."

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: E. Mitchell
Leslie Becher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10528

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

January 5, 1998

Mr. Malcolm Baptiste
96-A-4708
Great Meadow Correctional Facility
P.O. Box 51
Comstock, NY 12821-0051

Dear Mr. Baptiste:

I have received your appeal of December 29 pertaining to an alleged denial of access by the Department of Correctional Services.

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 dealing with the right to appeal a denial of access to records is §89(4)(a) of the Freedom of Information Law, 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."

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

Despite the absence of any authority to determine your appeal, I note that I do not understand it. The appeal involves copies of packages and mail that you received at your facility during a certain period. Assuming that those items were delivered to you, they would not be in possession of the Department. If that is so, the Freedom of Information Law would not apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10529

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

January 5, 1998

Mr. Lawrence R. Southwick
95-A-1772
Mt. McGregor Correctional Facility
P.O. Box 2071
Wilton, NY 12831

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

Dear Mr. Southwick:

I have received your letter of November 19, which reached this office on December 1. You have complained with respect to the Greene County District Attorney and Supreme Court Judge Daniel K. Lalor in relation to your requests for records. In making the requests, you referred to the Freedom of Information and Privacy Acts, the Criminal Procedure Law (CPL), the federal rules of discovery and constitutional law, as well as the Brady and Rosario decisions.

In this regard, it is noted at the outset that two of the acts that you cited are, respectively, the federal Freedom of Information and Privacy Acts [U.S.C. §§552 and 552(a)]. Those provisions pertain only to records maintained by federal agencies; they are not applicable to records maintained by entities of government in New York. The statute that deals primarily with access to agency records in New York is the New York Freedom of Information Law.

It appears that you are contending that the records should be made available because you are entitled to them under the CPL, federal rules, judicial decisions and constitutional law. Notwithstanding the possibility that the records are or were available under those provisions or decisions, it is emphasized that those vehicles are separate and distinct from the Freedom of Information Law. 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, 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 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 (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.

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).

Lastly, as indicated earlier, 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 are not subject to the Freedom of Information Law. Nevertheless, court records are generally available under different provisions of law (see e.g., Judiciary Law, §255). Assuming that the records in which you are interested are maintained by a court, in order to request them, it is suggested that you write to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for your request.

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: Hon. Daniel K. Lalor
District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10530

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

January 6, 1998

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 December 1 in which you requested a second opinion concerning your ability to obtain education records from a school district.

You referred to an opinion rendered on October 28, 1996, in which reference was made to the Family Educational Rights and Privacy Act (FERPA, §1232g). In that opinion, it was advised, in brief, that education records identifiable to students cannot be disclosed without the consent of the parents of students under the age of eighteen, or the students themselves when they reach that age. You suggested that I "misunderstood" the matter for I "didn't take into consideration that the educational records...were admitted as evidence in [your] trial litigation." You contended that "in order for a confidential record to be admitted in a trial litigation, that right to confidentiality must be waived" by the parent or the student. It is your belief that since there was an apparent waiver, the school district would be required to disclose education records pertaining to the student.

In this regard, at the time of the preparation of the earlier opinion, I had no knowledge that the records were used in litigation. Had I been aware of that factor, it is likely that the opinion would have been more precise. The regulations promulgated pursuant to the FERPA by the U.S. Department of Education (34 CFR Part 99) provide specific direction on the matter. When a parent or student waives confidentiality, §94.30(b) states that:

"The written consent must -

(1) Specify the records that may be disclosed:
(2) State the purpose of the disclosure; and
(3) Identify the party or class of parties to whom the disclosure may be made."

Education records pertaining to a student might also be disclosed without the consent of the parent or student pursuant to §99.31(9)(i), which authorizes disclosure "to comply with a judicial order or lawfully issued subpoena." Based on the foregoing, if the disclosure is made with the consent of the parent, the waiver is limited and identifies the persons to whom the disclosure may be made. In the other situation, the disclosure is made not by means of a waiver, but rather by means of compulsory legal process.

In short, it does not appear that you would have the right to obtain the records at issue from an educational agency, except under circumstances prescribed in the FERPA and the regulations promulgated thereunder.

Notwithstanding the foregoing, as a general matter, when records are submitted into evidence in a judicial proceeding and become part of the court record, they are available from the court in which the proceeding was conducted. I note that the Freedom of Information Law does not apply to the courts or court records. However, such records are frequently 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-10531

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

January 6, 1998

Mr. Anson Clark
91-B-1441
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. Clark:

I have received your undated letters, which reached this office on December 3. You have sought assistance in obtaining records from the Office of the Monroe County District Attorney and the Drug Enforcement Agency.

In this regard, the Drug Enforcement Agency is a federal agency that is subject to provisions of federal law. Since the advisory jurisdiction of this office pertains only to the New York Freedom of Information Law, the ensuing comments will be restricted to matters involving your request to the Office of the District Attorney pursuant to New York law.

Having reviewing your correspondence, 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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.

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.

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: Hon. Howard R. Relin
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10532

41 State Street, Albany, New York 12231
(518) 474-2518
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January 9, 1998

Ms. Mary J. Dosio
[redacted]

Dear Ms. Dosio:

I have received your letter of January 4 in which you requested information concerning an individual other than yourself.

In this regard, it is emphasized that the Freedom of Information Law pertains to records maintained by entities of state and local government in New York. That law does not apply to a private employer.

When a request for records is directed to a government 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. If, for example, the person identified in your letter is a governmental employee, the items to which you made reference would be public. The name of the agency as the employer, the person's title, and his salary, including overtime or other payments, would be accessible to the public.

Every 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 a request should be directed to that person at the agency that maintains the records requested. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records requested. Therefore, a request should include sufficient detail to enable an agency to locate and identify requested records.

Lastly, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not maintain possession or custody of records generally. In short, this office does not possess the kinds of records or information that you are seeking. Again, a request should be made to the governmental agency that maintains the records.

Enclosed for your review is "Your Right to Know", which summarizes the Freedom of Information Law. 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-1053

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

January 12, 1998

Mr. Rashon King
Sullivan County Jail
2 Bushnell Avenue
Monticello, NY 12701

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

Dear Mr. King:

I have received your letter of December 1. You have sought assistance concerning an unanswered request for copies of visitor records involving visits to you by a named individual during your incarceration at the Sullivan County Jail.

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)].

With respect to your ability to obtain the records, a potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

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

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

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In this instance, I am unaware of the means by which a visitor's log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search, unless the inmate can specify the days or dates of visits.

Lastly, since you referred to a waiver of fees, I point out that the Freedom of Information Law does not include provisions regarding fee waivers. Further, 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Wendy Herbert

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10534

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

January 12, 1998

Mr. Darryl Mitchell
93-A-4375
Clinton Correctional Facility - Annex
P.O. Box 2002
Dannemora, NY 12929-2002

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

Dear Mr. Mitchell:

I have received your letter of December 2 in which you sought assistance in obtaining records from your attorneys.

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 pertains to records maintained by entities of state and local government; it does not apply to private attorneys.

It is suggested that you be persistent in your efforts or that you seek guidance from Prisoners' Legal Services.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10535

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

January 12, 1998

Mr. James J. Dunn
96-B-1034
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Dunn:

I have received your letter of December 26, which reached this office on January 9. You have requested a variety of information apparently maintained by the New York State Department of Correctional Services concerning alcohol and substance abuse programs that operate in the correctional system.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have possession or control of records generally. In short, I cannot provide the information in question because this office does not possess it.

A request should be made to the "records access officer" at the agency that maintains the records. According to the regulations promulgated by the Department of Correctional Services, a request for records kept at a facility should be made to the facility superintendent or his designee; a request for records maintained at the Department's central offices may be made to Mr. Mark Shepard, Records Access Officer.

It is also noted that in your request, you sought information by asking questions. Here 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 for information. In the context of your request, if, for example, there is no breakdown of cost per inmate, the Department could not be required to create a new record or calculate such cost. Similarly, agency staff is not required to provide information by answering questions.

In the future, rather than seeking answers to questions, it is suggested that you request existing 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10535

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

January 12, 1998

Mr. James J. Dunn
96-B-1034
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Dunn:

I have received your letter of December 26, which reached this office on January 9. You have requested a variety of information apparently maintained by the New York State Department of Correctional Services concerning alcohol and substance abuse programs that operate in the correctional system.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee does not have possession or control of records generally. In short, I cannot provide the information in question because this office does not possess it.

A request should be made to the "records access officer" at the agency that maintains the records. According to the regulations promulgated by the Department of Correctional Services, a request for records kept at a facility should be made to the facility superintendent or his designee; a request for records maintained at the Department's central offices may be made to Mr. Mark Shepard, Records Access Officer.

It is also noted that in your request, you sought information by asking questions. Here 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 for information. In the context of your request, if, for example, there is no breakdown of cost per inmate, the Department could not be required to create a new record or calculate such cost. Similarly, agency staff is not required to provide information by answering questions.

In the future, rather than seeking answers to questions, it is suggested that you request existing 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10536

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

January 12, 1998

Mr. James McDonald
Cayuga Correctional Facility
Route 38A
P.O. Box 1186
Moravia, NY 13118

Dear Mr. McDonald:

I have received your letter of January 5 in which you requested "copies of any or all documents pertaining to the estates and will(s)" of two named individuals.

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 requested available, because this office does not possess them.

If the records in question have been filed with a government office, the likely office would be the Surrogate's Court in the county of residence of the individuals named. I note that the Freedom of Information Law applies to "agency" records, and that the definition of "agency" [see Freedom of Information Law, §86(3)] specifically excludes the courts. Although the Freedom of Information Law does not apply to the courts, other provisions of law frequently grant access to court records. If the records in question have been filed with the Surrogate's Court, it is suggest that a request be sent to the clerk of the appropriate court, citing §2501 of the Surrogate's Court Procedure Act 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-10537

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

January 12, 1998

Mr. Daniel O'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. O'Gorman:

As you are aware, your letter of November 30 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 advise with respect to the Freedom of Information Law.

You have questioned the propriety of a denial of a request to the New York City Department of Citywide Administrative Services for a list of applicants for a "NYC License Master Plumber Exam." From my perspective, the denial of access was appropriate.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant to the matter is §87(2)(b), which enables an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy." It has consistently been advised that names of those who have applied for a license may be withhold. By comparing a list of applicants with those who pass such an exam and become licensed, a recipient of the information could ascertain who failed the exam. That kind of disclosure would, in my view, clearly result in an unwarranted invasion of personal privacy.

In addition, §89(2)(b) provides examples of unwarranted invasions of personal privacy, one of which includes the sale or release of a list of names and addresses, if the list would be used for "commercial or fund-raising purposes." I note that a denial of a request for list of names and addresses of applicants for a licensing exam was sustained judicially in Person -Wolinsky Associates v. Nyquist [377 NYS 2d 897 (1975)].

I hope that the foraging 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: Thomas J. Patitucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10538

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

January 14, 1998

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 undated and unsigned letter, which reached this office on December 4. You have sought guidance concerning your unsuccessful efforts in obtaining information relating to a case brought against a person who testified at your trial. You indicated that you were informed that you must know the disposition of the case and the date in order to obtain the information.

In this regard, the issue appears to involve the requirement in the Freedom of Information Law that an applicant must "reassonably describe" the records sought. In short, while there is no requirement that an applicant identify a record with particularity, a request should include sufficient detail to enable agency staff to locate the record. For example, names, approximate dates, index, docket or other identification numbers may be needed in order to locate records.

It is noted that if a person is charged with a criminal offense and the charge is later dismissed in favor of the accused, the records regarding the matter generally are sealed pursuant to §160.50 of the Criminal Procedure Law.

Lastly, I point out that the courts and court records are not subject to the Freedom of Information Law. That is not to suggest that court are not public, for most such records are available under other provisions of law (see e.g., Judiciary Law, §255). To seek court records, a request should be made to the clerk of the appropriate court, again, providing sufficient detail to locate 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-10539

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

January 15, 1998

Mr. Peter Henner
Attorney and Counselor at Law
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:

I have received your letter of November 20, as well as the correspondence attached to it.

You have sought an advisory opinion concerning issues that have arisen in relation to a request for certain records of the Department of Correctional Services. In a letter of September 16 addressed to the Department's records access officer, you requested:

> "1) any documents which summarized, or present statistical tabulations, of the number of applicants for the position of Correction Officer who are disqualified by the Department of Correctional Services pursuant to §22-a of the Corrections Law, 2) all letters of disqualification which have been sent to prospective applicants for the position of Correction Officer, 2) access to all disciplinary settlements between the Department of Correctional Services (including but not limited to those settlements negotiated by the Bureau of Labor Relations with: a) individual Corrections Officers or b) AFSCME Council 82 resolving allegations of disciplinary misconduct which include allegations that the corrections officer committed criminal conduct or was arrested for alleged criminal activity, and 4) all opinions and awards of labor arbitrators appointed pursuant to the contract agreement between Council 82 and the State of New York where a Correction Officer was found guilty of misconduct pertaining to criminal activity, and/or pertaining to a Correction Officer's conviction for criminal activity, and where a disciplinary penalty was imposed."

In a response dated October 3, the first category of records was found to be accessible. The second was denied on the ground that the Department "does not maintain files in a manner which allows it to reproduce the requested documents." In response to the third and fourth categories, you

were informed that the matter was "pending." You appealed the denial on October 9 and on November 14, the records access officer indicated that your request for both the third and fourth categories of records requested were "denied as the records are not maintained in the manner in which they are requested", and that "[s]ettlement agreements do not establish guilt." You appealed again on November 20.

In this regard, I offer the following comments.

First, you contended that the Department did not comply with §89(4)(a) of the Freedom of Information Law due to its failure to respond to your appeal of October 9 within ten business days. I concur and point out that a response indicating that a determination of a request is "pending" is, in my view, insufficient. 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)].

Second, a key issue appears to involve extent to which the request "reasonably describes" the records sought as required by §89(3) of the Freedom of Information Law. As you may be aware, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

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

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

While I am unfamiliar with the record keeping systems of the Department, 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. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If the Department can locate the records sought with a reasonable effort analogous to that described above, i.e., by reviewing perhaps hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that the Department maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing the records.

Assuming that the request does reasonably describe the records, the remaining issue involves rights of access.

Item 2 of your request involves letters of disqualification sent to applicants for the position of correction officer. In this regard, §89(7) of the Freedom of Information Law states in part that nothing in that statute shall require the disclosure of "the name or home address ...of an applicant for appointment to public employment." Therefore, if the letters can be found, the names and residence addresses of the applicants may be deleted.

With respect to items 3 and 4, again, assuming that the records can be located, a significant element in an analysis of rights of access involves the application of §50-a of the Civil Rights Law, which pertains to personnel records of police and correction officers, as well as professional firefighters. If §50-a does not apply, I believe that the records would be accessible. If it does apply and you are not interested in the names of the officers who are the subjects of the records, the remainder, in my view, would be available. If §50-a applies and you are interested in obtaining the names, I believe that they would clearly be available with regard to those who are no longer correction officers; with regard to those who remain correction officers, the extent to which the Department must disclose is questionable.

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

If the subjects of the records are no longer correction officers, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision would no longer be present.

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, §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 specific respect to the settlements reached following the initiation of disciplinary proceedings, 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).

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 states 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.

It is emphasized 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 and the nature of disciplinary action or sanction imposed against them must be disclosed.

Lastly, in good faith, I point out that a contrary determination was reached in Daily Gazette v. City of Schenectady (Supreme Court, Schenectady County, August 21, 1997). In that case, it was held that the identities of some eighteen police officers reprimanded following an "egg throwing incident" could be withheld. Although the court rejected contentions regarding the ability to withhold the information sought under §87(2)(b) and (g) of the Freedom of Information Law, it was found that §50-a of the Civil Rights Law provides "an almost impenetrable cloak of secrecy" and bars disclosure.

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-1050

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

January 15, 1998

Mr. Robert Butts
81-B-0638
Eastern NY 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. Butts:

I have received your letter of December 1. You have sought assistance in obtaining medical records pertaining to yourself under the Freedom of Information Law from the Elmhurst City Hospital in Queens.

In this regard, since the facility in question is part of the New York City Health and Hospitals Corporation, I believe that it is a governmental agency subject to the Freedom of Information Law. As a general matter, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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-10541

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

January 20, 1998

Mr. Dana Sydnor
97-A-4590
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 December 1. You have complained that the Department of Homeless Services has failed to respond to your requests for records and questioned why the Orange County Clerk cannot provide you with a record indicating whether you were arrested.

In this regard, first, you referred to the Department of Homeless Services at 40 North Pearl Street in Albany. That is the address of the New York State agency formerly known as the Department of Social Services. The agency with the title of the Department of Homeless Services is a New York City agency located at 161 William Street, New York, NY 10038. If indeed you are seeking records from that agency, it is suggested that you submit a new request to the proper address.

Second, I would conjecture that the records relating to an arrest and indictment would be maintained by the clerk of the court in which the proceeding occurred. As such, a request might be made to the court clerk, rather than the County Clerk. Alternatively, a request might be made to the office of the district attorney.

Lastly, it is noted that the courts and court records are not 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."

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

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

Based on the foregoing, while the office of a district attorney would constitute an "agency" required to comply with the Freedom of Information Law, the courts would fall beyond the coverage of that statute. I point out that court records are frequently available under other provisions of law (see e.g., Judiciary Law, §255).

I hope that the preceding remarks 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-10542

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

January 20, 1998

Mr. Joseph Cosentino
91-A-5031
Southport Correctional Facility
Box 750
Wallkill, NY 12589-0750

The staff of the Committee on Open 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 December 8. As I understand its contents, 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-10543

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

January 20, 1998

Mr. Steven Ayers
Director of Business Operations
Hilton Central Schools
225 West Avenue
Hilton, NY 14468

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

Dear Mr. Ayers:

I have received your letter of December 5, as well as the materials attached to it. Please accept my apologies for the delay in response. You have sought my views concerning the District's ability to deal with an increasing number of requests made under the Freedom of Information Law.

In this regard, I offer the following comments.

First, having reviewed the correspondence, I would conjecture that staff in some instances may have expended a substantial amount of time in attempting to locate or retrieve requested records. If an attempt to locate records involves the equivalent of searching for what may be a very few needles in a large haystack, the law does not require that such a degree of effort be expended.

If my assumption is accurate, perhaps the primary issue involves the extent to which the requests "reasonably described" 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 District's recordkeeping systems, to the 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 thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

For example, in one request, the applicant sought "food bills and receipts for teachers workshops and receptions within the district" for a period of four years. If the records are filed under a particular heading or field, if maintained electronically (i.e., "workshops", "receptions", etc.), it may be relatively easy to locate and retrieve the records. However, if the bills and receipts are maintained chronologically, not by subject matter, locating the records could involve a review of thousands of items. In that latter situation, the request would not, in my opinion, reasonably describe the records, even though the request might have been specific. In short, in that kind of situation, the District would not maintain the records in a manner that would permit their retrieval without engaging in an effort exceeding that required by the Freedom of Information Law.

Another request involved "receipts of all expenses to the district for the CLASSIC project symposium." Again, if there is a file or computer entry containing all receipts pertaining to that event, locating the records could readily be accomplished. On the other hand, if the records are kept differently, it may be difficult or even impossible to locate the records. Expenses might have been incurred, for instance, for the purchase of supplies at various times, perhaps without specific designation in relation to the symposium; there may have been expenditures for security, custodial staff, invitations, prizes, etc. Again, the means by which the records are kept and filed would be relevant in determining whether or the extent to which the request would have met the standard of reasonably describing the records.

Second, the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to

rights of access to existing records. Similarly, while that statute may require an agency to disclose records it does not require that an agency provide answers in response to questions. In one request, the applicant wrote that she "would...like to know if there are any clauses" in certain contracts dealing "with severance pay at the time of leaving the district." Rather than reviewing what may be a lengthy document, the applicant could be furnished with the contract, and at that time, she could review it for the purpose of ascertaining whether it includes the kind of clause to which she referred.

In a related vein, §89(3) of the Law states in part that an agency is not required to create a record in response to a request, unless otherwise specified in §87(3). In one of the requests, the applicant sought "a list of how the money allocated to these codes have been spent." If no list exists or can be generated, the District would not be obliged to create a list, a new record, containing the information requested.

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 information sought cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest. As you are aware, often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically.

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-1054

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

January 20, 1998

E-mail
TO: Jonathan Slosser<alarming@maestro.com>

Dear Mr. Slosser

Your communication of December 6 sent to the Department of State has been forwarded to the Committee on Open Government. As you may know, the Committee, a unit of the Department, is authorized to provide advice concerning the Freedom of Information Law. You have asked whether a complaint submitted to an agency is subject to that statute and whether you "can find out who made the complaint."

In this regard, I offer the following comments.

First, all records maintained by a government agency fall within the coverage of hte Freedom of Information Law. That statute pertains to agency records and defines the term "record" to mean:

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

Due to the breadth of the definition, a complaint sent to an agency would constitute a "record" subject to rights of access.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL - AO-224
FOIL - AO-1054

41

January 20, 1998

Ms. Diane Staffieri
[redacted]

Dear Ms. Staffieri:

I have received your recent letter and have enclosed the publications that you requested.

With respect to the amendment of records about oneself, it is noted that the legal ability to attempt to do so arises under the Personal Privacy Protection Law, which applies only to state agencies; it does not apply to records of local governments, such as the City of New York.

As a general matter, a request for records should be directed to the agency that you believe maintains the records of your interest. All government agencies in New York are subject to the State's Freedom of Information Law, and all such agencies are 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, and requests should be made to that person. State agencies are required to designate a "privacy compliance officer", and that person is frequently also the records access officer.

When making a request, I point out that both the Freedom of Information Law [§89(3)] and the Personal Privacy Protection Law [§95(1)] require 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 your interest.

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-1054b

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

January 20, 1998

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 December 5. You have sought assistance in relation to a situation in which you believe that the Division of State Police maintains records, but where the agency has indicated that it does not possess them.

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:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10547

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

January 20, 1998

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 December 10. You have sought assistance in obtaining records from the office of a district attorney and a police department, as well as medical records.

In this regard, I offer the following comments.

First, each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. A request should ordinarily be sent to the records access officer at the agency (i.e., the office of a district attorney or a police department) that maintains the records of your interest.

Enclosed is an explanatory brochure concerning the Freedom of Information Law that may be useful to you.

Second, there may be distinctions between your rights "as a defendant under Criminal Procedure Law (CPL) and your rights as a member of the public under the Freedom of Information Law. 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, 89 NY 2d 267 (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 "complaint follow-up reports" prepared by police officers, which are 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 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" (id., 276-277).

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.

I 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).

Lastly, 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-1054B

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

January 20, 1998

Mr. Robert Pihl
[redacted]

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

Dear Mr. Phil:

I have received your letter of December 12, as well as the materials attached to it.

You complained that the Herricks Union Free School District failed to respond to requests for records in a timely manner. In addition, you referred to an inconsistency between the Freedom of Information Law and the District's policy.

In this regard, I offer the following comments.

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

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

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

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

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

Having searched our files of appeals, it appears that the District did not forward the materials as required by §89(4)(a).

Second, based on a review of the District's policy and its request form, it appears that both are based upon the Freedom of Information Law as originally enacted in 1974. That version of the law was repealed and replaced with the current version, which became effective in 1978.

Enclosed for your review is a copy of model regulations designed to enable agencies to easily achieve procedural compliance with the Freedom of Information Law. Copies of this response and model regulations will be forwarded to the District's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Arline M. Visconte, Records Access Officer.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1054

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

January 20, 1998

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 undated letter in which you requested "the name, phone number & address of the person that has been harassing [you] with repeated phone calls for past 11 months." You wrote that you contacted the telephone company, which traced the calls and sent the information it had acquired to the 68th precinct in Brooklyn. The Police Department indicated that it "would get back to [you] in 30 days", but you have not heard from the Department.

In this regard, the Committee on Open Government is authorized to provide advice concerning public access to government records, primarily under the State's Freedom of Information Law. The Committee does not maintain custody or control of the records in which you are interested. However, in an effort to provide guidance, I offer the following comments.

First, it is suggested that you continue to attempt to acquire the information informally by contacting the precinct. If that fails to produce results, a request for records maintained by the Police Department pertaining to the matter can be made under the Freedom of Information Law. Such a request should be made to the Department's "records access officer." Every government agency is required to designate one or more persons as "records access officer", and that person has the duty of coordinating an agency's response to requests for records. The Department's records access officer is located at Room 110C, One Police Plaza, New York, NY 10038.

Second, I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe the records sought." Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

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

Without knowledge of the status of your complaint, I cannot offer specific direction concerning the extent to which the records in question would be available. However, the provision that is frequently of greatest significance regarding police agencies is §87(2)(e), which authorizes an agency to withhold records under certain circumstances, i.e., when disclosure would interfere with an investigation.

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1655D

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

January 20, 1998

Mr. A. Logallo
90-B-1210
P.O. Box 51
Comstock, NY 12821

Dear Mr. Logallo:

I have received your letter of December 2, which reached this office on December 9. You asked whether Prisoners' Legal Services is subject to the Freedom of Information Law, particularly in view of the funding it received in the New York State budget.

In this regard, the receipt of public moneys is not determinative of an entity being subject to the Freedom of Information Law. That statute pertains to agencies, and section 86(3) defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law pertains to governmental entities, i.e., entities of state and local government.

Although Prisoners' Legal Services may receive government money, my understanding is that it is a not-for-profit corporation that is not a governmental entity. If that is so, it would not be an "agency" subject to the Freedom of Information Law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Prisoner's Legal Services

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1055

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

January 20, 1998

Mr. Julio Roman
93-A-1503
Green Haven Correctional Facility
Drawer B, route 216
Stormville, NY 12582

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

Dear Mr.Roman:

I have received your letter of November 29, which reached this office on December 10. You complained that the office of the New York County District Attorney failed to respond to your requests for records in a timely manner and asked that the Committee "enjoin [you] in this particular matter."

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

Nevertheless, in conjunction with the matter that you raised, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gary Gaperin
Allison Turkel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10552

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

January 20, 1998

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 December 8. You referred to requests to a number of school districts in which you sought "copies of pages from yearbooks on which photographs of various former students appear." You indicated that you are "in doubt as to just how much responsibility a school district must assume in locating a requested record."

In this regard, the issue appears to involve extent to which the requests "reasonably describe" the records sought as required by §89(3) of the Freedom of Information Law. 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.

To extent that the records sought can be located with reasonable effort, I believe that the request would meet the requirement of reasonably describing the records. In Ruberti, Girvin & Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

If an agency can locate the records sought with a reasonable effort analogous to that described above, i.e., even by reviewing perhaps hundreds of records, it apparently would be obliged to do so. As indicated in Konigsberg, only if it can be established that an agency maintains its records in a manner that renders its staff unable to locate and identify the records would the request have failed to meet the standard of reasonably describing 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-1055

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

January 20, 1998

Mr. Jeffrey H. Greenfield
[redacted]

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

Dear Mr. Greenfield:

I have received your letter of December 10 in which you questioned the fee of five dollars charged by the New York State Department of Motor Vehicles when you sought to obtain a record. You added that it is your "understanding of the Freedom of Information Law that there is no down payment or up front fee required when requesting information, and that the fee is .25 per page to cover the cost of copying."

In this regard, section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy, unless a different statute authorizes a different fee. In this instance, a statute other than the Freedom of Information Law applies and, therefore, would supersede the Freedom of Information Law. Specifically, section 202 of the Vehicle and Traffic Law pertains to records maintained by the Department of Motor Vehicles pursuant to the Vehicle and Traffic Law. Enclosed is an excerpt from that provision indicating that the Department is authorized to charge fees different from and in excess of those that could be charged under the Freedom of Information Law.

It is also noted that an agency may ask for payment in advance of producing copies when a request is made under the Freedom of Information Law (see e.g., Sambucci v.McGuire, Sup. Ct, New York City., Nov. 4, 1982).

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-225
FOIL-AO-10554

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

January 20, 1998

Mr. Gregory Firaga
[redacted]

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

Dear Mr. Firaga:

I have received your letter of December 6. You wrote that you would like to amend a file pertaining to yourself maintained by the New York City Department of Social Services and you have asked whether you have the right to do so under the Personal Privacy Protection Law.

In this regard, the Personal Privacy Protection Law is applicable only to state agencies. For purposes of that statute, §92(1) defines the term "agency" to mean:

> "any state board, bureau, committee, commission, council, department, public authority, public benefit corporation, division, office or any other governmental entity performing a governmental or proprietary function for the state of New York, except the judiciary or the state legislature or any unit of local government and shall not include offices of district attorneys."

Based on the foregoing, the Personal Privacy Protection Law excludes from its coverage "any unit of local government." Consequently, the Personal Privacy Protection Law would not be applicable or serve as a barrier to disclosure of records maintained by a unit of local government, such as a New York City agency.

Second, although the Freedom of Information Law pertains to all agency records, that statute does not include provisions concerning the amendment of records. The Freedom of Information Law, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Laws pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). 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 care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you are the subject of a case file, it is likely that you would have rights of access under the regulations cited above. While the regulations do not refer to the ability to amend records, I believe that agencies have an interest in ensuring the accuracy of their records. That being so, even though the Personal Privacy Protection Law may not apply, and even though there may be no right to amend records, it is suggested that you ask to amend records pertaining to you if you believe or can prove that the contents of the records are inaccurate.

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-1055

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

January 20, 1998

Mr. Stephen Donati, Jr.
95-A-5022
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. Donati:

I have received your letter of December 9 and the materials attached to it. You have sought assistance and asked that this office "possibly intervene" in relation to an unanswered request for records sent to the City of Yonkers 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 "intervene" in the legal sense or otherwise compel an agency to grant or deny access to records. However, 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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)].

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.

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 your request for a "subject matter list", the provision that refers to that record represents one of the few instances in the Freedom of Information Law in which an agency is required to create and maintain a record. Specifically, section 87(3)(c) states that: "Each agency shall maintain... a reasonably detailed current list by subject matter of all records in possession of the agency, whether or not available under this article." As such, the subject matter list is not intended to be an index of each and every record of an agency; rather, it should be a list that categorizes the kinds of records maintained by an agency. It has been suggested that municipalities may adopt the records retention schedules developed by the State Archives and Records Administration pursuant to the Arts and Cultural Affairs Law as their subject matter list.

I hope that I have been of assistance.

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-1055b

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

January 20, 1998

Mr. Danny Andersen
[redacted]

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

Dear Mr. Andersen:

I have received your letter of December 11 in which you questioned a practice of Suffolk County in relation to requests for records. Specifically, you wrote that the County is requiring you to sign affidavits in which you express an "assurance" that you have not sought the records "for 'commercial or fund-raising' purposes or for purposes prohibited by the Freedom of Information Law."

From my perspective, there are no prohibitions in the Freedom of Information Law concerning the use of records that are available under that statute. 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 a list of names and addresses 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. Further, it is emphasized that the provision imposing a condition on disclosure pertains only to lists of names and addresses of natural persons; no conditions may be imposed, in my opinion, with respect to requests for records other than such lists of names and addresses, irrespective of the intended use of the records.

Having recently received correspondence regarding your efforts from Senator Kenneth P. LaValle, enclosed is a copy of a "Primer on Electronic Information, Fees and Responses to Requests."

In an effort to clarify understanding of and compliance with the Freedom of Information Law, a copy of this response and the Primer 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:tt

cc: Derrick Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1055?

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

January 21, 1998

Mr. Lasyah Palmer
97-A-5841
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Palmer:

I have received your letter of December 12 in which you sought an advisory opinion concerning the Freedom of Information Law and your ability to obtain "note pad notes" prepared by detectives in relation to your arrest, as well as information pertaining to an alleged informant.

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, 89 NY2d 267. 276-277 (1996); emphasis added by the Court].

Based on the foregoing, the agency could not claim that the complaint reports or police officers' memo books 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. It is likely that portions of records relating to an informant could be withheld to protect the person's privacy.

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). Particularly pertinent with respect to records identifying an informant would be §87(2)(iii).

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

FOIL-AO-1058

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

January 21, 1998

Mr. Philip G. Beckley
Finger Lakes Times
218 Genesee Street
Geneva, NY 14456

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

Dear Mr. Beckley:

As you are aware, I have received your letter of December 12 in which you referred to a denial of access to records sought by your reporter, Louise Hoffman, relating to the death of a child who had been in foster care.

Based on my conversations with Ms. Hoffman and a review of the correspondence pertaining to the request, it appears that the records sought could justifiably be denied at this time. It is possible, however, that some aspects of the records may become available at some point in the future. While I believe there is a basis for the denial, it differs from the reasons offered by the Seneca County Attorney, which, in my view, are inconsistent with law.

The initial ground for denial offered by the County Attorney included reference to Westchester Rockland Newspapers v. Mosczydlowski [58 AD2d 232 (1977)], and he wrote that it was held in that decision that "when the records of government are necessarily part of a litigated matter, they are not subject to the Freedom of Information Law." I do not agree that the decision stands for that principle. Moreover, the State's highest court, the Court of Appeals, reached a different conclusion in an ensuing case.

As stated by the Court of Appeals in a decision involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78

(1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules (CPLR). Specifically, it was found that:

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

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

The County Attorney also wrote that "Under Section 166 of the Family Court Act, all records of any proceedings in the Family Court are not subject to disclosure except with a court order." As I interpret §166, it does not provide an absolute bar to disclosure, nor would a court order necessarily be required to obtain Family Court records. That statute states in relevant part 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." Based on the foregoing, it is unlikely that a member of the public or news media could review family court records on the basis of mere curiosity; however, if a matter before the court involves an issue of public concern, a request for records pertaining to the matter would not, in my opinion, involve an effort to engage in "indiscriminate public inspection." In such a circumstance, a court could, through its exercise of discretion, permit disclosure without any formal order.

Notwithstanding my disagreement with the rationale for the denial, other provisions of law are pertinent that would preclude you from obtaining the records sought 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.

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." One such statute is §372 of the Social Services Law, which requires that various records be kept by "every court, and every public board, commission, institution, or officer having powers or charged with duties in relation to abandoned, delinquent, destitute, neglected or dependent children who shall receive, accept or commit any child..." Subdivision (4) of §372 states in relevant part that such records:

> "shall be deemed confidential and shall be safeguarded from coming to the knowledge of and from inspection or examination or by any person other than one authorized, by the department, by a judge of the court of claims when such records are required for the trial of a claim or other proceeding in such court or by a justice of the supreme court, or by a judge of the family court when such records are required for the trial of a proceeding in such court, after a notice to all interested persons and a hearing, to receive such knowledge or to make such inspection or examination. No person shall divulge the information thus obtained without authorization so to do by the department, or by such judge or justice."

Based on the foregoing, I do not believe that records maintained by entities having duties relating foster care 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.

Similarly, §422 of the Social Services Law is a statute which pertains specifically to the statewide central register of child abuse and maltreatment and all reports and records included in the register. Subdivision (4) (A) of §422 states that reports of child abuse as well as information concerning those reports are confidential, and may be disclosed only under specified circumstances listed in that statute.

There is a potential for disclosure at some point in the future pursuant to "Elisa's Law." As I understand the series of provisions comprising "Elisa's Law", a local agency, such as a county department of social services, would be authorized to release information, but likely not an entire case record, if one or more among certain conditions are present. Those conditions involve situations in which: (1) the subject of an abuse/neglect report has been formally charged with committing a crime; or (2) a government official acting in the course of his or her official duties disclosed information concerning an abuse/neglect report; or (3) disclosure of a report to the public was made by the subject of the report; or (4) the allegedly abused/neglected child named in the report died. If none of those conditions is present, a local department of social services cannot disclose.

Based on my conversation with Ms. Hoffman, the one condition that might, under the circumstances, authorize disclosure has not yet occurred. As I understand her comments, the successor to the State Department of Social Services has not yet issued a report pursuant to §20(5) of the Social Services Law, nor has there been any finding that the child's death was the result of abuse or neglect. If such a finding is made and disclosed, at that juncture, a second request to the County would in my view be appropriate.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Arthur I. Seld, County Attorney
Louise Hoffman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-0559

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

January 21, 1998

Mr. Richard Kosinski
96-B-2462
Elmira Corrrectional Facility
P.O. Box 500
Elmira, NY 14902-500

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

Dear Mr. Kosinski:

I have received your letter of December 12 in which you sought assistance in obtaining records from your attorneys 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, as a general matter, the Freedom of Information Law applies to records maintained by entities of state and local government in New York; it would not apply to private attorneys or law firms.

It is suggested that you be persistent in your efforts, and I hope that the preceding commentary enhances your understanding of the scope of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AP-10560

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

January 22, 1998

Mr. Herbert Washington
88-A-2845
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562

Dear Mr. Washington:

As you are aware, your letter addressed to the Superintendent of your facility, a copy of which was sent to the Attorney General, who in turn sent a copy to me, has been forwarded to this office. As you may recall from earlier correspondence, the Committee on Open Government, a unit of the Department of State, is authorized to provide guidance concerning the Freedom of Information Law.

It appears that the matter involves a request for certain records of the Department of Correctional Services that had not been answered in a timely fashion. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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:jm

cc: Superintendent Greiner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10561

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

January 22, 1998

Mr. Aydin Torun
94-A-6919 E-2-30
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. Torun:

I have received your letter of December 15. You have sought guidance in your efforts in obtaining a transcript of a hearing from the Division of Parole. It appears that your requests for the transcript have not been answered.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. If the transcript has not yet been prepared, that statute would not be applicable.

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)].

Please note that the Division's former records access officer, Mr. William Altschuller, is deceased. I believe that he has been succeeded in that position by Mr. David Molik. The person designated by the Division to determine appeals is Mr. Terrence Tracy, Counsel to the Division.

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-1056Z

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

January 21, 1998

Mr. Kevin Smyth
93-B-1546
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. Smyth:

I have received your letter of December 13 in which you asked that I "take appropriate action" concerning an alleged constructive denial of a request directed to the Department of Correctional Services. The request involved "a copy of each and every record pertaining to issue of special winter clothing to prisoners who have medical conditions, diseases or illnesses requiring such special clothing."

In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to "take action", i.e., by compelling an agency to grant or deny access to records. Nevertheless, in an effort to offer 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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)].

Second, since you requested "each and every record..." relating to a particular matter, a potential issue involves the extent to which the request "reasonably described" 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 Department's record keeping systems, to the 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 a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

For example, if the records are filed under a particular heading or field, if maintained electronically (i.e.,"special winter clothing", etc.), it may be relatively easy to locate and retrieve the records. However, if the records are maintained by inmate name, not by subject matter, locating the information sought could involve a review of thousands of items. In that latter situation, the request would not, in my opinion, reasonably describe the records, even though the request might have been specific. In short, in that kind of situation, the Department would not maintain the records in a manner that would permit their retrieval without engaging in an effort exceeding that required by the Freedom of Information Law.

Lastly, 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.

If the Department has adopted a policy concerning the issuance of special winter clothing and that record can be located in accordance with the standards referenced earlier, I believe that it would be available under §87(2)(g)(iii). Insofar as the records sought identify inmates, those records or portions thereof could in my view be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy", for they would be pertain to persons with special medical needs or conditions [see §89(2)(b)(i) and (ii)].

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-10563

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

January 22, 1998

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:

As you are aware, I have received a variety of correspondence from you pertaining to your requests for information relating to the City Parks Foundation (CPF).

Having reviewed the opinion addressed to you on August 7, the primary points remain as expressed in that response. Specifically, based on the language of the Freedom of Information Law and particularly its judicial interpretation, CPF, like other not-for-profit organizations created solely to carry out functions for government agencies, may be found to constitute an "agency" subject to the requirements of the Freedom of Information Law. Alternatively, even if CPF is not an "agency", due to that statute's broad definition of the term "record", it would appear that documentation in possession of CPF is maintained "for" an agency, the New York City Department of Parks and Recreation. Throughout the materials that you sent, there are indications that many of the functions of the Department and CPF overlap or are carried out by the same person or persons, frequently making the roles of the two institutions largely indistinguishable.

For purposes of clarification, however, I offer the following additional remarks concerning the correspondence.

First, the title of the Freedom of Information Law is somewhat misleading, for it is not vehicle that requires the disclosure of information per se. Several aspects of your requests involve an effort to acquire information by asking questions. In short, while agency officials may provide information by responding to questions, the Freedom of Information Law does not require that they do so. Similarly, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request.

In the future, rather than seeking information or asking questions, it is suggested that you request existing records.

Second, in a letter addressed to you on December 19 by the Department's Counsel in response to appeals made under the Freedom of Information Law, he indicated that you "fail[ed] to state the basis for each of your appeals" and that you must "state why you believe Parks' responses are in violation of the New York State Freedom of Information Law." In this regard, there is nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) that requires a person denied access to records to express a basis for an appeal other than that he or she believes to have been denied access to records. Very simply, if a person believes that records sought were withheld, that person has the right to appeal. There is no need or obligation to include arguments, legal or otherwise, in favor of disclosure or opposing an agency's denial when submitting an appeal.

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, with respect to the bequest for the maintenance of the Central Park tennis courts, the primary public source of documentation would likely be Surrogate's Court. 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., §2501(8) of the Surrogate's Court Procedure Act].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas G. Rozinski, Counsel
Stacey Greenebaum, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1056

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

January 22, 1998

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 December 18 in which you requested an advisory opinion concerning the Freedom of Information Law.

You referred to an earlier opinion in which it was advised that records relating to grand jury proceedings are confidential pursuant to §190.25 of the Criminal Procedure Law and, therefore, §87(2)(a) of the Freedom of Information Law. You wrote, however, that the records in question were generated prior to and independent of any proceeding before a grand jury. Consequently, it is your contention that the records "are not exempted from the Freedom of Information Law."

From my perspective, if your assertion is accurate, the records would not be subject to the secrecy provisions of the Criminal Procedure Law. That is not to suggest, however, that they would necessarily be accessible under the Freedom of Information Law. In this regard, I offer the following comments.

First, the State's highest court, 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)]. There is case law that illustrates why the basis for denial at issue should be construed narrowly, and why a broad construction 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 for presentation to the grand jury. Those minutes, which were prepared by the petitioner, were requested from the District Attorney under the Freedom of Information Law. 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, in litigation, or even for presentation before a grand jury. In my view, and that of the court in King, when that occurs, the records would not be transformed into records compiled for law enforcement purposes, nor would they have been prepared for the proceeding. 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.

Second, the documentation sought appears to involve complaints made against a particular individual. As I interpret the correspondence attached to your letter, it appears that Fulton County officials have indicated that the records sought do not exist. If that is so, the Freedom of Information Law would not apply. Further, §89(3) of that statute provides in part that an agency an agency is not required to create a record in response to a request.

Lastly, even if there are existing records, there may be grounds for denial. If, for example, a person is subject of a complaint or allegation, and it is later determined that the complaint or allegation was unfounded or could not be proven, it has been advised that records may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Also of potential significance may be §87(2)(e), which authorizes an agency to withhold records compiled for law enforcement purposes in certain circumstances.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Hon. Joseph Salamack

There is
NOT An AO
for
FOIL
10565

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10566

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

January 22, 1998

E-mail
TO: KloeberEng[redacted]

Dear Mr. Kloeber:

I have received your e-mail message of January 21. For reasons unknown, your communication of December 18 was not received by this office.

You referred to the status of electronic records maintained by a sewer district, a public authority and a town. The records consist of CADD drawings and GIS databases.

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, each of the kinds of entities to which you referred would constitute "agencies" subject to the Freedom of Information Law.

Second, §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."

In view of 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. 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)].

Additionally, 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.

Next, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the State's highest court, nearly two decades ago:

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

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

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

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

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

Lastly, if an agency's denial of access is challenged in a judicial proceeding, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

There is nothing in the Freedom of Information Law that deals with the award of other damages, such as punitive damages.

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-10567

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

January 23, 1998

Ms. Joan K. Hall
Office of the Town Clerk
Town of Lake Luzerne
Lake Luzerne, NY 12846

The staff of the Committee on 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. Hall:

I have received your letter of December 22, as well as the materials attached to it. The correspondence involves voluminous requests for Town records.

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

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

Second, having reviewed the correspondence, I would conjecture that staff in some instances may need to or may have expended a substantial amount of time in attempting to locate or retrieve requested records. If an attempt to locate records involves the equivalent of searching for what may be a very few needles in a large haystack, the law does not require that such a degree of effort be expended.

If my assumption is accurate, perhaps the primary issue involves the extent to which the requests "reasonably described" 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 record keeping systems, to the extent that the records sought can be located with reasonable effort, I believe that requests would meet 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 many possible locations in an effort to locate those falling within the scope of a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

Lastly, since one item attached to your letter appears to involve the work product of an attorney, I have attached a copy of an advisory opinion pertinent to that issue.

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-10568

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

January 23, 1998

Mr. Eric Skalwold
[redacted]

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

Dear Mr. Skalwold:

I have received your letter of December 24, as well as a variety of materials relating to it.

The matter pertains to your request to the Ithaca City School District for "the names, addresses if available, and the grade level which their child (children) applied to enter, for all the parents who requested that their child be admitted to The Alternative Community School for the Fall of 1997, and whose children were not granted placement at A.C.S." It appears to be your contention that because you are seeking the names of parents rather than children, the District improperly denied access.

From my perspective, the District's denial of your request was consistent with law. Before providing the rationale for that conclusion, your correspondence suggests that there may be a misunderstanding of the role of the Committee on Open Government. The Committee's primary function involves providing advice and opinions concerning public access to government information. It has no authority to compel an agency to grant or deny access to records, and it does not determine appeals following denials of access to records. The provision concerning the right to appeal, §89(4)(a) of the Freedom of Information Law, provides that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the 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 when received by the agency and the ensuing determination thereon."

While an agency must inform the Committee of appeals and their determinations of the appeals, this office performs no substantive function in granting or denying access to records. The role is more akin that of ombudsman or adviser.

With respect to issue, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is the Family Education Rights and Privacy Act (20 U.S.C. §1232g), which is commonly known as "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 the names of students' parents, as well as 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.

In short, because the records sought involve the names of parents of students, they would constitute "personally identifiable information" that could not be disclosed absent the consent of the parents of the students.

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: Judith C. Pastel
Paul D. Mintz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10569

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

January 23, 1998

E-mail
TO: Henry J <henryj@lostkids.org>

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

Dear Mr. Jolls:

I have received your communication of December 25 in which you sought an opinion concerning your right to obtain an autopsy report and perhaps related records from Wyoming County.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although that statute provides broad rights of access, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute."

One such statute is §677 of the County Law, which refers to autopsy reports and related records. It is noted that the "County Law" consists of a series of statutes enacted by the State Legislature that pertain to all counties in the state outside of New York City. As such, the law to which I referred in our initial correspondence is not a law adopted by one county; it is the law applicable to every county, except those comprising New York City.

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.

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-1057O

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

January 23, 1998

Mr. William V. Camfield
Turning Point Enterprises
263 Verbeck Avenue
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. Camfield:

I have received your letter of December 26, as well as the correspondence attached to it. In brief, you have sought assistance in relation to longstanding requests for records of the Town of Stillwater.

Having reviewed the earlier correspondence with you, I believe that the records in question are accessible under the Freedom of Information Law, and that does not appear to be an issue. Rather, as I interpret your commentary, the primary concern appears to be the delay in disclosure.

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

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

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and

the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

A second issue may also be pertinent to the matter. One element of your request involves building permits and certificates of occupancy "for a certain time period." Here I direct your attention again to §89(3), which requires that an applicant "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 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 record keeping systems, to the extent that the records sought can be located with reasonable effort, I believe that requests would meet the requirement of reasonably describing the records. On the other hand, if, for example, building permits and certificates of occupancy are maintained by location (i.e., address or lot number), rather than chronologically, it is possible that the request might not have met the standard of reasonably describing the records. It is suggested that you attempt to learn of the means by which the records are maintained or can be retrieved by the Town.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10571

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

January 26, 1998

Mr. David Goguen
[redacted]

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

Dear Mr. Goguen:

I have received your letter of December 23 and the correspondence attached to it.

You have sought assistance in obtaining marriage records pertaining to certain individuals from the State Department of Health. The Department denied your request and indicated that a "written authorization" in the form of a notarized statement must be given by the bride or groom would be required in order to gain access to the records in question.

In this regard, there is nothing in any provision of law that would require the kind of authorization to which the Department 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. The only ground for denial significant to the matter is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While I believe that some elements of marriage records might properly be withheld, the remainder must, in my opinion, be disclosed.

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. In my opinion, the same is true with respect to marriage records, 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, which dealt with a request made to a local registrar, 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 [see §87(2)(b)]. 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.

In sum, the restrictive interpretation by the Department of Health regarding the disclosure of marriage records reflected in the correspondence is, in my view, inconsistent with the Freedom of Information Law and its judicial interpretation

Lastly, the response to your request did not include any reference to your right to appeal a denial of access. 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).

For your information, the person designated by the Department of Health to determine appeals is Robert Hinckley, Director of the Public Affairs Group.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Hinckley
Peter Carucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10572

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

January 26, 1998

Mr. Stephen Donati, Jr.
95-A-5022
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. Donati:

I have received your letter of December 29 in which you indicated that your "main objective is to gain access to the criminal history records of several witnesses that testified at the grand jury proceedings that resulted in an indictment, ideally directly from the Department of Criminal Justice Services ('DCJS')." You indicated that you have obtained some of the records from the courts and questioned the fees charged for copies of court records.

In this regard, I offer the following comments.

First, with respect to criminal history records, the general repository of those records is the Division of Criminal Justice Services. While the subject of a criminal history record may obtain such record from the Division, it has been held that criminal history records maintained by that agency are exempted from public disclosure pursuant to §87(2)(a) of the Freedom of Information Law [Capital Newspapers v. Poklemba, Supreme Court, Albany County, April 6, 1989]. Nevertheless, if, for example, criminal conviction records were used in conjunction with a criminal proceeding by a district attorney, it has been held that the district attorney must disclose those records [see Thompson v. Weinstein, 150 AD 2d 782 (1989); also Geames v. Henry, 173 AD 2d 825 (1991)]. It is also noted that while records relating to convictions may be available from the courts or other sources, when charges are dismissed in favor of an accused, records relating to arrests that did not result in convictions are generally sealed pursuant to §160.50 of the Criminal Procedure Law.

Second, 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, and that has always been so.

The advisory opinions that you cited include essentially the same point as that made here. With regard to fees charged by the courts, while I am aware of some of the provisions dealing with fees for copies of court records and searches, I am not familiar with all such provisions. Further, because court records are outside the coverage of the Freedom of Information Law, issues involving fees for those records are beyond the jurisdiction of this office. It is suggested that you discuss the matter with 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-1052

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

January 26, 1998

Mr. Dana Sydnor
97-A-4590 A2-53
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 December 29 in which you sought assistance concerning requests for records of the New York City Department of Homeless Services and Orange County Court.

In this regard, I believe that the subject of your request to the court was addressed in previous correspondence. With respect to the other matter, the correspondence attached to your letter indicates that your request involves identification photographs taken at a particular shelter during a certain time period, a log book indicating your "in & out movement" during a certain period, and the names of police officers on duty on certain days.

First, with respect to the photographs, you did not specify which photographs you have requested. While it might be assumed that you are seeking photographs of yourself, that is not clear on the basis of your request.

Second, it is noted that the Freedom of Information Law pertains to existing records. If the log book entries and records identifying police officers on duty continue to exist, those records would be subject to the Freedom of Information Law. If they have been destroyed, that statute would no longer be pertinent.

Third, if the records continue to exist, a possible issue involves whether the request "reasonably describes" the records as required by §89(3) of the Freedom of Information Law. It has been held by the Court of Appeals, the State's highest court, 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 record keeping systems, to the extent that the records sought can be located with reasonable effort, I believe that requests would meet the requirement of reasonably describing the records. On the other hand, if agency staff had to review thousands of entries individually in an effort to locate those pertaining to you, the request might not meet the standard imposed by the law.

Lastly, assuming that the records exist and that they reasonably described the records, I believe 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. Although §87(2)(b) of the Law enables an agency to withhold records when disclosure would result in "an unwarranted invasion of personal privacy", insofar as your request involves records pertaining only to yourself, that provision would be inapplicable as a basis for denial. Further, it has been held that attendance records pertaining to public employees, including police officers, must be disclosed [see Capital Newspapers v. Burns, 109 AD2d 92, aff'd 67 NY2d 562 (1986)].

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-AC 1057Y

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

January 26, 1998

Mr. Joseph Donahue
[redacted]

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

Dear Mr. Donahue:

I have received your letter of December 29, as well as the materials attached to it. In brief, the matter involves your request for records relating to payments to attorneys by the Town of East Greenbush. Although some records were disclosed, others have been withheld. Further, you complained with respect to the delay in response to your request and appeal. The records sought were denied on the ground that they are subject to the attorney-client privilege.

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..."

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, 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 payments to an attorney or a law firm, the judicial interpretation of the Freedom of Information Law indicates that much of the information sought must likely 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, 637 NYS 2d 596 (1995)]. Although monthly bills indicating amounts charged by the firm were disclosed, the agency redacted "'the daily descriptions of the specific tasks' (the 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.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-10525

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

January 26, 1998

Mr. Damian C. Rossney
89-B-0346
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. Rossney:

I have received your letter of December 23 and a copy of your request of the same date for records of the Division of Parole. You wrote that "All the documents requested are listed as disclosable in the Division of Parole Master Index", and you have asked for any advice or opinion that I might offer concerning the request.

First, I am unaware of whether your request has been answered. However, I note that the phrase "master index" is not found or expressed in the Freedom of Information Law, and I know of only one instance in which it is used. Specifically, the phrase "master index" is used in the regulations promulgated by the Department of Correctional Services under the Freedom of Information Law. Those regulations are based upon §87(3)(c) of the Freedom of Information Law, which requires that each agency maintain:

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

The subject matter list is not, in my opinion, required to identify each and every record of an agency; rather, I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency. A subject matter list is not prepared with respect to records pertaining to a single individual. Further, the subject matter list does not ordinarily identify the categories of records that must be disclosed; again, it refers to the kinds of records maintained by an agency, "whether or not available" under the Freedom of Information Law.

Second, I am unfamiliar with the contents of the records that you requested. It is possible that they are made available routinely to inmates as a matter of policy or practice. Nevertheless, I point out that various aspects of records may be withheld under that statute. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Of potential relevance with respect to the records sought in my view 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.

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: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10576

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

January 26, 1998

E-mail

TO: Michael Lisuzzo <michael.saratoga@internetmci.com>

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

Dear Mr. Lisuzzo:

I have received your e-mail communication of December 29 in which you asked whether the names, positions, salaries and similar details must be disclosed by school districts concerning their employees.

It is clear that school districts must make available the kinds of items to which you referred, as well as others. In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and school districts constitute "agencies" required to comply with that statute [see definition of "agency", Freedom of Information Law, §86(3)].

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.

Second, it is emphasized that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

The provision of most significance concerning the kinds of items at issue is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to those persons, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

With specific regard to employee payroll records, 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 for unused sick, vacation or personal leave, must be disclosed. 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).

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-A- 10577

41 State Street, Albany, New York 12231
(518) 474-2518
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January 26, 1998

Mr. Candido Rodriguez
91-A-4028
Clinton Correctional Facility
Box 2001
Dannemora, NY 12929

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

Dear Mr. Rodriguez:

I have received your letter of December 22. You indicated that you completed the "anti-violence program" at Attica in the summer of 1994, but that in January of 1995, much of your property was lost during the move from one cell to another, including your "anti-violence completion certificate." Although you requested a copy of the certificate, you had received no response as of the date of your letter to this office. You also wrote that you have learned that there is no record at Attica of your completion of the program.

In this regard, I am unaware of which office might have a copy of a record demonstrating your completion of the program. It is suggested that you discuss the matter with your counselor and perhaps contact the inmate records coordinator, who might maintain a copy of a record proving that you completed the program. Nevertheless, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. If the record in question no longer exists, the Freedom of Information Law would not apply. In that event, it is recommended that you attempt to ascertain how a new certificate might be issued.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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 of Correctional Services 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-10578

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

January 26, 1998

Mr. Thomas J. Walsh
[redacted]

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

Dear Mr. Walsh:

I have received your letter of December 23 in which you referred to a request for records of the Hicksville School District submitted on November 13. Because you request had not been answered over the course of three weeks, despite several telephone calls to the District, you "exercised [your] right of appeal." Nevertheless, on December 6, you received a letter from the District acknowledging the receipt of your request and indicating that it would take "approximately two more weeks" to grant or deny your request.

From my perspective, you had the right to appeal when you did so, and the District's acknowledgment of the receipt of your request was rendered too long after receiving 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 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. 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 an effort to enhance compliance with and understanding of the Freedom of Information 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: Maureen Bright

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10579

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

January 26, 1998

Ms. Sandra Kissam
President
Stewart Park & Reserve Coalition
Box 90
Blooming Grove, NY 10914

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

Dear Ms. Kissam:

As you are aware, I have received your letter of December 31, as well as a variety of related materials concerning "the recent difficulties encountered in receiving copies of proposals, received by NYS DOT and the Empire State Development Corporation, for the lease of Stewart Airport and the sale of the Stewart Properties." It is noted that I recently obtained a copy of a response to your request by DOT (the New York State Department of Transportation) dated January 22 in which it denied access to the records sought in their entirety.

From my perspective, it is likely that some elements of the records sought might justifiably have been withheld; it is unlikely, however, that the records could properly have been withheld in their entirety. 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, 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 different from that 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.).

Based on the direction given by the Court of Appeals in several decisions, the records must be reviewed by the agencies in receipt of your requests 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).

As you may recall, essentially the same kind of analysis was expressed by the court in a case brought by your organization against DOT nearly eight years ago (Stewart Park and Reserve Coalition v. White, Supreme Court, Albany County, September 4, 1991).

Second, the provision cited in the denial of your request, §87(2)(c), enables agencies to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." In my view, the key word in the quoted provision is "impair", and the question involves the extent to which disclosure would impair the process of awarding a contract.

Section 87(2)(c) often applies in situations in which agencies seek bids or RFP's. While I am not an expert on the subject, I believe that bids and the processes relating to bids and RFP's are different. In the traditional competitive bidding process, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency seeks proposals by means of RFP's, there is no obligation to accept the proposal reflective of the lowest cost; rather, the agency may engage in negotiations with the submitters regarding cost as well as the nature or design of goods or services, or the nature of the project in accordance with the goal sought to be accomplished. As such, the process of evaluating RFP's is generally more flexible and discretionary than the process of awarding a contract following the submission of bids.

When an agency solicits bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor a bid in a manner that provides the bidder with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available, even before a contract has been signed, for the possibility of "impairment" would have disappeared.

In the case of RFP's, even though the deadline for submission of proposals might have passed, an agency may engage in negotiations with several of the submitters resulting in alterations in proposals, including associated potential costs. Whether disclosure at that juncture would "impair" the process of awarding a contract is, in my view, a question of fact. In some instances, disclosure might impair the process; in others, disclosure may have no harmful effect or might encourage firms to be more competitive, thereby resulting in benefit to the agency and the public generally.

Claims have been made in situations similar to that described in your letter that proposals and other records pertaining to the RFP process may always be withheld prior to the final award of a contract. In general, I have disagreed with those kinds of blanket assertions. Again, unlike the bid

process in which an agency essentially has no choice but to accept the low appropriate bid, in the RFP process, the proposals offered by submitters, including monetary figures, are subject to negotiation and change; they do not reflect the "bottom line." If it is understood and known by the submitters of proposals that the process is flexible, that their proposals are subject to revision, and that figures regarding cost are subject to change, the question, again, involves how disclosure would adversely affect an agency's ability to engage in an optimal agreement on behalf of the public.

There may be elements of the records sought which would fall within the exception, particularly if disclosure would in some way impair an agency's negotiation strategy. However, disclosure of other elements of the proposals might encourage the submitters to better accommodate the needs of the agency or propose what might be characterized as a better deal. Rather than impairing the process, some disclosure might enhance it.

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John B. Dearstyne
Lawrence M. Gerson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-226
FOIL-AO-1058

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

January 26, 1998

Mr. Jim Tricoli
[redacted]

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

Dear Mr. Tricoli:

I have received your undated letter, as well as the materials attached to it. You have sought assistance in your efforts in obtaining a list of town of Amherst employees, their titles and their salaries.

According to the correspondence, the town clerk initially denied access on the ground that disclosure would result in an "unwarranted invasion of personal privacy." In response to your appeal, the Town Attorney referred to §96 (1)(a)(iii) of the Public Officers Law, which is part of the Personal Privacy Protection Law, and which states that "the uses which will be made of such personal information by the person or entity receiving it" must be described. In short, he appears to be conditioning disclosure on your intended use of the record in accordance with that statute.

In this regard, the provision of law to which the Town Attorney referred is inapplicable, for the Personal Privacy Protection Law pertains 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 or serve as a barrier to disclosure of records maintained by a unit of local government [see Seelig v. Sielaff, 607 NYS 2d 300, 201 AD 2d 298 (1994)].

The applicable statute is the Freedom of Information Law, which pertains to records of agencies of state and local government [see definition of "agency", section 86(3)]. Further, it has been held that records accessible under the Freedom of Information Law 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), M. Farbman & sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)]. As such, in my view, the Town does not have the right to insist that you indicate that the intended use of the information in question be expressed as a condition precedent to 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.

Although the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

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

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

As stated even before 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 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 by the Town.

Lastly, in affirming the Appellate Division decision in Capital Newspapers v. Burns, supra, the Court of Appeals found that:

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Susan Jaros, Town Clerk
Phillip A. Thielman, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10581

41 State Street, Albany, New York 12231
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January 27, 1998

Mr. Robie J. Drake
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. Drake:

I have received your letter of January 5 in which you questioned the propriety of the deletion of identifying details by the Office of the Bronx County District Attorney from an affidavit prepared by a licensed dentist in conjunction with a proceeding that occurred in 1975. The denial is based on §87(2)(f) of the Freedom of Information Law, which permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

According to your letter, the affidavit was filed with a court of record, "was submitted in open court", and, to the best of your knowledge, has not been sealed. If your contentions are accurate, I believe that the record must be disclosed in its entirety. 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.

It is also noted that although the courts and court records are not subject to the Freedom of Information Law, many court records are available under other provisions of law (see e.g., Judiciary Law, §255). If you choose to seek the records from a court, it is suggested that a request be made to the clerk of the court that maintains the record, 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:jm

cc: Peter Coddington
Jean Joyce

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10582

41 State Street, Albany, New York 12231
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January 27, 1998

Mr. Casim Noble
91-A-4074
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Noble:

I have received your letter of January 5. You indicated that you requested "a list of the names and titles of documents relating to a misbehavior incident" in which you were involved in September. Specifically, you asked for "the names of whatever documents were created as a result of the 9/29/1997 incident" in order that you can know "specifically" which documents to request under the Freedom of Information Law. You have sought an opinion concerning your right "to this documentary identification list."

In this regard, I offer the following comments.

First, I point out 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. I would conjecture that there may be no list identifying or naming each of the records pertaining to the incident in question. If that is so, facility staff would not be required to prepare the list that you seek on your behalf.

Second, there is no need to have a list identifying each document to make a proper request under the Freedom of Information Law. When that statute was initially enacted in 1974, it required that an applicant seek "identifiable" records. As such, an applicant had to name or identify the records to make an appropriate request. Since 1978, however, §89(3) has provided that an applicant must merely "reasonably describe" the records sought. Therefore, there is no requirement that an applicant specify with particularity the records in which he or she may be interested. So long as a request contains sufficient detail to enable the agency to locate and identify the records sought, the request would meet the standard of "reasonably describing" the records.

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: Patricia Priestly, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 10583

41 State Street, Albany, New York 12231
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January 28, 1998

John Boyce, M.D.
Professor and Chairman
Dept. of Obstetrics and Gynecology
SUNY Health Science Center at Brooklyn
450 Clarkson Avenue, Box 24
Brooklyn, NY 11203-2098

Dear Dr. Boyce:

As you are aware, your letter of January 8 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 advise with respect to the Freedom of Information Law. I note that the Committee is not empowered to investigate or compel an agency to grant or deny access to records. Nevertheless, it is my hope that opinions rendered by this office are educational and persuasive, and that they serve to encourage compliance and resolve disputes.

The issue that you raised pertains to a denial of access by the State University to a settlement agreement concerning a physician at the State University of New York Health Science Center at Brooklyn relating to the "continuation of his employment." Based on your letter to the Attorney General, a series of allegations made by the physician in question against you and the department that you serve as chairman were investigated and found to be false.

The University denied your request for the settlement agreement, stating that disclosure would "constitute an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law, and because the document consists of inter-agency or intra-agency material that may be withheld under §87(2)(g) of that statute.

As I understand the matter, the settlement agreement must be disclosed. While release of the agreement would represent an invasion of the physician's privacy, according to judicial interpretations of the Freedom of Information Law, it would not result in an "unwarranted" invasion of privacy. Further, while I agree that the settlement agreement constitutes "intra-agency material", due to the structure of the provision in which that phrase appears, I believe that it requires disclosure. In this regard, I offer the following analysis of the matter.

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

Second, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Both of the grounds for denial to which the State University alluded are relevant in ascertaining rights of access; neither, however, would in my view serve to justify a denial of access to what essentially is a contract between a public employee and his employer.

Perhaps of greatest significance is §87(2)(b), which, as indicated earlier, 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 public officers and employees are required to be more accountable than others. With regard to records pertaining to those persons, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

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 those records [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

"the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

In so holding, the court cited a decision rendered by the Court of Appeals and stated that:

"In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforceable as contrary to statutes and

> public policy stated: 'Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).
>
> A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.
>
> The agreement to conceal the terms of this settlement is contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access.:

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

Another decision also required the disclosure of a settlement agreement between a teacher and a school district following the initiation of disciplinary proceedings under §3020-a of the Education Law (Buffalo Evening News v. Board of Education of the Hamburg School District and Marilyn Will, Supreme Court, Erie County, June 12, 1987). Further, that decision relied heavily upon an opinion rendered by this office.

It has been held in variety of circumstances that a promise or assertion of confidentiality cannot be upheld, unless a statute specifically confers confidentiality. In Gannett News Service v. Office of Alcoholism and Substance Abuse Services [415 NYS 2d 780 (1979)], a state agency guaranteed confidentiality to school districts participating in a statistical survey concerning drug abuse. The court determined that the promise of confidentiality could not be sustained, and that the records were available, for none of the grounds for denial appearing in the Freedom of Information Law could justifiably be asserted. In a decision rendered by the Court of Appeals, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..."

> [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his

> professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [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 a settlement agreement between a public employee and a public employer 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 SUNY officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Martin T. Reid
Lynne Reid-McQueen
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AL-32
FOIL-AO-10584

41 State Street, Albany, New York 12231
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January 28, 1998

Mr. Edward S. Rowley
Associate Attorney
NYS Department of Agriculture and Markets
1 Winners Circle
Albany, NY 12235

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

Dear Mr. Rowley:

As you are aware, I have received your letter of December 29 and related materials. You have sought an advisory opinion concerning a request for "the state's computerized database of dog licenses" by a member of the news media and the fees that can be charged if the database is to be disclosed.

According to your letter and a sample of the kinds of the items contained in it, "the database contains personal information on natural persons (data subjects), including the home address and home telephone number of each dog owner in the database", and you expressed concern "as to whether the release of any or all of the database would constitute an unwarranted invasion of personal privacy, and/or whether certain personal information and/or identifying details should be redacted."

In this regard, I offer the following comments.

First, since you referred to "data subjects", the phrase "data subject" is defined in the Personal Privacy Protection Law to mean "any natural person about whom personal information has been collected by an agency" [§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 pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

Second, I believe that most of the items maintained by the Department would be accessible in this instance.

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

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 (or their dogs) are generally accessible to the public.

The only instance in which the names and addresses of licensees 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." In my view, news gathering cannot be equated with commercial or fund-raising activity.

Notwithstanding the foregoing, it is likely in my opinion that two elements of the database could be withheld. One involves the telephone numbers of licensees. While a telephone number might not represent highly personal or intimate information, many people have unlisted numbers in order to avoid or diminish unwanted intrusions into their lives. The Department's information does not appear to distinguish between listed and unlisted numbers; nevertheless, it has been advised in many contexts that home phone numbers in general need not be disclosed. The other item involves an indication of whether the licensee or owner of a dog is a minor. In my view, the characterization of individuals as minors would, if disclosed, constitute an unwarranted invasion of privacy. Further, it might be argued that there may be issues of safety as well, and §87(2)(f) permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." In short, I believe that the reference to "minors" could be withheld.

Third, when information is maintained electronically, it has been advised insofar as the information 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 by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since §89(3) of the Freedom of Information Law states that an agency need not create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

Assuming that the two items discussed earlier, the home telephone number and the indication of whether the licensee is a minor, represent "fields" that can be deleted from the remainder of the database, I believe that the Department would be obliged to duplicate the remainder of the database upon payment of the requisite fee.

Lastly, with respect to fees, 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 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 the 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, it is noted that 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. 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-10585

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

January 30, 1998

Mr. Thomas J. Hillgardner
[redacted]

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

Dear Mr. Hillgardner:

I have received your letter of December 30. You described in some detail a database known as the "Summons Tracking and Retrieval System" maintained by the New York City Parking Violations Bureau and sought my views concerning rights of access to certain information, particularly a "list by summons number all tickets adjudicated by the NYCPVB wherein the respondent was found not guilty due to improper service of process."

In this regard, I offer the following comments.

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

Aside from the technical aspects of your inquiry, it has been advised in a variety of contexts that if a person is the subject of an allegation or a charge, but there is no final determination sustaining the allegation or charge, the records relating to the matter may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Similarly, if a person is charged with a criminal offense and the charge is later dismissed in favor of the accused, the records ordinarily are sealed pursuant to §160.50 of the Criminal Procedure Law and, therefore, are exempted from disclosure in accordance with §87(2)(a) of the Freedom of Information Law.

Second, with respect to the electronic information issues that you raised, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency need not create a record in response to a request. It is emphasized, however, that §86(4) of the Freedom of Information Law defines the term "record" expansively to include:

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held some fifteen years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS 2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

When information is maintained electronically, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. As stated earlier, since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

If information sought cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of one's interest.

However, often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically. In my view, if electronic information can be extracted or generated with reasonable effort, 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 course of action. Whether a court in such circumstances would require an agency to follow that course of action 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-10586

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

January 30, 1998

Mr. David Auer
90-T-3534
Clinton Correctional Facility
P.O. 2002
Dannemora, NY 23939-2002

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

Dear Mr. Auer:

I have received your letter of January 5 in which you sought assistance in obtaining a copy of a "parole recommendation letter" that Assistant District Attorney Georgia Tschiember of the Office of the Suffolk County District Attorney "submitted to the Parole Board of the purpose of opposing [your] release."

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.

Pertinent under the circumstances is §87(2)(g), which relates to "inter-agency or intra-agency materials." From my perspective, a letter transmitted by an official of one agency, the Office of the District Attorney, to another agency, the Parole Board, would clearly constitute "inter-agency" material. The provision at issue 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.

Based on the foregoing, it appears that the letter in question may be withheld under 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

cc: Georgia Tschiember
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10587

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

January 30, 1998

Ms. Linda A. Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of January 7, as well as the materials attached to it. You have sought my views relating to two issues pertaining to your requests made under the Freedom of Information Law to the Village of Ossining.

The first concerns what you characterized as a "boiler plate reply" to requests in which it is stated that: "As soon as it is available, I will be in touch with 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 the Freedom of Information Law states in part that:

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

The second issue pertains to a denial of your request for "all Applications for overnight parking permits that were refused by the Village." You added that your interest is in knowing the reasons the Building Department's rejections of applications for overnight permits.

As you are aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 in my view is §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

In my view, pursuant to the provision quoted above, the Village has the authority to withhold any portion of the records in question which, if disclosed, could identify an applicant. There are many instances in which the identities of applicants may be withheld, often until an application, license or permit is granted. For example, when individuals apply for public employment, the law specifies that neither their names nor their home addresses must be disclosed [see §89(7)]; if, however, an individual is hired and is on the public payroll, that person's identity becomes public. If a person has applied to take a licensing examination, the name may in my view be withheld, for later, the names of those who become licensed are public, and comparing the names of those who applied with those granted licenses would indicate who failed the exams. For that reason, I believe that the names of applicants may be withheld.

Further, based on a review of the form used by the Village, an applicant for a "Hardship - Parking Exemption" must include a variety of personal information, such as a telephone number, an indication that he or she may be physically handicapped, or that he or she is involved in work that merits the grant of an exemption. In my opinion, those kinds of personal details would in many instances result in an unwarranted invasion of privacy if disclosed.

In short, for the reasons expressed above, I believe that the identities of applicants for the exemption, particularly those whose applications have been rejected, may be withheld.

If you are interested only in the portion of the application indicating the reasons for rejections of applications by the Building Department, I believe that that aspect of the application would be available. Further, rather than deleting identifying details from the application, it would appear that the back side of the application, which includes the reasons for rejection by the Building Department, would not include personally identifiable information regarding applicants. If that is so, seeking copies of those pages of the application would enable you gain access to the information sought.

Lastly, in conjunction with your other correspondence, which will be answered within approximately three to four weeks, enclosed is a copy of the Open Meetings Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie A. Fuesy

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10588

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

February 2, 1998

Mr. Daniel Muha
Muha Services
4301 State Rt 26
Turin, NY 13473

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

Dear Mr. Muha:

I have received your letter of January 12 in which you sought assistance in obtaining records pertaining to your case from the Lewis County District Attorney. 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 for information. From my perspective, the correspondence indicates that several aspects of your request involve an attempt to acquire information or essentially seek responses to interrogatories rather than seeking existing records. In the future, when seeking records under the Freedom of Information Law, it is suggested that you request existing records.

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.

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
Executive Director

RJF:tt

cc: James P. O'Rourke, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AT 10589

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

February 2, 1998

Mr. Rocco Panetta
96-R-9062
Gowanda Correctional Facility
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:

I have received your letter of January 9. Having been denied access to records by the Nassau County Police Department, You asked how you might "continue [your] quest to obtain this information." You also asked how you can obtain a "Vaughn Index."

In this regard, I offer the following comments.

First, 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 short, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

For your information, I believe that the person designated to determine appeals involving all units of Nassau County government is the County Attorney.

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

> "All of these documents were inter-agency or intra-agency materials exempted under Public Officers Law section 87(2)(g) and some were materials the disclosure of which could endanger the lives or safety of certain individuals, and thus were exempted under Public Officers Law

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10590

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address:http://www.dos.state.ny.us/coog/coogwww.html

February 2, 1998

Mr. Kenneth G. Pavel
90-C-1235
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-2500

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

Dear Mr. Pavel:

I have received your letter of January 8 in which you expressed the belief that you are being "stonewalled" in your attempt to obtain information under the Freedom of Information Law from the Department of Correctional Services. You have sought an opinion concerning the Department's obligation to provide you with "any and all information pertaining to [you], Kenneth G. Pavel #90-C-1235, stored on any and all computer or data processing systems within the New York State Department of Correctional Services."

From my perspective, the request raised three issues.

First, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. I am unaware of the number or nature of "computer processing systems" that may be maintained or used by the Department or the extent to which they may include information about inmates. If there are hundreds of possible sources of the information about you, and if individual searches would be required to be accomplished to ascertain whether there is information falling within the scope of your request, it is doubtful in my view whether the request would have reasonably described the records. On the other hand, of only a few systems or databases include inmate information, the request would likely meet the standard of reasonably describing the records.

The second issue involves the extent to which data about you can be retrieved by means of your name or identification number. When information is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such

as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since §89(3) does not require an agency to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retretrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)]. In short, there may be situations in which the Department maintains data pertaining to you that might not be retrievable by means of your name or identification number.

Lastly, insofar as the request reasonably describes the records and can be retrieved in the manner suggested above, the next issue involves the extent to which it 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. Without knowledge of the nature of the data, I cannot conjecture as to rights of access other than suggesting that there may be grounds for withholding some of the data.

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: Anthony Annucci
Mark Shepard

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10591

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

February 2, 1998

Ms. Deborah Davis
93-G-1210 C-90
Taconic Correctional Facility
250 Harris Road
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. Davis:

I have received your letter of January 12 concerning an unanswered request for records pertaining to you maintained at your facility.

In this regard, I offer the following comments.

First, the provisions that you cited in your request are the federal Freedom of Information and Privacy Acts. Those statutes apply to records maintained by federal agencies. The statute that generally pertains to records of agencies of state and local government in New York is the New York Freedom of Information Law, Article 6 of the Public Officers Law.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written 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 of Correctional Services to determine appeals is Anthony Annucci, Counsel to the Department.

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 am unfamiliar with the contents of the records sought, 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."

Lastly, since you referred to alleged inaccuracies in records, I point out that there is nothing in the Freedom of Information Law pertaining to the accuracy of records or which provides a right to attempt to correct or amend records. However, the regulations promulgated by the Department of Correctional Services enable an inmate to "challenge the accuracy" of the personal history or correctional supervision history portion of an inmate's record. It is suggested that you review the

provisions beginning with §5.50 of the regulations, which should be available through the facility librarian.

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 2

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

February 2, 1998

Mr. Arthur A. Wannamaker
[redacted]

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

Dear Mr. Wannamaker:

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

According to the materials, having submitted a request for minutes of a meeting of the Cherry Valley Board of Fire Commissioners, you were informed that "It is the Board's position that as you are no longer a voting member of either the emergency squad or fire company that you do not have standing to request the records..." Based on that response, you asked that I advise the Board and its attorney that you are "entitled to inspect, review and copy the minutes of all official meetings of the Fire Commissioners."

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, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

In short, unless there is a basis for withholding records in accordance with the grounds for denial appearing in the Freedom of Information Law, the fact that you may no longer be associated with a particular organization is irrelevant. Very simply, as a member of the public, you enjoy rights of access under that statute.

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

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

A fire district is a public corporation [see General Construction Law, §66, and Town Law, §174(7)]. Consequently, I believe that a fire district is required to comply with the Freedom of Information Law. Further, the Board of Fire Commissioners, the governing body of a fire district, has the responsibility of ensuring compliance with the Freedom of Information Law [see §87(1)].

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is clear in my opinion that minutes of meetings of the Board must be disclosed, for none of the grounds for denial would be applicable.

Lastly, pursuant to §87(2) of the Freedom of Information Law, accessible records must be made available for inspection and copying, and an agency is required to produce a copy of a record upon payment of the requisite fee [see §§87(1)(b)(iii) and 89(3)].

As you requested and in an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of that statute and this response will be forwarded to the Board and its attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Board of Fire Commissioners
Bruce C. McGregor, Jr.

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

February 2, 1998

Mr. Martin Hodge
86-A-8851
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. Hodge:

I have received your letter of January 7 addressed to William Bookman. Please note that Mr. Bookman has retired.

You have sought information concerning the extent to which you may obtain records form the Department of Correctional Services, and you made specific reference to records pertaining to your "enemies", Program and Security Assessment Summaries, and unusual occurrence reports.

In this regard, I would conjecture that there is no record that characterizes people as "enemies." If that is so, the Department would not be required to create or prepare records on your behalf containing the information of your interest [see Freedom of Information Law, §89(3)]. Further, the contents of records and the effects of disclosure generally determine 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.

While, I am unfamiliar with "program history data", 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."

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.

I point out that a decision rendered in 1989 dealt some of the records in which you are interested. In that case, it was stated that:

> "The petitioner seeks disclosure of unredacted portions of five Program Security and Assessment Summary forms, prepared semi-annually or upon the transfer of an inmate from one facility to another, which contain information to assist the respondents in determining the placement of the inmate in the most appropriate facility. The respondents claim that these documents are exempted from disclosure under the intra-agency memorandum exemption contained in the Freedom of Information Law (Public Officers Law, section 87[2][g]).

> We have examined in camera unredacted copies of the documents at issue (see Matter of Nalo v. Sullivan, 125 AD 2d 311, 509 NYS 2d 53; see also Matter of Allen Group, Inc. v. New York State Dept. of Motor Vehicles, App. Div., 538 NYS 2d 78), and find that they are exempted as intra-agency material, inasmuch as they contain predecisional evaluations, recommendations and conclusions concerning the petitioner's conduct in prison (see Matter of Kheel v. Ravitch, 62 NY 2d 1, 475 NYS 2d 814, 464 NE 2d 118; Matter of Town of Oyster Bay v. Williams, 134 AD 2d 267, 520 NYS 2d 599)" [Rowland D. v. Scully, 543 NYS 2d 497, 498; 152 AD 2d 570 (1989)].

Insofar as the records sought are equivalent to those described in Rowland D., I believe that they may 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.

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-10594

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

February 2, 1998

Mr. Shawn Green
97-A-0801
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Green:

I have received your letter of January 8. You asked where you might seek information pertaining to "minimum standards for pretrial detainees on Riker's Island regarding medical treatment."

As a general matter, a request for records 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. For future reference, 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 of your interest.

In this instance, since the Rikers Island facility is part of the New York City Department of Correction, it is suggested that a request be directed to Mr. Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

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-1059

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

February 2, 1998

Mr. Gerard Wright
95-A-0361
Woodbourne Correctional Facility
Pouch 1
Woodbourne, NY 12788

Dear Mr. Wright:

I have received your letter of January 6. You have asked that this office address an appeal made under the Freedom of Information Law on November 14 sent to the Office of the Kings County District Attorney that had not been answered as of the date of your letter to this office.

In this regard, first, §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."

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

Second, since many of the records sought were apparently introduced as exhibits and made part of the record at your trial, I note that it was held in Moore v. Santucci [151 AD 2d 677 (1989)] that if records have been disclosed during a public proceeding, they are generally available under the Freedom of Information Law. In that decision, it was also found that an agency need not make available records that had been previously disclosed to the applicant or that person's attorney, unless there is an allegation "in evidentiary form, that the copy was no longer in existence." In my view, if you can "in evidentiary form" demonstrate that neither you nor your attorney maintains records that had previously been disclosed, the agency would be required to respond to a request for the same

records. I also point out, however, that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jodi Mandel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10596

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

February 2, 1998

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:

I have received your letter of January 8 in which you raised a series of questions relating to your difficulty in obtaining a "bio" from the New York City Health and Hospitals Corporation pertaining to a member of its Board of Directors. In conjunction with those questions, I offer the following comments.

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

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

Therefore, if the Corporation maintains a copy of the bio, that document would constitute a "record" that falls within the coverage of that statute.

Second, while agencies frequently accept and respond to requests made orally, I believe that they may require that all requests for records be made in writing [see Freedom of Information Law, §89(3)]. It has been suggested that records access officers, whose duty includes coordinating an agency's response to requests for records (see regulations promulgated by the Committee on Open Government, §1401.2), use discretion in a manner consistent with the Law's stated intent that agencies make records available "wherever and whenever feasible." From my perspective, if certain records are generally made available informally, without resort to written requests, all who seek such records should be treated in like manner.

Third, 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)].

Unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the use of the records, and other status of the applicant, are in my opinion irrelevant.

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

If the bio is question has been disclosed in its entirety, either in response to requests, or perhaps by means of a news release or other public disclosure, I believe that you would have the same right of access. On the other hand, if the bio has not been disclosed it its entirety, one of the grounds for denial would be pertinent to the matter. Specifically, §87(2)(b) authorizes an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, the first of which was cited as the basis for denial. That provision states that an unwarranted invasion of personal privacy includes:

> "disclosure of employment, medical or credit histories or personal references of applicants for employment..."

In my opinion, the provisions cited above might serve to enable an agency to withhold some aspects of a bio or resumé.

While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their

official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

With respect to access to a bio or resumé of a public officer or employee, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a bio or resume 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 agency. In my view, to the extent that a bio or resumé contains information pertaining to the requirements that must have been met to hold the position, it must be disclosed, for I believe that disclosure of those aspects of such records would result in a permissible rather than an unwarranted invasion of personal privacy.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]. However, reference to private employers could in my opinion be withheld. Further, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy. I note that it has been held that one's educational background must be disclosed [Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS2d, 411, 218 AD2d 494 (1996).]

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: Records Access Officer
Patricia Lockhart
Dennis Young

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-A-2828
FOIL-AO-10597

41 State Street, Albany, New York 12231
(518) 474-2518
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February 3, 1998

Mr. Anthony Logallo
90-B-1210
P.O. Box 51
Comstock, NY 12821

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

Dear Mr. Logallo:

I have received your letter of January 8. You referred to a decision rendered under the Open Meetings Law concerning the award of attorneys' fees [Gordon v. Village of Monticello, 87 NY2d 124 (1995)] and asked whether the direction provided by the Court of Appeals in that decision would be applicable relative to an award of attorneys' fees under the Freedom of Information Law.

From my perspective, the standards are different. Under §107(2) of the Open Meetings Law, a court has the discretionary authority to award attorneys' fee to the successful party. In contrast, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Notably, the Court of Appeals in Gordon referred to the distinction in the two statutes, stating that "unlike New York's Freedom of Information Law - a related statute enacted two years earlier.... the

Open Meetings Law contains no requirement, for an award of attorneys' fees, that the information be of 'clearly significant interest' and that there be no 'reasonable basis' for withholding it..." (id., 127).

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

As you requested, enclosed is copy of the memorandum on "Confidentiality" that you requested.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10598

41 State Street, Albany, New York 12231
(518) 474-2518
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February 3, 1998

Mr. Robert C. McDonough
Michael G. Kessler & Associates, Ltd.
Park Avenue Atrium
237 Park Avenue, 21st Floor
New York, NY 10017

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

Dear Mr. McDonough:

I have received your letter of January 13 in which you sought guidance concerning a request for records of the New York City Health and Hospitals Corporation. The records that you requested relate "to the investigation and/or complaints against Dr. Bruce Siegel during his employ as President of New York City's Health and Hospitals Corporation."

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, perhaps of primary significance 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 findings of misconduct or the imposition of some sort of disciplinary action pertaining to particular public employees were held 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)].

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.

The other provision of relevance, §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.

If complaints were made by employees of the Corporation, those records would constitute "intra-agency materials", as would the investigative documentation prepared by the Corporations's staff. Those records would be accessible or deniable in accordance with the commentary in the preceding paragraph pursuant to §87(2)(g). Further, as suggested above, even factual information otherwise available under §87(2)(g)(i) could be withheld if disclosure would constitute an unwarranted invasion of personal privacy pursuant to §87(2)(b).

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: Elizabeth St. Clair, General Counsel
Patricia Lockhart, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10599

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

February 4, 1998

Ms. Jean A. Black
[redacted]

.3

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

Dear Ms. Black:

I have received your letter of January 13 in which you sought advice concerning a request made under the Freedom of Information Law to the Sewanhaka School District.

According to your letter, you sought "a list encompassing all full-time teachers and administrators by name, title and most recent salary." In response to the request, you were informed by phone that the information sought would cost "in excess of $200." You wrote that Mr. John Cappenberg, an official of the District, indicated, in your words, that "while Albany does require him to prepare a list, they do not dictate how many names are to be listed per page, and he has chosen to include one teacher/administrator per page."

If your rendition of the facts is accurate, I believe that the response is inconsistent with the spirit and likely the letter of the Freedom of Information Law. In this regard, I offer the following comments.

First, as you and perhaps Mr. Cappenberg are aware, the Freedom of Information Law generally 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.

Although §87(2)(b) of the Freedom of Information Law permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy", 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.

Second, I believe that every law, including the Freedom of Information Law, must be implemented in a manner that gives reasonable effect to its intent. I note that the Legislative Declaration appearing at the beginning of the Freedom of Information Law, §84, provides in part 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).

From my perspective, in view of the clear language of the law, its judicial interpretation and the statement of intent, it would be unreasonable to make the information sought available only on a one name per page basis. Due to the physical distance between yourself and the District, which I would estimate to be more than three hundred miles, the response by Mr. Cappenberg is tantamount, in my view, to a denial of access.

Third, if a list that includes more than one employee per page exists, or if the information sought can be generated, either in printout form or stored on a computer tape or disk, I believe that the District would be required disclose the information sought in either format upon payment of the requisite fee.

It is important to note 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 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, 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.

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 it can be generated in a format in which you request it, the District 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.

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 paper if printed out) 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, as suggested earlier, the response is, in my view, equivalent to a denial of your request. As such, I believe that it may be appealed in accordance with §89(4)(a) of the Freedom of Information Law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Superintendent of Schools
John Cappenberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10600

41 State Street, Albany, New York 12231
(518) 474-2518
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February 9, 1998

Mr. N. Gecetchkori
94-A-7438
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Gecetchkori:

I have received your letter of January 5, which reached this office on January 16. You have sought guidance with respect to a variety of records that may be maintained by the Office of the Kings County District Attorney. In this regard, I offer the following comments.

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

With respect to 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.

Section 87(2)(a) is also relevant with regard to autopsy reports and records reflective of grand jury proceedings. When an autopsy is 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.

Similarly, §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.

Since I am unaware of the contents of all of the remaining 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10601

41 State Street, Albany, New York 12231
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February 9, 1998

Mr. Terry Daum
97-A-1295
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902

Dear Mr. Daum:

I have received your letter of February 3 in which you sought information pertaining to the 70th precinct in new York City.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning public access to government records, primarily under the Freedom of Information Law. The Committee does not maintain information generally, and this office possesses no information concerning the 70th precinct.

Pursuant to the regulations promulgated by the Committee (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 a request should ordinarily be made to that person. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

It is suggested that you could write directly to the precinct, which may be willing to make the information available directly. Alternatively, a formal request could be directed under the Freedom of Information Law to the Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

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-10602

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

February 9, 1998

Ms. Janet M. 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 Ms. Roberts:

I have received your letter of January 16, as well as related materials. You have sought assistance concerning your requests for two traffic tickets written by a particular City of Albany Police officer on a specified date.

One request was made to Albany City Court, and you were informed that the Public Officers Law "does not provide for access to records of the Judiciary" and that Court personnel "do not conduct formal searches for requests under the Freedom of Information Law other than requests for a defendant's own records." A second request was made to the City's records access officer, who indicated that the "case involving the ticket is still open; therefore the information is not discoverable."

From my perspective, it is likely that both the Court and the records access officer are required by law to disclose the tickets. 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 terms "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, a city police department, for example, would clearly constitute an "agency" that falls within the coverage of the Freedom of Information Law. A court, however, would beyond its scope.

This is not to suggest that court records are not open to the public, for other statutes frequently provide broad rights of access to court records (see e.g., Judiciary Law, §255). In general, I believe that court records are accessible to the public, unless there is a statutory prohibition against disclosure, and I know of none that would be applicable in this instance. Further, often it is not only a party to a proceeding that may have a right of access to records pertaining to the proceeding; on the contrary, when records are filed with a court, they are generally open to any member of the public.

Insofar as the matter involves your request to the records access officer, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, if the matter of the tickets remains open, it is doubtful that any ground for denial would apply.

I note that there is a distinction in terms of rights of access between those situations in which a person is alleged or 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).

Copies of this opinion will be forwarded to the Chief Clerk of Traffic Part of Albany City Court and to the City's Records Access Officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Margaret Davidson, Chief Clerk
Nancy S. Anderson, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10603

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

February 10, 1998

Mr. George Rand
[redacted]

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

Dear Mr. Rand:

I have received your letter of January 16. You have sought my views concerning the difficulties you have encountered in relation to your efforts to obtain "salary data for teachers and the administrative staff showing base salary and other pay or stipends for the current school year or last calendar year or any 12 month period."

From my perspective, the information sought 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. 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 information in question would constitute "intra-agency materials." However, it 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.

Second, 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 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).

It is further noted that a recent amendment to the Education Law specifies that certain information relating to administrators must be disclosed as part of a school district's proposed budget, which is characterized in §1716 of the Education Law as the "Estimated expenses for ensuing year." Subdivision (4) of that statute states in relevant part that:

> "The board of education shall append to the statement of estimated expenditures a detailed statement of the total compensation to be paid to the superintendent of schools, and any assistant or associate superintendents of schools in the ensuing school year, including a delineation of the salary, annualized cost of benefits and any in-kind or other form of remuneration. The board shall also append a list of all other school administrators and supervisors, if any, whose annual salary will be eighty-five thousand or more in the school year, with the title of their positions and annual salary identified..."

Third, in view of the delays that you encountered, 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)].

Lastly, your status as a journalist does not entitle you to a waiver of fees, and it has been held that an agency may charge its established fees, even if the applicant is indigent [see Whitehead v. Morgenthau, 552 NYS2d 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-10604

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

February 10, 1998

Mr. Sergio Mendez
95-A-6786
Adirondack Correctional Facility
P.O. Box 110
Raybrook, NY 12977-0110

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

Dear Mr. Mendez:

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

You have sought assistance in relation to a denial of access to records by the office of the Bronx County District Attorney pertaining to a matter for which you were convicted in 1993, and you indicated that "there is no action or appeal pending on this case." In response to your request, Assistant District Attorney Patrick Breen wrote that, since the receipt of the request, he learned that you have an appeal pending concerning what appears to be a separate matter. He added that: "Because you are presently represented by counsel, this Office is not permitted to communicate with you. See NYCRR §1200.35, DR 7-104."

From my perspective, it is unclear why Assistant District Attorney referred to those provisions or how they may be relevant. DR 7-104, entitled "Communicating With One of Adverse Interest", states that:

"A. During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized to do so.
2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

As I understand the matter, your request has no relation to representation. Further, you initiated the contact for the sole purpose of seeking records under the Freedom of Information Law, and the indictment to which the Assistant District Attorney referred is separate from the proceeding that is the subject of your request. Moreover, as stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. Most recently, the Court of Appeals held that the Criminal Procedure Law 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 (1996)].

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a litigant or defendant, and the nature of the records or their materiality to a proceeding. For the foregoing reasons, I do not understand the pertinence of the provisions cited by the Assistant District Attorney to the matter.

Notwithstanding the foregoing, having reviewed your request, one element involves the provision of "an inventory list, or an Index list of all documents in such case file..." In this regard, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. If no inventory or index of records exists, the Office of the District Attorney would not be obliged to prepare such a document on your behalf.

I note as well that 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." 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). Some of the records that you described as having requested from the District Attorney might constitute court records that the agency is not required to provide.

Lastly, although the federal Freedom of Information Act includes provisions concerning the waiver of fees, the New York Freedom of Information Law contains no such language. Further, it

has been held that an agency may charge its established fees, even if the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrick Breen, Assistant District Attorney
Michelle Parisien, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-10605

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

February 10, 1998

Mr. Jose Medina
94-A-3634
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. Medina:

I have received your letter of January 14 in which you sought assistance in relation to a denial of your request for medical records apparently maintained at your facility. You indicated that the records were withheld on the ground that you had no money in your inmate account.

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

Nevertheless, a different statute, §18 of the Public Health Law, generally grants rights of access to medical records 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. I note, too, that paragraph (e) of subdivision (2) of §18 states in part that "A qualified person shall not be denied access to patient information solely because of inability to pay."

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information 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-10606

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 10, 1998

Mr. Louis Jenkins
90-A-2229 B2-10b
Washington Correctional Facility
Lock 11 Road, P.O. Box 180
Comstock, NY 12821-0180

The staff of the Committee on C l to issue advisory opinions. The ensuing staff advisory opinion is bas presented in your correspondence.

Dear Mr. Jenkins:

I have received your letter aterials attached to it.

The first attachment is a "N Application for Subpoena(s) Duces Tecum Pursuant to CPLR Section 2307(a) and CPL Section 610.23(3)." In this regard, the Committee on Open Government is authorized to provide advice concerning rights of access to records under the Freedom of Information Law. I note that there is a distinction in terms of the ability to obtain records between that statute and those that you referenced.

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.

When you seek records 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. 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.

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

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-10607

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 10, 1998

Mr. Dennis Rogha
91-A-7163
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. Rogha:

I have received your letter of January 8, which reached this office on January 20. You have sought assistance in obtaining medical records from the Bellevue Hospital Center. In response to your request, you were informed that staff was unable to locate a medical record number under your name.

In this regard, I offer the following comments.

First, when seeking records under the Freedom of Information Law or any other provision, it is necessary to provide sufficient detail to permit the location and identification of the records. As such, it is suggested that any ensuing request include information sufficiently specific to enable staff to locate the records of your interest.

Second, 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 as well as a statute to be referenced

later when seeking the records. I note, too, that paragraph (e) of subdivision (2) of §18 states in part that "A qualified person shall not be denied access to patient information solely because of inability to pay."

To obtain additional information concerning access to medical records and the fees that may be charged for searching and copying those records, you may write to:

Access to Patient Information Program
New York State Department of Health
Hedley Park Place
Suite 303
433 River Street
Troy, NY 12180

In view of the nature of your commitment, §33.16 of the Mental Hygiene Law may also be pertinent. As I understand that statute, 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."

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-10608

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

February 10, 1998

Mr. Preston Smith
87-C-0186
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. Smith:

I have received your letter of January 14 in which you sought assistance in obtaining certain "missing" portions of your "disciplinary record history" from the Department of Correctional Services. Attached to your letter is a response by the inmate records coordinator at your facility to which she attached "your disciplinary history printout."

In this regard, having reviewed your correspondence, I offer the following comments.

First, you cited 5 USC §§552 and 552a as the basis for your request. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records of federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

Second, 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. If the information sought does not exist in the form of a record or records, the Department of Correctional Services would not be required to prepare a record on your behalf.

Third, §5.5 of the regulations promulgated by the Department define "correctional supervision history" to include "disciplinary charges and dispositions", and §5.50 states in relevant part that:

> "If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of

> an inmate's record is disputed by the inmate, the inmate shall convey such dispute to the custodian of the record or the designee of the custodian reviewing the record with him."

It is suggested that you read the regulations cited above in an effort to correct what you believe to be an incomplete record.

Lastly, although the federal Freedom of Information Act includes provisions regarding the waiver of fees, the New York counterpart includes no waiver provisions. Further, it has been held that an agency may charge its established fees, even when a request is made by an indigent inmate [Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: V. Carlsen, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10608-A

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 11, 1998

MEMORANDUM

TO: Hank Greenberg

FROM: Bob Freeman

SUBJECT: Access to Marriage Records

I thank you for sharing your memorandum to Peter Carucci on the subject of access to marriage records. I believe that we can agree on a variety of points, and in an effort to reach a meeting of the minds, I offer the following observations and suggestions.

From my perspective, the difficulty involves harmonizing three standards: the presumption of access in the Freedom of Information Law, the ability to withhold records under that statute to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", and the "proper purpose" standard in §19 of the Domestic Relations Law.

Commercial or Fund-raising Purposes

Before considering particular elements of marriage records, I think that we can agree that a request for a commercial or fund-raising purpose always involves an unwarranted invasion of personal privacy and never constitutes a proper purpose. As you may be aware, under the Freedom of Information Law, it has been established that 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)]. The only exception to that principle relates to §89(2)(b)(iii) of the Freedom of Information Law, which 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 is relevant, and case law indicates that an agency can ask that an applicant certify that a 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].

In my view, whether an applicant seeks a list of marriages or a single marriage record, the response should be the same if the request is made for a commercial or fund-raising purpose. Very simply, in that kind of situation, the request could justifiably be denied based on the privacy provisions in the Freedom of Information Law or the proper purpose standard in the Domestic Relations Law.

"Zones" of Accessible and Deniable Information

Accessible Information

For the remainder of this commentary, it should be assumed that requests are not made for commercial or fund-raising purposes. With that issue aside and perhaps resolved, I hope that we can agree that some elements of marriage records are always public, and that others would, if disclosed, result an unwarranted invasion of personal privacy.

It was established in Gannett Co., Inc. v. City Clerk's Office, City of Rochester [596 NYS2d 968, aff'd 197 AD2d 919 (1993)] that the names of applicants for marriage licenses are accessible, and that disclosure would not constitute an unwarranted invasion of privacy or be contrary to the proper purpose standard. The court did not address the disclosure of other items, and I do not believe that the name of an applicant is the only item within a marriage record that must routinely be disclosed.

The dates of validity of licenses indicate to the public and to government authorities the time within which certain activities may legally be performed, i.e., practicing law or medicine, teaching, possessing or carrying a firearm, hunting, fishing, etc. I believe that the same should be true in the case of marriage licenses. When a marriage begins or ends should be public, and the court in Gannett inferred that such a result should be reached with respect to marriage records. The decision referred with apparent favor to a contention offered by petitioner "that a final judgment of divorce dissolving a marriage is publicly available, as is the identity of other selected licensees and that common sense would dictate a similar result for the release of marriage applicants..." In short, the fact of a marriage and its duration should in my view be public, as is the fact of a divorce pursuant to §235 of the Domestic Relations Law..

Another element of the record that I believe should routinely be disclosed is the municipality of an applicant's residence. In most instances, at least one member of a couple applying for a marriage license resides in the municipality in which the license is sought. Therefore, disclosure of names alone would indicate that one of the two likely lives (or perhaps lived) in a certain municipality. Again, and as suggested by the court in Gannett, disclosure of that item would "not equate with the type of personal, confidential, or sensitive information precluding public access, or which would constitute an 'unwarranted invasion of personal privacy.'"

In short, I do not believe that reasonable people or the courts would find that disclosure of the kinds of items described above would be unreasonable, unwarranted or improper.

It is suggested with respect to those items that it might be worthwhile to consider the guidance offered by the courts in the cases dealing with lists of names and addresses. It may not be appropriate or efficient to ask in every instance the purpose of a request for those basic, largely innocuous items. But it would be appropriate in my view to ask for a written certification or statement that a request for those items does not involve a commercial or fund-raising purpose. It would be easy to devise a simple form and to suggest to local clerks that requests involving clearly public items by the news media and others should be routinely granted, so long as the requests are not made for a commercial or fund-raising purpose.

Deniable Information

You referred in your memorandum to a variety of other items, such as social security numbers, ages, occupations, names of fathers and countries of birth, maiden names of mothers and their countries of birth, and whether former spouses are living or deceased. With respect to those and perhaps other items, it is likely in my view that it would be determined judicially that disclosure would constitute an unwarranted invasion of personal privacy. They are largely incidental to the qualifications of individuals to marry. In addition, while I believe that the municipality of residence should be disclosed, the street address of applicants could in my view be withheld as an unwarranted invasion of privacy.

As in the case of certain items being routinely disclosed (unless, of course, the request is made for a commercial or fund-raising purpose), the items referenced in the preceding paragraph might routinely be withheld.

Proper Purpose

In conjunction with the foregoing, if it can be agreed that certain items will routinely be public and that others can routinely be withheld, the proper purpose standard becomes important only with respect to the latter group. The age, the country of birth and similar items might be withheld as a matter of course, unless a proper purpose can be demonstrated. By means of analogy, in the case of death records, which are typically exempted from public disclosure under §4174 of the Public Health Law, there are exceptions that authorize disclosure, i.e., "when a documented medical need has been demonstrated" or "when a documented need to establish a legal right or claim has been demonstrated." That kind of justification would provide town and city clerks with the flexibility to make judgments regarding the ability, but only upon a showing of a good reason, a "proper purpose", to disclose items which could routinely be withheld on the ground that disclosure would result in an unwarranted invasion of privacy.

In essence, I am suggesting three zones regarding access. The first pertains to items that would always be public; the second to items which would always, if disclosed, result in an unwarranted invasion of privacy, and the third to items that would ordinarily be withheld to protect privacy, but which could be disclosed upon a showing of a proper purpose. Again, another absolute would pertain to the ability to withhold when a request is made for a commercial or fund-raising purpose.

If there is an accord, to make life a little easier for the clerks, it suggested that a new form be prepared to enable them to readily segregate the routinely public from the routinely deniable information.

I hope that you find the foregoing to be constructive, and I would appreciate your reaction to it.

Thanks.

RJF:jm

NOTE: The New York State Department of Health has agreed to use the parameters described in this memorandum as the basis for its consideration of requests for marriage records.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10609

41 State Street, Albany, New York 12231
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February 12, 1998

Hon. John J. Flanagan
Member of the Assembly
75 Woodbine Ave
Northport, NY 11768

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

Dear Assemblyman Flanagan:

I have received your letter of February 3, which reached this office yesterday.

You have sought assistance on behalf of a constituent, Mr. Thomas J. Kehoe, who has attempted without success to obtain "the names of commercial fisherman who received state grant monies to assist them in the start-up costs associated with oyster farming." Despite denials of his requests by the Town of East Hampton and Cornell Cooperative Extension, you expressed the view that the request should have been granted, for the information sought is "not of a personal nature."

I agree with your contention. Before offering an analysis of rights of access, however, I note that among the attachments to your correspondence is a letter addressed to this office by Mr. Kehoe on January 9. Having reviewed our log of incoming mail, for reasons unknown, his letter never reached the Committee. If it had, a response would already have been prepared.

As you are 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."

In this regard, the response to Mr. Kehoe by the Director of Cornell Cooperative Extension referred to federal regulations pertaining to the distribution of mailing lists. From my perspective, the federal law to which he alluded has no relevance to the matter, for Cornell Cooperative Extension is an "agency" subject to the requirements of the New York Freedom of Information Law.

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." Moreover, in a recent unanimous decision rendered by the Appellate Division, it was held that the records of Cornell University pertaining to its four "statutory colleges", arms of the State University of New York, are subject to the State's Freedom of Information Law [Stoll v. New York State College of Veterinary Medicine at Cornell University, 664 NYS2d 851, __ AD2d __ (1997)]. The provision of the County Law cited above refers specifically to the extension service and the "educational programs of the New York State College of Agriculture and Life Sciences and the New York State College of Human Ecology at Cornell University", both of which are statutory colleges. As such, again, the provision of the Freedom of Information Law, not federal regulations, govern in this instance.

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 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)].

Based on the foregoing, 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.

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); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

There are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities and which indicate, as you suggested, that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

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

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

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

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

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

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

The standard in the New York Freedom of Information Law, as in the case of the federal Act, is subject to conflicting points of view, and reasonable people often differ with respect to issues concerning personal privacy. In this instance, although the information in question would be identifiable to particular individuals, it would pertain solely to their business capacity. Unlike an individual's social security number or medical records identifiable to patients, which would involve unique and personal details of people's lives, the records in question are not "personal" in my opinion; rather, again, they deal with functions carried out by individuals business in their capacities certified to teach at their business addresses.

In short, in my opinion and as indicated in the decisions cited above, the exception concerning privacy does not extend to the kind of information at issue. If that is so, disclosure would not constitute an unwarranted invasion of personal privacy, and the records should be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to the Town of East Hampton and Cornell Cooperative Extension, and to Mr. Kehoe.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas J. Kehoe
Cynthia Shea
William B. Lacy

NO FOIA AD

10610

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10611

41 State Street, Albany, New York 12231
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February 18, 1998

Hon. Mario DiFelice
Trustee
Village of North Tarrytown
28 Beekman Avenue
North Tarrytown, NY 10591

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

Dear Trustee DiFelice:

I have received your letter of January 20 and the materials attached to it.

In your capacity as a new member of the Board of Trustees of the Village of Sleepy Hollow, you have sought to obtain records pertaining to the now retired former Chief of Police, particularly those that include charges brought against the former Chief and the "final employment disposition...(i.e. final monetary settlement)." The Village initially denied access, referring to the records as a "personal matter" and citing "Unwarranted Invasion of Personal Privacy" as the basis for a denial of access. Following an appeal, although the Mayor disclosed a voucher indicating payment made to the Chief's attorneys on his behalf, he wrote that: "With regard to any document which involves the disciplinary proceedings...New York State Law prohibits the disclosure of disciplinary documents unless the employee requests a public hearing." Since the Chief made no such request, the Mayor concluded that "the file is not subject to disclosure."

From my perspective, because the former Chief is no longer a police officer, it would appear that the settlement agreement would be accessible under the Freedom of Information Law. However, unproven charges and related records could likely be withheld. In this regard, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 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, in reviewing the legislative history leading to its enactment, has held that §50-a is not a statute that exempts records from disclosure when a request is made under the Freedom of Information Law in a context unrelated to litigation. More specifically, in a case brought by a newspaper, it was found that:

> "Given this history, the Appellate Division correctly determined that the legislative intent underlying the enactment of Civil Rights Law section 50-a was narrowly specific, 'to prevent time-consuming and perhaps vexatious investigation into irrelevant collateral matters in the context of a civil or criminal action' (Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, 109 AD 2d 92, 96). In view of the FOIL's presumption of access, our practice of construing FOIL exemptions narrowly, and this legislative history, section 50-a should not be construed to exempt intervenor's 'Lost Time Record' from disclosure by the Police Department in a non-litigation context under Public Officers section 87(2)(a)" [Capital Newspapers v. Burns, 67 NY 2d 562, 569 (1986)].

It was also found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" (id. at 568).

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

Since the Chief is no longer a police officer, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision would no longer be present.

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, §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 specific respect to the settlements reached following the initiation of disciplinary proceedings, 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).

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 states 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.

It is emphasized 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Sean Treacy, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1062

41 State Street, Albany, New York 12231
(518) 474-2518
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February 18, 1998

Mr. Anson Clark
91-B-1441
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. Clark:

I have received your letter of January 14 in which you sought assistance relating to your efforts in obtaining records concerning an alleged informant from the Onondaga County District Attorney and the Drug Enforcement Agency (DEA).

In this regard, I offer the following comments.

First, the DEA is a federal agency that falls within the coverage of the federal Freedom of Information Act. Since the advisory jurisdiction of the Committee on Open Government pertains to the New York Freedom of Information Law, which generally covers entities of state and local government in New York, I cannot offer guidance insofar as your inquiry pertains to the DEA.

To the extent that records of your interest may be maintained by the Office of the District Attorney, the same kind of analysis would be pertinent as that described in the opinion addressed to you on January 6. In short, it is likely that several grounds for denial might be relevant with respect to records maintained by the District Attorney regarding the individual in question. Paragraphs (b), (e) and (f) of §87(2) of the Freedom of Information Law dealing respectively with unwarranted invasion of personal privacy, records compiled for law enforcement purposes and disclosures that could endanger life or safety would apparently be relevant to an analysis of rights of access.

Lastly, I note that neither the New York Freedom of Information Law nor the federal Freedom of Information Act includes the courts within their coverage. Nevertheless, frequently other statutes provide broad rights of access to court records (see e.g., Judiciary Law, §255). Therefore, if you believe that the individual about whom you are interested has been the subject of judicial

proceedings, the courts in which those proceedings were conducted might serve as a source of records relevant to your inquiry.

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-A-10643

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February 18, 1998

Ms. June Maxam
Box 408
Chestertown, NY 12817

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

Dear Ms. Maxam:

I have received your letter of January 21 and the news article attached to it. The article indicates that the Town of Chester discussed "dealing with excessive or nuisance freedom of information requests." You have asked whether this "could...be done" and "how could an agency define what constitutes a 'nuisance' request or how many is 'excessive'."

From my perspective, for purposes of the Freedom of Information Law, there is no appropriate definition of what might be characterized as excessive or nuisance requests, and there is no judicial decision rendered under that statute of which I am aware that deals directly with the issue. In general, there is no limitation on the number of requests an individual might serve upon government, nor is there a limitation on the volume of records that might be requested. Nevertheless, there are provisions in the Law and judicial decisions that deal with the matter somewhat indirectly. In this regard, I offer the following comments.

First, an agency is not required to respond instantly to a request. Under §89(3) of the Freedom of Information Law, an agency has five business days from its receipt of a request to respond. If more than five business days may be needed to determine to grant or deny access, the agency may acknowledge the receipt of the request within that time in order to extend its time to determine rights of access. If an agency acknowledges the receipt of a request in order the extend the time for responding, it must include an approximate date indicating when the request will be granted or denied. In my view, so long as the estimated date is reasonable in view of the facts and circumstances (i.e., the volume of a request, the search needed to locate the records, the need to review records to ascertain which portions might properly be withheld, etc.), the agency would be acting in compliance with law.

Second, 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."

Third, often a key 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.

If the Town maintains records sought in a file or group of files that are retrievable on the basis of the terms of a request, I believe that the applicant 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 a 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. When that is so, a request, in my opinion, would not reasonably describe the records sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10614

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February 18, 1998

Dr. Peter C. Paciolla
Superintendent of Schools
Mount Sinai Union Free School District
North Country Road
Mount Sinai, NY 11766

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

Dear Dr. Paciolla:

I have received your letter of January 26 in which you sought an advisory opinion relating to two requests made under the Freedom of Information Law.

The first request involves "all records & documents and minutes of the School Board meeting showing the vote on Bob Petrolac's raise prior to the 4% that raised his salary from 60,000 to 74,000." In the second, the same applicant requested "all records & documents and/or minutes of the Board meetings of the Mt. Sinai District indicating the motion & subsequent vote authorizing building principals the ability to suspend students. Prior to December 1 199_" (note: the last digit on the copy sent to me is missing). You wrote that there is no record on file that addresses the first request. With respect to the second, you wrote that in order to locate the information sought, "it would be necessary for someone to review the minutes back to the first organization of the school district."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency is not required to create a record in response to a request. Therefore, if no records exist that would be responsive to the request, the District would not be required to prepare a new record in order to satisfy a request.

While I am unaware of whether any vote by the Board would typically be taken in the context of the request for minutes relating to an individual's salary increase, I note that when votes are taken,

§87(3)(a) of the Freedom of Information Law requires that a record of votes be prepared indicating the manner in which each member cast his or her vote. The record of votes generally appears in the minutes of meetings.

Second, perhaps the primary 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 the requests to which you referred, if the District does not index its minutes by subject matter, if the purported actions taken might have occurred years ago, if at all, and if locating the records, should they exist, would involve a search of hundreds of records, page by page, covering a period of decades, it is unlikely in my view that the request would have met the requirement of reasonably describing the records.

In an effort to enhance his understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the person who made the requests in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Frank Giosi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-1061S

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February 18, 1998

Mr. Gerald Payne
90-A-5297
Eastern NY 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. Payne:

I have received your letter of January 21 in which you referred to unanswered requests for records sent to the New York City Police Department and asked that this office "conduct an investigation" concerning the matter.

In this regard, the Committee on Open Government is authorized to provide advice pertaining to the Freedom of Information Law. The Committee is not empowered, nor does it have the staff or resources, to conduct investigations. Nevertheless, I offer the following remarks.

First, in order to know whether and when an agency received correspondence, items could be sent with a return receipt requested. With a receipt, you can know precisely when an agency receives a request or an appeal.

Second, 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 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 I have been of assistance.

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- 10616

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February 18, 1998

Mr. Kevin Cullen
96-B-1128
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. Cullen:

I have received your letter of January 16. You have sought assistance in relation to a request for records directed to the Onondaga County District Attorney on December 29 that had not been answered as of the date of your letter to this office.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 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 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-1061?

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February 19, 1998

Ms. Katherine L. Boron
Randolph Academy Teacher's Association
336 Main Street
Randolph, NY 14772

The staff of the Committee on 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. Boron:

I have received your letter of January 21 in which you sought assistance in obtaining a record from the Randolph Academy, a special act school district.

According to your letter, the former superintendent was charged with sexual harassment and later was dismissed and sued by the two individuals who brought the charges. You added that following his dismissal, "the school district made a settlement with [the former superintendent] because he threatened to sue him." Despite your repeated efforts to obtain a copy of the settlement agreement, the District has not yet granted access.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. If no settlement agreement has yet been made final, there would be no record to be disclosed. 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.

Second, if the record in question exists, I believe that it would be subject to rights of access, whether it is maintained by the District or by its attorneys. The Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" to include:

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

Based on the foregoing, if the documentation is in possession of the District, or if it is maintained for the District, by its attorneys, for example, it would constitute a "record" that falls within the scope of the Freedom of Information Law.

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 emphasized that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

In the context of your inquiry, perhaps of greatest significance is §87(2)(b), which permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy". While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. With regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The other ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell, Geneva Printing, Scaccia and Sinicropi, supra].

In Geneva Printing, supra, a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. On the contrary, it was determined that:

> "the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement".

It was also found that the record indicating the terms of the settlement constituted a final agency determination available under the Law. The decision states that:

> "It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of the matter. The public is entitled to know what penalty, if any, the employee suffered...The instant records are the decision or final determination of the village, albeit arrived at by settlement..."

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does

> contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [632 NYS 2d 576 (1995)], even though the sanction was far short of a removal from employment, the Appellate Division held that a settlement agreement was available insofar as it included admissions of misconduct. In that case, charges were initiated but were later "disposed of by negotiation and settled by an Agreement" (id., 577) and withdrawn. The court rejected claims that the record could be characterized as an employment history that could be withheld as an unwarranted invasion of privacy, and found that a confidentiality agreement was invalid. Specifically, it was stated that:

> "Having examined the settlement agreement, we find that the entire document does not constitute an 'employment history' as defined by FOIL (*see, Matter of Hanig v. State of New York Dept. of Motor Vehicles, supra*) and it is therefore presumptively available for public inspection (*see,* Public Officers Law § 87[2]; *Matter of Farbman & Sons v. New York City Health and Hosps. Corp., supra,* 62 N.Y.2d 75, 476 N.Y.S.2d 69, 464 N.E.2d 437). Moreover, as a matter of public policy, the Board of Education cannot bargain away the public's right of access to public records (*see, Board of Educ., Great Neck Union Free School Dist. v. Areman,* 41 N.Y.2d 527, 394 N.Y.S.2d 143, 362 N.E.2d 943)" (id., 578, 579).

Notwithstanding the foregoing, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action or a finding of misconduct, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Similarly, to the extent that charges are dismissed or allegations are found to be without merit, I believe that they may be withheld.

Lastly, in view of the delays that you have encountered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be forwarded to the current superintendent of the Randolph Academy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent

STATE OF NEW YORK
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February 19, 1998

Ms. Jean M. Baric
[redacted]

The staff of the Committee on 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. Baric:

I have received your letter of January 22. You wrote, in brief, that the planning board in your community, as a condition of approving "an industrial/office development", has required that the developer prepare "an acceptable Health Safety Contingency Plan (the Plan) to deal with the known soil contamination of the property." You added that the Plan was also required by other agencies, but that the Planning Board has "final approval authority."

Your concern involves the degree of detail that must be disclosed regarding the Plan, for you indicated that:

> "In its current (and likely final) form, the Plan is relatively generic in describing how the developer will handle contamination. Instead, it mandates that all sub-contractors will be responsible for having their own separate and individual Contingency Plans which deal with the specifics of how contamination will be handled. The Contingency Plan as it stands, does not require that the Planning Board review or even have a copy of the sub-contractor's plans, but merely mandates that they have one which is in overall accordance with the approved developer's Contingency Plan."

The question is whether the sub-contractors' contingency plans will be subject to the Freedom of Information Law.

From my perspective, the answer is dependent upon the terms of the agreement between the Town and the developer that required the preparation of the Plan. If the agreement merely requires that the developer prepare and receive approval of the Plan as it exists, it would be unlikely in my view that the contingency plans would fall within the coverage of the Freedom of Information Law.

On the other hand, if the contingency plans are prepared as elements of the Plan as a whole, they would appear to fall within the scope of that statute.

The issue in my opinion involves whether the contingency plans constitute agency records. In this regard, §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, 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, it has been 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 short, if the agreement in question indicates that the contingency plans are part of the Plan or are produced for the town, it appears that they would be agency records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

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February 19, 1998

Mr. John Restivo
87-A-1969
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582-0010

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

Dear Mr. Restivo:

I have received your letter of January 27 in which you sought guidance concerning access to photographs maintained by a medical examiner. In addition, you referred to a "short blurb" involving a case in which it was determined that "graphic crime scene photos" had to be disclosed.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. 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. 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, I am unaware of any judicial decision dealing with the disclosure of crime scene photos. It is possible that you may have recalled an article that appeared in the New York Times dealing with disclosure of such photos to an inmate. I do not believe that the disclosure was the result of a judicial decision; rather, I believe that the photographs were made available from the court in which the photos were used in evidence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 19, 1998

Mr. Steven Donati, Jr.
95-A-5022
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. Donati:

I have received your letters of January 23. I believe that certain issues raised were answered in my response to you dated January 26. The remaining matters relate to appeals under the Freedom of Information Law and information regarding grand jury proceedings..

In this regard, 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).

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)].

With respect to records relating to matters before a grand jury, as you may be aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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, records concerning 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.

Lastly, the receipt or absence of receipt of an advisory opinion rendered by this office is irrelevant to the exhaustion of administrative remedies. Seeking an advisory opinion is optional and is never required by statute. As such, the timeliness of receipt of an advisory opinion has no bearing on the time for appealing a denial of access to records or the statute of limitations.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 19, 1998

Mr. Andrew Postelli
96-A-7069
Clinton Correctional Facility
Dannemora, NY 12929

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

Dear Mr. Postelli:

I have received your undated letter, which reached this office on January 27. You have sought assistance concerning your efforts to obtain court records.

It is noted that you referred to both the New York Freedom of Information Law and the federal Freedom of Information Act as the bases of your request. However, the federal act applies to records maintained by federal agencies and excludes the courts from its coverage. Similarly, the state Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

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

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

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

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

access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

In short, the Freedom of Information Law is not the vehicle that would require the disclosure of court records. Due to the limited scope of the Committee's jurisdiction, I cannot offer additional guidance.

I hope that the foregoing serves to enhance your understanding of the coverage of the Freedom of Information Law.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 19, 1998

Mr. Vincent DeVivo
93-A-9162
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. DeVivo:

I have received your letter of January 17 in which you questioned the fee sought to be assessed by the New York City Board of Elections for "printouts" of voter registration records pertaining to individuals with certain names.

In this regard, I offer the following comments.

When information is maintained electronically, in a computer, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since §89(3) of the Freedom of Information Law provides that an agency is not required to create a record, I do not believe that an agency would be required to reprogram or develop new programs to retrieve information that would otherwise be available [see Guerrier v. Hernandez-Cuebas, 165 AD 2d 218 (1991)].

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., paper, a computer tape or disk) to which data is transferred.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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February 20, 1998

Mr. Joe DuPont
[redacted]

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

Dear Mr. DuPont:

I have received your communication of January 27 in which you referred to your efforts in obtaining "factual information" from the New York State Board of Elections "about the issue of Mr. Howard Stern's bid for Governor of NY."

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request for information or, in the context of your remarks, "confirmation" of alleged facts. In short, if the information sought does not exist in the form of a record or records, the Freedom of Information Law would not apply.

Second, when a request for records is denied, an applicant may appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

I hope that 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
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February 20, 1998

Mr. Talib Alsaifullah
86-D-0106
Arthur Kill Correctional Facility
2911 Arthur Kill Road
Staten Island, NY 10309-1197

Dear Mr. Alsaifullah:

I have received your letters of February 12 and February 15 in which you requested certain records from this office.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee does not have possession or control of records generally. In short, I cannot make the records sought available to you, because this office does not possess them.

As a general matter, a request for records 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. 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 your interest. It is suggested that you submit requests to the records access officers at the agencies that maintain the records of your interest.

Lastly, since you asked that copies of records be made available free of charge, I point out that the Freedom of Information Law does not contain any provision dealing with the waiver of fees. Further, 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)].

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2838
FOIL-AO-10625

41 State Street, Albany, New York 12231
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February 20, 1998

Mr. Albert D. Fagant
[redacted]

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

Dear Mr. Fagant:

I have received your letter of January 27 in which you raised questions concerning the application of the Open Meetings Law to the Shared Decision Making Committee at the South Country Central School District, as well as "individual building teams", which are frequently characterized as "school-based committees."

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

First, as you may be aware, regulations promulgated by the Commissioner of Education, 8 NYCRR §100.11, require that boards of education "in collaboration with" so-called "compact for learning" or "shared decisionmaking" committees must develop a plan "for the participation by teachers and parents with administrators and school board members in school-based planning and shared decisionmaking".

Second, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

The definition quoted above includes reference to a quorum requirement. In this regard, even though the action creating school-based committees might not refer to a quorum requirement, I believe that it is imposed by statute. Specifically, §41 of the General Construction Law, which has been in effect since 1909, 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."

Based upon the foregoing, a quorum is a majority of the total membership of a public body, notwithstanding absences or vacancies. Further, a public body cannot do what it is authorized or empowered to do except at a meeting during which a quorum is present.

Judicial decisions indicate generally 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)].

While the "compact for learning" or "shared decisionmaking" committees do 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 decisionmaking plans. Those committees must, by law, be involved in the development of district plans. 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" such 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 decisionmaking 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).

Since a plan cannot be adopted absent "collaboration" and participation by those committees, and since they carry out a necessary function in the development of shared decisionmaking plans, I believe that they perform a governmental function and, therefore, are public bodies subject to the Open Meetings Law.

With respect to the entities that are the subject of your inquiry, while the 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 school-based committees perform pursuant to the Commissioner's regulations and the plans adopted in accordance with those regulations, I believe that those committees constitute "public bodies" subject to the requirements of the Open Meetings Law.

Next, you asked whether minutes of meetings must identify those who make and second motions. While nothing in the Open Meetings Law specifies that those who introduce or second motions must be identified in minutes, it is common practice to do so.

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, as you inferred, if a vote is other than unanimous, a record must be prepared that indicates how each member cast his or her vote. That record is typically part of the minutes.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph A. Laria
William C. Morrell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10626

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February 23, 1998

Ms. RaeAnn Fitch
[redacted]

The staff of the Committee on 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. Fitch:

I have received your letter of January 23 in which you raised questions concerning your request for tape recordings of a meeting of the Town Board of the Town of Salina.

According to your letter, in response to your written request for the tape recording of a meeting in which you offered to pay the requisite fees, the Town Clerk indicated that the tape would be prepared and made available on a certain date. Nevertheless, the Supervisor later asked the Clerk why you wanted the tape. The Clerk indicated that she was unaware of your reason, that your reason "didn't matter" and that you were entitled to it. Nevertheless, you wrote that "[t]he Supervisor proceeded to take the tape and said that if [you] wanted it, [you] would have to go through her."

In this regard, I offer the following comments.

First, it has been held that when records are accessible under the Freedom of Information Law, they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

Therefore, once it is determined that a record is accessible under the law, I believe that it must be made available unconditionally, irrespective of its intended use.

Second, from my perspective, it is unlikely that the Supervisor should have played any role with respect to the request. I note that §30 of the Town Law states in part that the town clerk "Shall have the custody of all the records, books and papers of the town." Additionally, the Town Clerk, by statute, is the Town's "records management officer" (see Arts and Cultural Affairs Law, Article 5-A).

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

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

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If the Town Clerk has been designated records access officer, I believe that she has the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law; the Supervisor would not have such authority.

Lastly, with respect to the substance of your request, 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. 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 a "record" accessible for listening and/or copying under the Freedom of Information Law [see Zaleski v. Board of Education of Hicksville Union Free School District, Supreme Court, Nassau County, NYLJ, December 27, 1978].

Moreover, since 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 the tape.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response will be forwarded to the Town Supervisor and the Town Clerk.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Clerk
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10627

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February 23, 1998

Mr. Robert P. Hanks
Village Administrator/Attorney
Village of East Rochester
120 West Commercial Street
East Rochester, NY 14445

Mr. Arthur B. Archambeau
Odorisi & Bergin
P.O. Box 69
East Rochester, NY 14445

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

Dear Messrs. Hanks and Archambeau:

I have received your letters of January 23, both of which pertain to the same incident and a request for records under the Freedom of Information Law.

The facts, from my perspective, are generally not in dispute. The importance of certain details has, however, been questioned. In short, on October 16, a member of the Board of Trustees of the Village of East Rochester saw a person "whom she believed to be a political leader from the opposing party, sorting through a neighbor's garbage at approximately 5:30 AM." Thereafter, the "local police were summoned, investigated, wrote incident reports, and took supporting depositions." As I understand the matter, Mr. Archambeau's client is the political leader alleged to have been seen going through the garbage. He was not arrested, and it was stated that the matter has been closed. The owner of the property where the garbage was being sorted has filed a claim against the Village based on the allegedly "negligent and unlawful acts" of a Village police officer, who happens to be the son-in-law of the political leader. The Police Department has "released all incident reports and investigative action reports", but his request for the supporting depositions has been denied. The issue involves the extent to which those records must be disclosed.

Assuming that my rendition of the facts is accurate, it is likely that the majority of the contents of the supporting depositions must be disclosued. In this regard, I offer the following comments.

First, the fact that a claim has been made or that litigation might have been commenced is, according to judicial decisions, irrelevant. 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, the political party affiliation or motivation of those involved are, in my opinion, of no significance.

Second, 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. Although three of the grounds for denial may be pertinent to an analysis of rights of access, it appears that only one might potentially serve as a basis for denial.

Tacit reference was made to §87(2)(e) of the Freedom of Information Law, which permits an agency to withhold records that:

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

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, because the case has been closed and, perhaps more importantly, because all records relating to the incident, except the supporting depositions, have been disclosed, I cannot envision how §87(2)(e) would serve as a valid basis for a denial of access to the records sought.

Records prepared by police officers could be characterized as "intra-agency materials" that fall within the scope of §87(2)(g). Nevertheless, in a recent decision rendered by the Court of Appeals, it was determined that the exception was intended to enable government officials to exchange opinions, ideas and advice between or among one another; the exception would not apply with respect to statements made by witnesses and others who are not government officers or employees [Gould v. New York City Police Department, 89 NY 2d 267, 276-277 (1996)].

The remaining provision, and the only ground for denial that in my view might justify withholding some elements of the depositions, is §87(2)(b). The provision permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Without knowledge of the specific contents of the records in question, I cannot offer specific guidance. Nevertheless, it is emphasized 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. Consequently, it is possible if not likely that even though some aspects of the records in question might justifiably be withheld, the remainder must be disclosed. Perhaps of greater signficance is the prior disclosure of all other records relating to the incident. Unless the supporting depositions contain significantly greater or different information than the records previously disclosed, it would seem unlikely that the disclosure of the depositions would result in a more substantial invasion of privacy than the records previously disclosed. If that is so, I believe that the depositions would be available in great measure, if not in their entirety. If, on the other hand, the supporting depositions identify persons who were not or could not have been identified in the records previously disclosed, identifying details regarding those persons might properly be deleted. Similarly, if the depositions include intimate personal information not previously disclosed through the other materials, those portions might also be properly withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10628

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February 24, 1998

Ms. Linda Perez
[redacted]

Dear Ms. Perez:

I have received your letter of February 20 in which you appealed a constructive denial of access to records by the freedom of information officer at the Greenhaven Correctional Facility.

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 and agency to grant or deny access to records.

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

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

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

I hope that 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-10629

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February 24, 1998

[redacted]
Buffalo Psychiatric Center
400 Forest Avenue
Buffalo, NY 14213-1298

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

Dear [redacted]:

I have received your undated letter, which reached this office on January 29.

As a general matter, the Freedom of Information Law pertains to records maintained by entities of state and local government in New York. 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. Enclosed for your review are copies of the Freedom of Information Law and an explanatory brochure that may be useful to you.

I note that a different provision of law, §33.16 of the Mental Hygiene Law, deals specifically with access to mental health records by the subjects of those records.

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." If 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 do not receive a satisfactory response to a 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

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1630

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February 24, 1998

Mr. John D. Schmitz
91-A-6976
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. Schmitz:

I have received your letter of January 20, which reached this office on January 29. You have raised a series of questions concerning your efforts in obtaining records from the City of Albany. Based on your remarks, 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..."

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.

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).

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)].

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 requests, relevant is a recent decision by the Court of Appeals to which you alluded 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: Nancy S. Anderson
Michael Hall

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 24, 1998

Ms. Cristine Meixner
Managing Editor
Hamilton County News
P.O. Box 166
Speculator, NY 12164

The staff of the Committee on 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. Meixner:

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

According to your letter, while attending a meeting of the Wells Central School Board of Education, a draft budget was distributed to Board members and discussed. Your reporter's request for the draft budget was denied. Later, your written request citing the Freedom of Information Law was also denied.

From my perspective, it is likely that the draft budget should have been disclosed in great measure, if not in its entirety. 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, the characterization of a document as a draft is irrelevant; as soon as the documentation exists, it constitutes a "record" subject to rights of access.

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

One of the grounds for withholding records clearly relates to the kind of document that is at issue. However, due to the structure of that provision, it frequently requires 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 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.

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (Xerox v. Town of Webster, 65 NY 2d 131, 133 (1985).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted.

Further, 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 matters 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 only other ground for denial of possible significance would be §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 collective negotiations are not ongoing, it does not appear that §87(2)(c) would be pertinent or applicable as a basis for denial.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Glenn Goodale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 1998

Mr. Robert Vines
81-A-0025
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. Vines:

I have received a copy of your request for records directed to the Office of the Bronx County Office of the District Attorney and your note in which you asked for a "comprehensive opinion" concerning 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. 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 decision rendered 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
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COMMITTEE ON OPEN GOVERNMENT

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February 25, 1998

Ms. Heather DeCastro
School Board President
Lewiston-Porter Central School
4061 Creek Road
Youngstown, NY 14174

The staff of the Committee on 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. DeCastro:

I appreciate having received a copy of your determination of Ms. Anne McBride's appeal under the Freedom of Information Law. Although several of the items requested by Ms. McBride were made available, you affirmed the initial denial with respect to others.

Specifically, you wrote that a particular employee's "previous positions with the District 'both academic and extracurricular' and his educational background are referenced only in documents that constitute [the employee's] employment history which are exempt form disclosure pursuant to Public Officers Law Sections 87(2)(b) and 89(2)(b)(i)." I disagree with that portion of your determination, for the courts have held that those items must be disclosed.

As you are likely aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, as you indicated, 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."

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].

With respect to the items witheld, I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of records detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "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)]."

Based on that advice, the court found that:

> "Accordingly, to the extent that the records sought by petitioner contain data which would be available from the public employers under FOIL or similar statutes, employment histories of GP and LP are not exempt from disclosure. While such employment histories fit within the exemption provided under Public Officers Law §89(2), the statute merely provides a ground on which the agency 'may' withhold a document. Since this information is otherwise subject to disclosure, and has no legitimate claim to confidentiality, its inclusion in an employment history on a resume or job application does not endow it with protection which it otherwise would not have."

I hope that the foregoing serves to enhance your understanding of the Freedom of Information Law.and its judicial interpretation, 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: Anne McBride

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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February 25, 1998

Mr. Michael Minton
97-A-2429
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. Minton:

I have received your letter of January 29 in which you sought assistance in obtaining a copy of a "variance" from the Commission of Correction that permits the Department of Correctional Services to house a greater number of inmates in certain units than the number for which those units were designed. Although you were informed that the record would be disclosed, you indicated that you have faced a series of delays.

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. From my perspective, if indeed a variance has been granted or effectuated, that record would be available, for none of the grounds for denial would appear to apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10635

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 25, 1998

Ms. Debra Schluensen
[redacted]

The staff of the Committee on 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. Schluensen

I have received your letter of January 22, which reached this office on February 4.

You described a series of difficulties in your attempts to obtain copies of certain records from the Civil Division of the Ulster County Sheriff's Office. You specified that the records were inspected by yourself in the presence of Lieutenant Ostrander in December, but that the agency has placed impediments concerning your ability to obtain copies of those records, despite your offer to pay the requisite fees for photocopying.

In this regard, §87(2) of the Freedom of Information Law states that records available under that Law must be made available for inspection and copying. Additionally, §89(3) states that an agency is required to prepare copies of records upon payment of the appropriate fees for copying. Section 87(1)(b)(iii) states that an agency ordinarily cannot charge more than twenty-five cents per photocopy. In short, since the records have already been disclosed for your inspection, I believe that the Sheriff's Department is obliged to provide copies pursuant to your request.

Under the circumstances, I believe that it may be contended that your request for copies has been constructively denied. If that is so, you have the right to appeal the denial under §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."

I believe that the person designated to determine appeals regarding agencies of Ulster County government is the County Attorney, Francis Murray.

Lastly, you referred in your correspondence to your contention that "Federal Law mandates that the request be granted upon request." As I understand the matter, federal law is inapplicable in the context of the situation that you described. While there is a federal Freedom of Information Act, that statute pertains only to records maintained by federal agencies. As suggested above, the governing statute in this instance is the New York Freedom of Information Law. That statute pertains to records maintained by entities of state and local government in New York.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis Murray, County Attorney
Lieutenant Richard Ostrander

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10636

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 25, 1998

Mr. Michael Purcell
76-A-2063
P.O. Box 8
Otisville, NY 10963

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

Dear Mr. Purcell:

I have received your letter of January 30. Enclosed are copies of the advisory opinions that you requested.

You indicated that you have been attempting since May to obtain records from the Office of the Kings County District Attorney pertaining to your case. Although it was apparently determined that many of the records sought are accessible and a money order was sent to pay for copies of the records, the records have not yet been disclosed. Further, the Assistant District Attorney, Kelly Cahill, with whom you had communicated is no longer employed by the District Attorney.

Under the circumstances, I believe that you may consider the request to have been constructively denied. If that is so, you have the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

If you choose to appeal, it is suggested that you describe the matter in a manner similar to the description provided to me.

A newly designated appeals officer is Assistant District Attorney Sholom J. Twersky, and I recommend that you direct any such appeal to him.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Sholom J. Twersky, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10637

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 26, 1998

Mr. Mark C. Smith
[redacted]

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

Dear Mr. Smith:

I have received your letter of February 3 concerning your request for records of the Canastota Central School District.

According to your letter and related materials, you submitted a request under the Freedom of Information Law "for copies of letters or communications the District has received concerning you at the Board of Education meeting of October 14, 1997 or at anytime." In his response to your appeal following an initial denial of access, the Superintendent of Schools expressed the "understanding the records you seek are written complaints of certain parents and /or students concerning your performance as an athletic coach with the District." On that basis, he denied your request, contending that the records are exempted from disclosure under the federal Family Educational Rights and Privacy Act (FERPA), that disclosure would constitute an unwarranted invasion of personal privacy, and "because the records can be fairly characterized as inter-agency or intra-agency communications..."

While I disagree with one of the grounds for denial offered by the Superintendent, I believe that the two others were validly asserted. 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.

The ground for denial referenced by the Superintendent with which I disagree is §87(2)(g) of the Freedom of Information Law, which authorizes agencies to withhold some aspects of "inter-agency or intra-agency materials." I do not believe that the cited provision would be applicable. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, an "agency" is an entity of state or local government, and the materials falling within the exception involve communications among or between government officers or employees. As stated recently by the state's highest court, the intent of that exception involves the "limited aim to safeguard internal government consultations and deliberations" [Gould v. New York City Police Department, 89 NY2d 267, 276 (1996)]. Parents and students are not agency officers and employees; consequently, their communications with the District would not be "inter-agency or intra-agency materials" and §87(2)(g) would not serve as a basis for a denial of access.

Nevertheless, perhaps of greatest significance 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 FERPA (20 U.S.C. §1232g). In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions.

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

Aside from FERPA, it has generally been advised that those portions of a complaint which identify complainants may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. Further, §89(2)(b) contains examples of unwarranted invasions of personal privacy, the last two of which include:

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

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be withheld.

I note that the Superintendent wrote that "it does not appear that the mere deletion of identifying details would safeguard against the unwarranted invasion of personal privacy of such individuals." In my opinion, if the deletion of names or other identifying would clearly preclude the recipient of a record from ascertaining the identity of the writer or, for example, his or her child, the remainder of the record should be disclosed. If, however, as suggested by the Superintendent, those deletions would not clearly preclude ascertaining the identities of those persons, it would appear that other aspects of the records, or even the records in their entirety, may be withheld.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Harry T. Kilfoile, Jr.
Mary Fresina

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10638

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

February 27, 1998

Mr. Ken Howland
[redacted]

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

Dear Mr. Howland:

I have received your communication of January 28 concerning the necessity of using a particular form to seek records under the Freedom of Information Law.

In this regard, while an agency may require that a request be made in writing, the Freedom of Information Law does not refer to any particular form that must be used, and 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.

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-10639

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 2, 1998

Ms. Linda Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of February 5 in which you asked whether you have the right to use your own photocopier to reproduce records maintained by the Village of Ossining.

From my perspective, as a general matter, a municipality has the ability to adopt rules to implement and govern the manner in which it carries out its duties. So long as those rules are reasonable and not inconsistent with law, I believe that they would be valid. As you may be aware, in a decision concerning a situation in which a village adopted rules prohibiting requesters from using their own photocopiers, it was held that the rules "constitute a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [Murtha v. Leonard, 620 NYS 2d 101,102; 210 AD2d 411 (1994)]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency does not have sufficient resources or cannot carry out its duties effectively due to the use or presence of a personal copier without disruption, it might be found, as indicated in Murtha that a prohibition against the use of personal photocopiers would be valid.

In the context of your inquiry, I cannot offer an unequivocal response. There may be circumstances in which, due to the nature of the records sought, their volume, their location, the workload of the Village of staff and similar factors, the use of one's own photocopier may be disruptive. In that instance, it is likely in my view that a municipality, could validly prohibit an individual from using his or her own photocopier. There may be other instances, however, in which the attendant facts suggest that the use of a personal photocopier might not be disruptive. In those cases, it may be unreasonable to prohibit the use of a personal photocopier.

I regret that I cannot offer more precise guidance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marie Fuesy, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 2, 1998

Mr. Leroy Moore
85-D-0050
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. Moore:

I have received your letter of January 30. You have sought guidance in your efforts to obtain records, including grand jury minutes, from the Office of the Albany County Clerk.

In this regard, I point out that the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and that §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.

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. If your request involves records maintained by the County Clerk in his capacity as court clerk, the Freedom of Information Law, in my opinion, would not apply.

It is also noted that the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §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

No

10641

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10642

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 2, 1998

Mr. Paul J. Nassetta
[redacted]

Mr. Thomas D. Mahar, Jr.
[redacted]

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

Dear Messrs. Nasetta and Mahar:

I have received your communications, which are respectively dated February 5 and February 9, both of which pertain to the obligation of the Town of Hyde Park to disclose a proposed comprehensive plan and draft land use regulations.

According to Mr. Mahar, the Town "created a master plan committee consisting of private citizens and retained a professional consultant paid for by the Town to work with the committee to produce a new Comprehensive Plan and Land Use Regulation." While my intent is not to be overly technical, it appears, from my perspective, that the duty to disclose the documentation in question is largely dependent on the roles of the committee and the consultant. 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.

If the report was prepared by the committee consisting of private citizens, one of whom is also a consultant, and if the report is the result of the committee's work, I believe that it would be available in its entirety, for none of the grounds for denial would apply. In that circumstance, the exception referenced in the correspondence, §87(2)(g) of the Freedom of Information Law pertaining

to "inter-agency or intra-agency materials", would not be applicable, because the committee would not constitute an "agency."

The term "agency" is defined in §86(3) of the Freedom of Information Law to mean:

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

For purposes of analogy, there are several judicial decisions that have been rendered under the Open Meetings Law in which it was held that advisory bodies are not "public bodies" subject to that statute [see §102(2)], because they do not perform a "governmental" function [see e.g., Goodson-Todman v. Town of Milan, 542 NYS 2d 373, 151 AD 2d 642 (1989), NYPIRG v. Governor's Advisory Commission, 507 NYS 2d 798; 135 AD 2d 1149; 71 NY 2d 964 (1988); Poughkeepsie Newspaper v. Mayor's Intergovernmental, 145 AD 2d 65 (1989)]. Based on those decisions, the committee in question would not have performed a governmental function and, therefore, would not constitute an "agency" as that term is defined by the Freedom of Information Law. That being so, its report could not be characterized as inter-agency or intra-agency material, and there would be no basis, in my view, for a denial of Mr. Nassetta's request.

If the report, on the other hand, is the work product of a paid consultant and is considered to be the consultant's report, rather than that of the committee, §87(2)(g) would be pertinent. I note that the State's highest court, the Court of Appeals, has determined that records prepared for an agency by a consultant retained by the agency should be considered as if they were prepared by agency staff, and that those records may be treated as "intra-agency materials" [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)].

While §87(2)(g) serves as a potential basis for denial of access to records prepared for an agency by a consultant, due to its structure, it frequently requires substantial 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 emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 report is indeed the work of a consultant, it would be available or deniable, in whole or in part, based on its specific contents.

I note that the initial denial by the Town Clerk referred to the report as a draft and wrote that it may be withheld because it is not a "final agency policy or determination." The characterization of a record as a draft is, in my opinion, irrelevant. Again, the content of the record would determine the extent to which it may be withheld. I point out that one of the contentions offered by the New York City Police Department in a recent decision rendered by the Court of Appeals 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 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][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)..." [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)" (id., 276-277).

I hope that the foregoing will serve to resolve 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

PPPL-AO- 228
FOIL-AO-10643

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 3, 1998

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 February 2, as well as the materials attached to it. The correspondence relates to your continuing efforts to obtain accurate records pertaining to your husband's employment from the Manhasset Lakeville Water District.

Having reviewed the correspondence, there is little of substance that I can add to the opinion addressed to you on June 5, 1997. However, in an effort to offer clarification and assistance, I offer the following comments.

First, the Freedom of Information Law pertains to existing records, and §89(3) of that statute states in part that an agency is not required to create or prepare a record in response to a request. Therefore, insofar as the District does not maintain the records sought, it would not be required to create new records on your behalf. Similarly, although many agencies do so in an effort to ensure the integrity and accuracy of their records, the Freedom of Information Law does not require that agencies correct or amend records that may be inaccurate or incomplete.

I point out that the opportunity to amend or correct personal information maintained by a state agency is conferred by the Personal Privacy Protection Law. The Water District is not a state agency and is not subject to that statute. However, the New York State Employee Retirement System is a state agency required to comply with it. Therefore, if you, acting as your husband's legal representative, believe that records maintained by the Retirement System pertaining to him are inaccurate, and you can demonstrate that to be so, you may seek to amend those aspects of the records pursuant to §95 of the Personal Privacy Protection Law. Enclosed are copies of that statute and an explanatory brochure that may be useful to you.

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, as suggested in the earlier opinion addressed to you, any person may seek records under the Freedom of Information Law, irrespective of his or her 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)]. Assuming that you comply with applicable law, I do not believe that the Water District could validly reject your requests or force you seek records under the Freedom of Information Law solely through an attorney; the attorney would have no greater rights or status than you or any other person. I note, however, that the procedure outlined by the District's attorney to you in his letter of January 30 appears to be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Martin H. Scher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10644

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 3, 1998

Mr. Anatolis Fominas
83-A-0516
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. Fominas:

I have received your letter of February 2. You wrote that your appeal under the Freedom of Information Law to Counsel to the Department of Correctional Services for a copy of a "grievance investigation report" was denied, even though the report "was read out loud in the grievance office during the grievance hearing in front of about ten people", and that it "was given to [you] to read personally..."

You have asked that I obtain the report on your behalf and send it to you and questioned whether the appeal was sent to this office as required by §89(4)(a) of the Freedom of Information Law.

In this regard, the Committee is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee is not empowered to obtain records for individuals or otherwise compel an agency to grant or deny access to records. Nevertheless, if the facts that you presented are accurate, I believe that you would have a right to gain a copy of the report in question.

If indeed the report was read aloud in the presence of many, including yourself, I believe that the Department would have waived its ability to deny access to the report or to preclude you from obtaining a copy. I note that §87(2) of the Freedom of Information Law provides a right to inspect and copy records available under that statute. Further, so long as the prior disclosure to you, i.e., enabling you to read the report, was not inadvertent, you would have the right, in my opinion, to obtain a copy of the report upon payment of the appropriate fee [see McGraw-Edison v. Williams, 509 NYS2d 285 (1986)].

With respect to your appeal, having searched our files, a determination dated January 15 was forwarded to this office. As you are aware, the determination indicated that "evaluative" portions of the report were withheld. I note that in your appeal, although you asserted that you "know what it says", you did not indicate, as you did to me, that the entire report was read aloud or that you read it. Absent proof of prior disclosure to you, I believe that the response was accurate and consistent with law. In short, pursuant to §87(2)(g) of the Freedom of Information Law, those portions of the report consisting of advice, opinion, recommendation, i.e., those portions that are "evaluative", may be withheld.

Again, if the entirety of the report was knowingly and purposefully disclosed to you, I believe that you have the right to obtain a copy, for the Department would have waived its ability to deny access to a copy. It is suggested that you supply proof, in affidavit form if possible, demonstrating that Department officials read aloud in your presence or permitted you to read the entirety of the report, and that you forward such proof to Counsel in an effort to seek reconsideration of the determination.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci, Deputy Commissioner and Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 4, 1998

Mr. Michael Mimnaugh
[redacted]

Dear Mr. Mimnaugh:

Your letter of February 23 addressed to Governor Pataki has been forwarded to the Committee on Open Government. As you may be aware, the Committee, a unit of the Department of State, is authorized to provide advice and guidance concerning the Freedom of Information Law.

You referred to a request directed to the Village of Ossining in which you sought "a listing of village-owned vehicles and the license plate numbers of said vehicles." You indicated that the Village denied access, stating that "[w]e don't keep a list of village-owned vehicles." You also referred to an audit by the State Comptroller critical of the Village's recordkeeping practices concerning its fixed assets and included a recommendation that it maintain detailed inventory records of its assets, including vehicles.

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to existing records. In general, it does not require that agencies create or maintain particular records [see §89(3)]. Irrespective of the Comptroller's commentary, the Freedom of Information Law would not independently require the Village to maintain a list of its vehicles with license plate numbers. In short, if no list exists, the Freedom of Information Law would not require the Village to create or prepare such a list on your behalf.

Second, if such a list at some point is prepared in the future, I believe that it 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. If such a list is prepared, none of the grounds for denial could in my opinion be asserted to withhold such a 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

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March 4, 1998

Mr. Robert J. Coan
[redacted]

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

Dear Mr. Coan:

I have received your letter of February 5 in which you sought an advisory opinion concerning the application of the Freedom of Information Law.

The correspondence attached to your letter indicates that you requested various records from the Schenectady Permanent Firefighters Association (the Association) relating to its "receipt of tax dollars paid to [that] group by the NYS Insurance Department" pursuant to §9104 of the Insurance Law. Counsel to the Association has contended that the Association "is not an agency within the meaning of §86 of the Public Officers Law and accordingly does not honor FOIL requests." You asserted, however, that "[a]s a recipient of public funds and as the designated fire protection association for the City of Schenectady, the...Association...is an entity that performs a governmental and proprietary function for the City of Schenectady" and therefore is subject to the Freedom of Information Law. You added that "tax dollars [are] paid to [the Association]...in lieu of payments to the Treasurer of the Schenectady Fire Department pursuant to Sections 9104 and 9105 of the NYS Insurance Law" and that, absent disclosure, there may be no means of ascertaining "the legality of the expenditures" by the Association.

From my perspective, it is unlikely that the Association constitutes an "agency" required to comply with the Freedom of Information Law. However, as designated agent for the City of Schenectady, I believe that the records sought fall within the scope of that statute. In this regard, I offer the following comments.

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

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

Based on the foregoing, in general, an "agency" is a governmental entity performing a governmental or proprietary function. As I understand the nature of the Association, it is not a governmental entity and could not be characterized as an "agency" subject to the requirements of the Freedom of Information Law.

Second, if my understanding of the provisions of the Insurance Law is accurate, the Association has been designated by the City of Schenectady to perform certain duties on its behalf. Pursuant to §9104(a), except in New York City and Buffalo, fire insurers are required to pay a certain amount derived from moneys received from their insureds within each city, village, fire or similar district to the treasurer or other fiscal officer of or to authorities with jurisdiction and control over such entity, or "to such other person or entity as shall be designated in any special law to receive the premium tax..." As I comprehend the correspondence, the Association has been designated by the City of Schenectady to receive the tax. If that is so, I believe that the records maintained by the Association as agent for the City fall within the scope of the Freedom of Information Law.

Most pertinent under the circumstances in my view is §86(4) of the Freedom of Information Law, which 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, such as the City of Schenectady, to constitute agency records; insofar as they are produced, kept or filed for an agency, they fall within the coverage of the Freedom of Information Law, and the courts have so held.

For instance, 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 that agency did not possess the records and the attorney fees were paid by applicants that appeared 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).

Perhaps most importantly, in a decision rendered by the Court of Appeals, 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).

Based on the language of the Freedom of Information Law and its judicial interpretation, the records in question are apparently maintained by the Association for the City of Schenectady; they are "kept, held, filed [and] produced... for" the City. If that is so, despite their location and the fact that they may be in the physical custody of the Association, I believe that they are City records, and that the City of Schenectady has the responsibility of dealing with the request.

Because the Association, in my opinion, is not an agency, it would not be required to respond, absent direction to do so from the City, to your request. Because they are City records, it is suggested that you resubmit your request to the City's records access officer, who I believe is the City Clerk. Pursuant to the regulations promulgated by the Committee on Open Government, an agency's records access officer has the duty of coordinating the agency's response to requests for records (see 21 NYCRR Part 1401). As such, the records access officer should either obtain the records sought in order to determine the extent to which they should be disclosed, or direct the Association to disclose the records to the extent required by the Freedom of Information Law.

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.

In my view, records indicating amounts received via payments would clearly be accessible, for none of the grounds for denial would apply. Similarly, records identifying recipients of payments would be accessible. I note, however, that additional details that might pertain to the medical condition of recipients or other intimate personal information could in my opinion be withheld or deleted from records on the ground that disclosure of those items would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward Varno
Dale F. Jeffers
Michael Brockbank

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 4, 1998

Mr. Thomas Stoner
[redacted]

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

Dear Mr. Stoner:

As you are aware, I have received your letter of February 6, as well as a variety of related materials. In brief, you described a series of difficulties concerning your efforts to obtain records from the Village of South Nyack regarding its Harbor Patrol.

By way of background, the Harbor Patrol Department is a creation of local law [Chapter 48A, Ordinances of the Village of South Nyack]. As such, it is part of the government of the Village, and its records would clearly fall within the requirements of the Freedom of Information Law.

Second, some of the difficulty appears to relate to the procedure under which you have sought records. In this regard, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

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

In this instance, the governing board of a public corporation, the Village of South Nyack, 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."

In most villages, the clerk is the designated records access officer. If the clerk or other official has been so designated, he or she would have the duty of coordinating the Village's response to requests for records.

From my perspective, irrespective of where records concerning the Harbor Patrol may be maintained, the records access officer would have the duty to coordinate the Village's response to requests for its records. In my view, when a request is made, the records access officer should either acquire the records for the purpose of reviewing them and determining the extent to which they should be disclosed or directing Harbor Patrol staff to disclose the records to the extent required by law.

In a related vein, you referred to a provision of the Village ordinance stating that "all records" of the Harbor Patrol Department "shall be kept at the Village Hall and shall be public records..." The requirements of that provision are separate from the Freedom of Information Law. Nonetheless, it seems that the Village government should abide by the law that it enacted.

Next, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute provides in part that an agency need not create a record in response to a request. Therefore, insofar as the Village does not maintain the records of your interest, 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)].

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

As you requested, copies of this opinion will be sent to Mayor Cross and Mr. Bailey.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Charles Cross, Mayor
Chief Thomas Bailey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10648

41 State Street, Albany, New York 12231
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March 5, 1998

Mr. Steven A. Naples
[redacted]

Dear Mr. Naples:

I have received your letter of January 17 addressed "To Whom It May Concern", which reached this office on February 9.

As in the case of previous correspondence, the matter pertains to your efforts in obtaining records from the Greenlawn Fire Department, and you asked that it be investigated. In this regard, the Committee on Open Government has the authority to provide advice concerning the Freedom of Information Law. The Committee has neither the jurisdiction nor the staff or resources to conduct an investigation.

Having reviewed the opinion sent to you on December 15, I do not believe that I can add to that commentary. It is reiterated, however, that if a request for records is denied, either in writing or by means of a failure to respond, the applicant may appeal the denial. When an agency receives an appeal, §89(4)(a) of the Freedom of Information Law requires that the agency determine the appeal within ten business days by either granting access to the records or fully explaining the reasons in writing for any further denial. If the agency fails to respond to the appeal within the statutory time, the appeal is considered to have been denied, and the applicant has the right to seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules.

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

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March 5, 1998

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 February 4 in which you sought assistance in obtaining information from the South Seneca School District. Based upon your comments and questions, I offer the following comments.

First, I note that some of the information that you requested was sought through questions directed to the School District. In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading; that statute is not an access to information provision *per se*, but rather is a vehicle that requires agencies to respond to requests for records and to disclose records to the extent required by law. I point out, too, that §89(3) of the Freedom of Information Law states in part that an agency is not required to create a record in response to a request.

In the future, rather than seeking answers to questions, it is suggested that you request existing records (i.e., "I hereby request a record identifying the compliance officer for the District").

Second, you referred to a situation in which a fee for copies sought by a different parent was waived and another in which certain records were loaned to you and later returned to the District. Under the Freedom of Information Law, §87(1)(b)(iii), an agency may charge up to twenty-five cents per photocopy. Inspection of accessible records is free. From my perspective, if a record is sought by one person and a copy is made available at no charge, a second request for the same record should be treated in the same way. In short, I believe that, in implementing law or policy, members of the public should be treated equally.

Although the District might have loaned records to you in the past, such a practice in my opinion is questionable. Article 57-A of the Arts and Cultural Affairs Law, which is also known as

the "Local Government Records Law", imposes a variety of responsibilities upon local governments, including school districts, concerning the management, security and custody of records. In my opinion, unless a record loaned is a copy of a record that is maintained by the District, it would be inappropriate for the District to relinquish custody of a record to a person requesting a record.

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)].

Next, you questioned whether certain records must be stored in any particular manner. I have no knowledge of any such requirement, for the Freedom of Information Law does not address the issue of the means by which records are stored or maintained.

Lastly, you referred to a health survey conducted by the District last year and your unsuccessful efforts in obtaining the findings. In my opinion, a blank survey form or record reflective of a statistical compilation of the results of the survey 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.

While personally identifying details regarding those responding to the survey would be beyond the scope of rights of access due to considerations of personal privacy [see Freedom of Information Law, §87(2)(b) and Family Educational Rights and Privacy Act, 20 U.S.C. §1232g], responses to the survey following the deletion of personally identifiable details or, again, statistical compilations reflective of the results of the survey must in my view be disclosed.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
John Plume

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10650

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March 5, 1998

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:

I have received a copy of your letter of February 5 addressed to Rosa Gil, Chair of the New York City Health and Hospitals Corporation, on which you asked that I "treat this as a direct complaint."

You asked that Ms. Gil "waive all Freedom of Information Law procedures and fees and make available to [you] all documents distributed to the public and the members of the HHC board of directors at a joint meeting on Wednesday 14 January 1998 of the boards Strategic Planning and Managed Care Oversight committees meeting on a so-called 'Community Health Partnership'..."

In this regard, I am unaware of the contents of the documents in question or the extent to which any of the grounds for denial appearing in §87(2) of the Freedom of Information Law might be pertinent. However, if indeed the documents were disclosed at the meeting to members of the public, persons with no relationship to the Corporation different from yours, I believe that they must be disclosed, for the prior public disclosure would constitute a waiver of the ability to deny access to other members of the public. While it has been held that an erroneous or inadvertent disclosure does not create a right of access on the part of the public [see McGraw-Edison v. Williams, 509 NYS 2d 285 (1986)], the disclosure, as you described it, was apparently purposeful and intentional rather than inadvertent. If that is so, even though there may have been a basis for withholding prior to a public reading of the record, that activity in my view precludes the Corporation from withholding any portion of the documentation that was disclosed.

Because the meeting occurred nearly two months ago and the records in question might have been filed, perhaps in a number of locations, it would not be unreasonable in my opinion for the Corporation in such a circumstance to require adherence to its general procedures for implementation of the Freedom of Information Law (i.e., requiring that a request be made in writing). On the other

hand, if multiple copies of the documentation have been made and distributed to others, I believe that you and any others should be accorded like treatment in response to requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rosa Gil, Chair

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-10651

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March 6, 1998

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 February 5 in which you referred to a copy of an advisory opinion sent to you that focused on the most commonly cited grounds for entry into executive session. Although you distributed copies of the opinion to members of the Irvington Board of Education, the Board President, according to your letter, indicated that its attorney advised that since the opinion was addressed to the Mayor of the City of Geneva, not the School Board, it "did not have to comply."

You have asked that I "re-address" the "Geneva letter" to the President of the Board.

In this regard, it is emphasized that the Committee on Open Government is authorized to advise with respect the Open Meetings and Freedom of Information Laws. Entities of government are not required to "comply" with the opinions rendered by this office. The opinions are based on the language of the law and judicial decisions, and it is my hope that they are educational and persuasive. To attempt to enhance compliance with and understanding of the Open Meetings Law, I will respond to you directly and send copies to the President of the Board and the District's attorney. In responding to you, portions of the opinion previously rendered will be reiterated; additional commentary will be included relating to your views as expressed to the District's attorney.

By way of background, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

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

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

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Irvington School District."

You suggested that a public body cannot enter into executive session to discuss a matter that "may lead" to litigation. In my opinion, that may not be so in every instance. While the possibility of litigation alone is not sufficient to justify an executive session, there can be situations in which no

litigation has been commenced in which there would be a proper basis for entry into executive session. For example, a public body might discuss its litigation strategy in terms of the pro's and con's of bringing a lawsuit; similarly, it might discuss litigation strategy in the event that it is sued. Both of those situations pertain to matters that may lead to litigation. However, insofar as a public body's discussions involve litigation strategy, I believe that an executive session could properly be held.

Since you referred to a matter involving a possible real estate transaction, I direct your attention to §105(1)(h) of the Open Meetings Law. As in the case of the "litigation" exception in which the court considered the effects of public discussion as the basis for their determinations, the ability to conduct an executive session under §105(1)(h) is dependent upon the effect of public discussion. That provision permits a public body to enter into an executive session to consider:

> "the proposed acquisition, sale or lease of real property or the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof."

Based on the foregoing, if indeed publicity would preclude the government from engaging in an optimal arrangement on behalf of the taxpayers (i.e., if publicity would substantially affect the value of real property), an executive session in my opinion could properly be held.

Next, the language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division, Second Department, recently confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference

> to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

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 teachers union."

At the end of your letter, you referred to a fact finder's report and asked whether a "FOI [is] required when a document is made public" and whether you can be charged for copies of such a document.

In this regard, the Freedom of Information Law pertains to all agency records [see Freedom of Information Law, §86(4)]. While an agency may accept oral requests or respond informally to requests, I believe that it may require that a request be made in writing. Similarly, although an agency may provide copies of records at no charge, under §87(1)(b)(iii) of the Freedom of Information Law, the agency may charge up to twenty-five cents per photocopy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Penny Delaney, President
Phyllis Jaffe, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10652

41 State Street, Albany, New York 12231
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March 6, 1998

Ms. Jeanmarie Klaus
Secretary/Treasurer
Yorktown Heights Fire District
P.O. Box 81
Yorktown Heights, NY 10598

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

Dear Ms. Klaus:

I have received your letter of February 6, in which you sought guidance concerning access to incident reports prepared by the Yorktown Heights Fire District that contain personal information.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record or report may contain both accessible and deniable information. Moreover, that phrase in my opinion imposes an obligation upon agencies to review requested records in their entirety to determine which portions, if any, may justifiably be withheld.

Second, of primary relevance is §87(2)(b) of the Freedom of Information Law, which states that an agency may withhold records or portions thereof that:

> "if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article...."

In addition, §89(2)(b) lists a series of examples of unwarranted invasions of personal privacy, the first two of which pertain to:

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

From my perspective, a record of a medical emergency call consists in great measure of what might be characterized as a medical record or history relating to the person needing care or service (see Hanig v. NYS Department of Motor Vehicles, 79 NY 2d 106 (1992)].

In my opinion, portions of records identifying those to whom medical services were rendered, their ages, and descriptions of their medical problems or conditions could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy, for disclosure of a name coupled with those details in my view represents a personal and somewhat intimate event in the individual's life. However, I believe that other aspects of the records, such as the locations of calls or addresses, should be disclosed. In my view, an emergency call, particularly when sirens or flashing lights are used, is an event of a public nature. When a fire truck or ambulance travels to its destination, that destination is or can be known to those in the vicinity of the event. In essence, I believe that event is of a public nature and that disclosure of an address or a brief description of an event would not likely constitute an unwarranted invasion of personal privacy. Nevertheless, the personally identifiable details described earlier could in my view be withheld.

Also potentially relevant may be §87(2)(e), which enables an agency to withhold records that:

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

On rare occasions, as in the case of arson, it is possible that portions of the reports might be withheld, for example, on the ground that disclosure would interfere with an investigation.

Lastly, when a record is available in its entirely under the Freedom of Information Law, any person has the right to inspect the record at no charge. However, as suggested earlier, there are often situations in which some aspects of a record, but not the entire record, may properly be withheld in

accordance with the ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record.

When accessible and deniable information appears on the same page, preparing a redacted copy and charging the established fee, in my opinion, is justifiable. Further, it has been held that an agency may seek payment for copies in advance of preparing the copies (see Sambucci v. McGuire, Sup. Ct., New York Cty., Nov. 4, 1982).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10653

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March 9, 1998

Mr. Kevin D. Phillips
[redacted]

Dear Mr. Phillips:

I have received your letter of March 2, which you characterized as "an appeal to the administrative director." You referred to a request for records sent to the New York City Department of Sanitation that had not been answered. The records sought involve complaints made against the Department's medical division since January 1, 1993.

In this regard, if the appeal is intended to be determined by this office, it has been misdirected. 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, §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."

Notwithstanding the foregoing, insofar as the records in question exist and can be located based on the terms of your request, it is likely in my view that portions of the records could be withheld. In brief, it has consistently been advised that the identity of a person who submits a complaint may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Similarly, if a complaint is made against a public employee, if the complaint has not yet resulted or does not result

in a finding of misconduct on the part of the employee, identifying details pertaining to that person may in my view be withheld. On the other hand, if there is a final determination indicating that a public employee has engaged in misconduct, that determination, including the name of the employee, the nature of the misconduct and the penalty imposed must in my view be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Francis J. Valentino, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Mr. Christopher DiGabriel
97-A-4605
Mohawk Correctional Facility
P.O. Box 8451
Rome, NY 13443

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

Dear Mr. DiGabriel:

I have received your letter of February 8 and the correspondence attached to it. You have asked whether this office can "assist [you] in ensuring a response to...FOIL's" sent to a clerk of a court.

In this regard, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §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.

It is suggested that you be persistent in your efforts or that you contact your attorney or perhaps 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
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March 9, 1998

Charles J. Hamill, Chairman
Town of Grafton Board of Assessors
P.O. Box G
Grafton, NY 12082

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

Dear Mr. Hamill:

I have received your letter of February 10 and the correspondence from Assemblyman Casale in which he expressed concern that senior citizens may be reluctant to apply for a STAR exemption because the information that they must submit includes sensitive personal financial details. You have sought guidance regarding the treatment of those records.

It is noted that the issue has been discussed with representatives of the Office of Real Property Services, and that we agree that income tax forms or other personal financial information submitted by senior citizens seeking STAR exemptions may be withheld from the public. Although the Freedom of Information Law is based upon a presumption of access, §87(2)(b) authorizes an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." I point out that 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., §697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning taxpayers' income would constitute an improper or "unwarranted" invasion of personal privacy.

In short, I believe that an agency, such as the Town of Grafton, has clear authority to withhold records submitted by residents insofar as they include intimate or sensitive details of their lives, including copies of tax forms given to assessors in conjunction with an application for a STAR exemption.

While I believe that most assessment records are and have historically been public, and that the public has the right to know that a person has been granted a veteran's or senior citizen's exemption, again, records containing intimate personal information may be withheld and should be kept apart from public records in order to guarantee their security. In order to ensure the protection of privacy, it has been suggested that assessors maintain tax forms and similar records in secure facilities separate from other assessment records that are generally public.

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. Pat M. Casale

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Mr. Alfonso Rizzuto
88-A-2885
Sullivan Correctional Facility
Box AG
Fallsburgh, NY 12733

Dear Mr. Rizzuto:

I have received your letter of February 5 in which you appealed a denial of a request direct to the Sullivan Correctional Facility for copies of medical records pertaining to yourself and the credentials of medical staff persons at the facility.

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 concerning the right to appeal, §89(4) 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.

The person designated by the Department of Correctional Services to determine appeals in Anthony J. Annucci, Counsel to the Department.

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

Lastly, 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., 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. 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, often would if disclosed result in a permissible rather than an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: FOIL Officer Mitchell
Medical Records Clerk
Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Mr. Preston Smith
87-C-0286
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Smith:

Your letter of February 3 addressed to the Division of Corporations and State Records at the Department of State has been forwarded to the Committee on Open Government. The Committee, also a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law. It is also noted that the Department of State has moved to the address indicated on the letterhead above.

You ave complained that requests for records directed to three state agencies in January had not been answered as of the date of your letter. In this regard, I offer the following comments.

First, 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." The records access officer has the duty of coordinating an agency's response to requests, and for future reference, requests for records should ordinarily be directed to that person.

In my view, the person in receipt of a request at an agency should have responded in a manner consistent with law or forwarded the request to the records access officer. If your requests were not made to the records access officer, it might be worthwhile to do so. I note that the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a facility should be made to the facility superintendent or his designee; requests for records kept at the Department's Albany offices may be sent to Mr. Mark Shepard, Records Access Officer. Also, the Division of State Police, to the best of my knowledge, has a single records access officer, located at the Division's Albany headquarters.

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:

> 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 9, 1998

Hon. Linda Green
Town Clerk
Town of North Hempstead
P.O. Box 3000
Manhasset, NY 11030

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

Dear Ms. Green:

As you are aware, I have received your letter of February 10. You indicated that citizens of the Town of North Hempstead have on occasion asked for information relating to items appearing on agendas of Town Board meetings, and that members of the Board receive "back-up material further describing these items." You added, however, that the Town Attorney has stated that the public has no right to the materials, citing §87(2)(g) of the Freedom of Information Law as the basis for his denial of access.

From my perspective, some aspects of the materials may likely be withheld; others would likely be public. Further, the need to deny access or delay disclosure of many of the items is, in my view, questionable. In this regard, I offer the following comments.

As general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed, and several of the grounds for denial may be relevant to such an analysis in relation to the records in question..

As suggested by the Town Attorney, records prepared by Town staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

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

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

Moreover, the Court of Appeals, the State's highest court, has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" [Xerox Corp. v. Town of Webster, 65 NY 2d 131, 133 (1985)].

Therefore, as indicated earlier, intra-agency materials may be accessible or deniable in whole or in part, depending upon their specific contents.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within an agenda packet might in some instances fall within that exception.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session. Consequently, there may be no reason for withholding the record even though the Freedom of Information Law would so permit.

In short, while there may be a valid legal reason for withholding some elements of the records at issue, frequently their contents are fully discussed at open meetings, thereby seemingly diminishing the need or rationale for withholding.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Howard Miller, Town Attorney and Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10659

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 9, 1998

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:

I have received your handwritten complaint, which appears on a letter addressed to New York City Councilmember Victor Robles.

You indicated to Councilmember Robles that your health has prevented you from attending meetings of the New York City Health and Hospitals Corporation Board of Directors and meetings of committees, and that your "[r]equests for mailed copies of information distributed at these meetings are being systematically ignored by the chair and president..."

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 the agency's response to requests for records, and a request should ordinarily be directed to that person. While I believe that the persons in receipt of your requests should have responded in a manner consistent with law, it is suggested that you might resubmit your requests to the records access officer, and that in the future, requests should be made to the records access officer.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patricia Lockhart, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1066O

41 State Street, Albany, New York 12231
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March 9, 1998

Ms. Linda A. Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of February 10. You referred to your delivery on January 28 of a letter to the Ossining Village Manager in which you sought a written explanation concerning the alleged incompleteness of the Village's response to a request made on December 13. You also referred to a letter from me dated February 3 in which I quoted from a provision concerning requirements associated with the appeal of a denial of a request.

You have asked whether the Village's "non-response" may be considered a "constructive denial", whether you are "supposed to 'appeal' the village's non-response", and whether the Village is required to send this office a copy of your letter.

In this regard, I was unable to locate any letter that I addressed to you dated February 3. However, I believe that a letter of January 30 addressed to you includes answers to each of your questions. In short, if a request for records has been denied in whole or in part, either in writing or by means of a failure to respond, I believe that the request has been denied and that the applicant has the right to appeal. Further, pursuant to §89(4)(a) of the Freedom of Information Law, an agency is required to transmit to the Committee on Open Government copies of appeals and their determinations thereon.

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-229
FOIL-AO-1066

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 9, 1998

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 February 13 concerning your request to the Town of Chili for the resume of an employee recently hired by the Town, as well as a variety of information pertaining to his functions and role in relation to other employees. You were informed by the Town Clerk that the resume would be withheld pursuant to the "Privacy Act."

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 or serve as a barrier to disclosure of records maintained by a unit of local government [see Seelig v. Sielaff, 607 NYS 2d 300, 201 AD 2d 298 (1994)]. This is not to suggest that records or portions of records cannot be withheld, but rather that the Personal Privacy Protection Law simply does not apply.

Second, it is emphasized 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. If, for example, there is no "organizational chart listing the names, titles and responsibilities of the individuals who will report to" the new employee, the Town would not be obliged to prepare a record containing that information on your behalf.

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

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].

With respect to the items withheld, I note that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

In short, it is likely that some aspects of the resume must be disclosed, while others could be withheld to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Carol O'Connor, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10662

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 9, 1998

Hon. Ronald Canestrari
Member of the Assembly
Legislative Office Building - Room 731
Albany, NY 12248

Dear Assemblyman Canestrari:

I have received your letter of March 5, as well as the correspondence attached to it.

The matter involves the efforts of a constituent to obtain the questions and answer keys pertaining to civil service promotional examinations given in 1996 and 1997. In his appeal following an initial denial of a request, he indicated that a high percentage of questions in a different civil service exam he took were "repeats from previous exams", and he added that "these questions and the answer keys were made available in a 4-hour review session to all interested test-takers who signed up for the review."

In this regard, although the Freedom of Information Law is based on a presumption of access, relevant under the circumstances is §87(2)(h), which enables agencies to withhold records that "are examination questions or answers which are requested prior to the final administration of such questions". Therefore, if there is an intent or possibility that the questions used in an examination will be given in the future, I believe that the questions, as well as the answers, could be withheld. Disclosure of the questions or the answers in that circumstance would diminish or perhaps nullify the utility or efficacy of the exam.

In an effort to obtain additional detail concerning your constituent's inquiry, I contacted Patricia A. Hite, Acting Counsel at the Department of Civil Service and its Records Access Appeals Officer. She informed me that the reviews of the examinations at issue involved only whether the examinations were properly scored. She emphasized that the reviews did not include the disclosure of any questions. Ms. Hite also indicated that the questions on the examination or variations of those questions will likely be used in the future. Based on the information that she offered, it appears that the denial of the request was consistent with law.

I hope that I have been of assistance. If I can be of further assistance, 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-10663

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

E-Mail

TO: [redacted]

FROM: Robert J. Freeman

Dear Mr. Schachter:

I have received your communication of February 16. You have asked that I "explain the meaning of the phrase 'statistical or factual tabulations or data' so that a six year old child can understand it."

Some of the following remarks can likely be understood by many six years olds. In addition, however, guidance from a decision rendered by the state's highest court will be offered.

From my perspective, as the phrase that you quoted is used in the Freedom of Information Law, it is intended to distinguish opinions and ideas from facts and numbers. "It rained today" is a factual statement; "I think that it will rain" is an opinion. The former, as it appears in records prepared by government employees for use by other government employees, would be available to the public; the latter could be withheld.

A decision rendered in 1996 by the Court of Appeals dealt with the issue of factual information and 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).

"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" [Gould v. New York City Police Department, 89 NY 2d 267, 276-277 (1996)].

Based on the foregoing, opinions, ideas and advice within internal government records may be withheld. Factual information, however, must be disclosed unless there is a basis for a denial of access appearing in §87(2) of 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-1066

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

Mr. Matthew Lee
Executive Director
Inner City Press
1919 Washington Avenue
Bronx, NY 10457

The staff of the Committee on Open 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 February 19, as well as the materials relating to it. You have sought my views concerning the propriety of a partial denial of your request for records of the New York State Banking Department regarding applications submitted to the Department by the North Fork Bancorporation and the North Fork Bank.

The banking industry is not among my areas of expertise, and the extent to which the denial of access of was consistent with law is unknown to me. However, I hope that the principles and guidance offered in the following commentary will be useful to you.

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 ground for denial at issue, §87(2)(d), permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, 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."

From my perspective, 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.

Relevant to the analysis is a decision that you cited rendered by the Court of Appeals, 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 Court also 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Kristin H. Smith, Secretary to the Banking Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10665

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

Mr. Donald Wolfe
92-B-0653
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403

Dear Mr. Wolfe:

I have received your letter of March 4, which you sent as an appeal under the Freedom of Information Law.

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

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

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

Since your request appears to involve records of the Department of Correctional Services, I point out that the person designated by the Department to determine appeals is Anthony J. Annucci, Counsel to the Department.

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-10666

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

Ms. Kathleen M. Furbert
[redacted]

The staff of the Committee on 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. Furbert:

I have received your letter of February 19, as well as a variety of related correspondence concerning your requests for records of the Capital District Regional Off-Track Betting Corporation. You have sought an opinion concerning the "time frame" during which records should be released.

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: John Amuso, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10667

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

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 February 17, as well as the materials attached to it. You have sought assistance in relation to repeated requests for records sent to the Village of Green Island. The records sought include details pertaining to a grant made by the Village to a not-for-profit corporation, Senior Citizens of Green Island, Inc. A financial report submitted by the corporation to the Department of Law indicates that it received a grant of approximately ten thousand dollars from the Village.

In this regard, with one exception, insofar as the records are maintained by or for the Village, 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.

From my perspective, the records sought would not fall within any of the grounds for denial and, therefore, must be disclosed, with the exception of those portions that include the compensation and benefits of officers of the corporation. Those persons are not government employees. Consequently, while I believe that the names of officers must be disclosed, those elements of the records that include their compensation or benefits could be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

In view of the failure of the Village to respond to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 10668

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

Ms. Elizabeth L. Reece
[redacted]

Dear Ms. Reece:

I have received your letter of February 17 in which you sought a copy of a contract from the Office of Parks, Recreation and Historic Preservation.

Having contacted that agency on your behalf to learn more of the matter, I was informed that a copy of the contract was sent to you on February 17. As such, the matter appears to be resolved.

For future reference, since you inferred that a response might have been delayed, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Barr

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10669

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 10, 1998

Mr. David Zaire
83-A-2242
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. Zaire:

I have received your letter of February 17. You have asked that I review a denial of access to records that you requested from a parole officer at your facility.

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.

As your request pertains to a pre-sentence report, the initial ground for denial, §87(2)(a), is pertinent, for it states that an agency may withhold records or portions thereof that "...are specifically exempted from disclosure by state or federal statute..." Pertinent 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.

Next, other kinds of records were described as "evaluative." The exception applicable with respect to those kinds of records 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 remaining records are referenced as "diagnostic." If they are 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 agency 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.

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

cc: F. Connally

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10670

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 11, 1998

Mr. Paul Hanson
President
Orange County Property Owners Association
84 Genung Street
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. Hanson:

I have received your letters of February 18 and 20, both of which deal with delays in responding to your requests for records of the City of Middletown. The request attached to your letter involves many years of minutes of meetings of the City Planning 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)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, minutes of meetings of the Planning Board would clearly be available, for none of the grounds for denial would apply.

Lastly, no fee may be charged for the inspection of accessible records. However, an agency may charge up to twenty-five cents per photocopy for records up to nine by fourteen inches [see §87(1)(b)(iii)]. Further, 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 note, too, that although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals, the State's highest court, 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: Charles F. Mitchell, Records Access Officer
Common Council

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10671

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 11, 1998

Ms. Ann A. Perron
[redacted]

The staff of the Committee on 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. Perron:

I have received your letter of February 22 concerning a request for list of all telephone numbers used by or assigned to the Village of Ossining. Some of the numbers were withheld on the ground that they are "unlisted or confidential." You have questioned the propriety of the denial.

While I am unaware of the factual basis for the denial, there are instances, particularly those associated with law enforcement activities, in which a denial of access may be justifiable. It is noted, too, that some of the phone numbers may relate to fax machines.

By means of example, there may be phone lines dedicated to and used only for emergency communications involving public safety or criminal law enforcement activities. Others may be used to provide orders, directives and the like to police officers or other public employees involved in emergency responses. A situation was related to me in which certain fax machines are used solely to receive modifications relating to warrants issued and recalled and to engage in non-routine interdepartmental communications. If those lines were to become tied up due to calls made from members of the public, including potential lawbreakers, it is likely that the Village could not carry out its duties optimally or in a manner in which the public would be adequately served or protected.

In the kinds of circumstances described above, it is likely that §87(2)(f) of the Freedom of Information Law would be pertinent. That provision states that an agency may withhold records to the extent that disclosure "would endanger the life or safety of any person."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marie A. Fuesy
T.G. Barnes

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1672

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 11, 1998

Ms. Frances M. Heinrich
[redacted]

The staff of the Committee on 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. Heinrich:

I have received your letter of February 19 in which you referred to a telephone conversation concerning rights of access to town employees' time cards. Your recollection is that those records must be disclosed, and you asked that I provide written confirmation that they are accessible.

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 emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that single record or report might consist of both accessible and deniable information; it also indicates that an agency must review records sought, in their entirety, to determine which portions, if any, may justifiably be withheld. If there are portions of records that fall within one or more of the grounds for denial, those portions may be deleted, and the remainder of the records must be disclosed.

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

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

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

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

Also relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

With specific regard to time sheets or attendance records, in a decision pertaining to a particular police officer and records indicating the day and dates he claimed as sick leave, which was affirmed by the State's highest court, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Specifically, the Appellate Division found that:

"One of the most basic obligation of any employee is to appear for work when scheduled to do so. Concurrent with this is the rights of an employee to properly use sick leave available to him or her. In the instant case, intervenor had an obligation to report for work when scheduled along with a right to use sick leave in accordance with his collective bargaining agreement. The taxpayers have an interest in such use of sick leave for economic as well as safety reasons. Thus it can hardly be said that disclosure of the dates in February 1983 when intervenor made use of sick leave would constitute an unwarranted invasion of privacy. Further, the motives of petitioners or the means

> by which they will report the information is not determinative since all records of government agencies are presumptively available for inspection without regard to the status, need, good faith or purpose of the applicant requesting access..." [Capital Newspapers v. Burns, 109 AD 2d 92, 94-95 (1985), aff'd 67 NY 2d 562 (1986)].

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

In sum, I believe that, time sheets, attendance and similar records pertaining to public employees must be disclosed, subject to the qualifications described above.

I hope that I have been of assistance.

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-1062 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 11, 1998

Ms. Josephine Giuliano
Freedom of Information Officer
Suffolk County Department of Public Works
335 Yaphank Avenue
Yaphank, NY 11980

Dear Ms. Giuliano:

I have received a copy of a letter of February 23 addressed to you by Mr. Peter Henner. In brief, he objected to your requirement that he complete a particular form in order to request records under the Freedom of Information Law.

In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§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.

I hope that the foregoing enhances 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: Peter Henner
Derrick Robinson, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10624

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 12, 1998

Mr. David Port
394-228 Stiles
3060 FM 3514
Beaumont, TX 77705

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

Dear Mr. Port:

I have received your letter of February 14, in which you asked whether Public Officers Law, Article 6, §§84-90, which is commonly known as the Freedom of Information Law, "cover[s] just Public Officers or does it also cover getting information on anyone in general."

In this regard, the Freedom of Information Law pertains to records maintained by entities of state and local government in New York. As such, when a government agency in New York maintains records, whether the records deal with government employees or information about the public, all such records fall within the coverage of the Freedom of Information Law. This is not to suggest that all such records must be disclosed, for there are various grounds for withholding records (see attached, Freedom of Information Law).

There is no general law of which I am aware that provides public access to records concerning "anyone in general."

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
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10675

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 12, 1998

Mr. Jeff Blocker
93-A-0989
Groveland Correctional Facility
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 February 18 in which you referred to my letter to you of February 3 concerning access to court records. It appears that you misunderstand.

It is emphasized that the Freedom of Information Law is applicable to agency records, and that §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.

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-10676

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

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 letters of February 23, 25 and 26, all of which deal with your unsuccessful efforts in obtaining records from the Department of Correctional Services' Inspector General concerning "Mrs. Fournier's reasons for going to the Gowanda Police Station House" on certain date, as well as the "nature of her visit and complaint, and any telephone call log, of the telephone call that she made to the N.Y. State Police, therefrom." You added that you are " the assigned agent for Mrs Fournier (Principle), under the New York Power of Attorney Act."

In this regard, I offer the following comments.

First, while I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law, I note that the regulations promulgated by the Department of Correctional Services indicate that a request made for records kept at a correctional facility should be directed to the facility superintendent or his designee; a request for records kept at the Department's Albany offices may be made to Mr. Mark Shepard, Records Access Officer. It may be worthwhile to resubmit your request to the appropriate person.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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, Mr. Anthony J. Annucci.

Third, while I am unaware of the nature of the incident or the content of any records that might fall within the scope of your request, I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. If you have been designated as the agent of Mrs. Fournier, you would have the same rights of rights of access as she if she had sought the records directly.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Brian Malone, Inspector General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1067

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Ms. Lynn Radok
[redacted]

The staff of the Committee 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. Radok:

I have received your letter of February 23 and the correspondence attached to it.

According to the materials, you submitted a request to the Village of Ossining for "copies of all bills received by Ossining Village that would substantiate the amount the village paid in the amount of $18,847.32 for the year of 1996, for Special Legal Services." The Village responded by indicating that it is not required to create a record in response to the request.

In this regard, §89(3) of the Freedom of Information Law states in part that an agency is not required to create a record in response to a request, and having sought clarification of the matter from the Village Clerk, Ms. Marie A. Fuesy, it appears that her response was consistent with the law. You asked for records that would "substantiate" certain expenditures, and having discussed the matter with Ms. Fuesy, I was informed that the bills in question are not maintained in a manner that enables the Village to identify those used in reaching the figure to which you referred. My understanding is that an analysis of the contents of various records would have to be undertaken in order to substantiate the figure at issue. From my perspective, the Freedom of Information Law, which pertains to existing records, does not require the contents of records by analyzed and new tabulations created in order to provide the information sought.

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: Marie A. Fuesy, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-230
FOIL-AO-1067 8

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Mr. Allah Kasiem
83-A-0783
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

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

Dear Mr. Kasiem:

I have received your letter of February 19. You have sought an opinion concerning " public access to parole records", whether "DOCS's employees have free access to an inmate's parole records", and what part of parole records are deem confidential and what part deem public."

In this regard, I offer the following comments.

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

Since the contents of parole files may differ, the extent to which they may be available to the public or deniable will also differ. Certain elements of parole records in my opinion will always be available, such as the nature of the crime for which a person was convicted, the fact that he is on parole, and the terms and conditions of parole. Other elements could be withheld from the public, such as medical or psychiatric information, records pertaining to victims, and opinions concerning the propriety of parole prepared by offices of district attorneys or other government officials.

Second, I do not believe that all employees of the Department of Correctional Services have the right to obtain all records concerning parole. In general, I believe that such records are disclosed to those persons on the basis of their need to gain access in order to carry out their official duties. It is also noted that §96(1) of the Personal Privacy Protection Law limits the ability of a state agency to disclose records pertaining to any individual. Enclosed is a copy of that statute and an explanatory brochure on the subject.

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-1629

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Mr. Trazz Sawyer
97-B-2143
Housing Unit A-8-37
Elmira Correctional Facility
P.O. Box 500
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. Sawyer:

I have received your letter of February 17. You have sought assistance concerning a request for records reflective of the procedures used by the Ithaca Police Department relating to fingerprinting and blood testing that 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 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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)].

Second, it is likely that those portions of records containing the procedures in question would be available. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in section 87(2)(a) through (i) of the Law. From my perspective, two of the grounds for denial may be relevant to your inquiry.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records in question consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that rules and regulations would be available, unless a different basis for denial could be asserted.

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

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

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

Under the circumstances, it appears that most relevant is section 87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of

> Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief of Police
City Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10680

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Mr. Michael Gray
84-A-4897
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. Gray:

I have received your letter of January 30, which reached this office on February 23. Please note that the address of the Committee on Open Government has changed.

You referred to an appeal directed to the New York City Police Department that had not been answered, and a request to the office of the Kings County District Attorney that was acknowledged in April and August of last year, but which had not resulted in a determination as of the date of your letter to this office.

In this regard, as indicated to you in a letter of October 16, in the case of the Police Department's failure to respond to an appeal within ten business days as required by §89(4)(a) of the Freedom of Information Law, such failure may be considered a denial of the appeal. In that circumstance, the appellant is deemed to have exhausted his administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388 (1982)].

I note that the Department indicated that it does not maintain its records on the basis of indictment numbers, and that, therefore, it could not locate the records sought. I point out that §89(3) of the Freedom of Information Law requires that an applicant for records must "reasonably describe" the records. Consequently, a request should contain sufficient detail to enable an agency to locate and identify the records sought [see Konigsberg v. Coughlin, 68 NY 2d 245 (1986)]. It is suggested that you renew your request, including additional details that may enable Department employees to locate the records of your interest.

With respect to your request to the Office of the Kings County District Attorney, for reasons indicated in my letter to you of October 16, I believe that you may consider the request to have been denied and that, accordingly, you may appeal the denial.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito
Yuriy Kogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Mr. Edward C. Hansen
94-A-7607
Gowanda Correctional Facility
Bldg. A-North-3/K1B
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. Hansen:

I have received your letter of February 18 in which you sought assistance in obtaining records concerning the legislative history relating to provisions promulgated in either 1987 or 1988, or perhaps both of those years.

In this regard, the provisions to which you referred are regulations adopted by the Division of Parole. As such, the are not legislation enacted by the State Legislature, but rather are rules adopted by a state agency. That being so, it is likely that certain materials were prepared and filed prior to the adoption of those provisions, perhaps under the State Administrative Procedure Act. It is suggested that you contact the records access officer at the Division of Parole and that you request records relating to the promulgation of the records in question. If there is a record or series of records that were prepared to comply with the State Administrative Procedure Act, I believe that those records would be public.

If the regulations to which you referred were adopted as the result of legislation, the legislation would be cited in the records serving as the basis of the adoption of those regulations. Records indicating the intent of any such legislation would be available from the Senate and/or Assembly public information offices.

I emphasize that the Freedom of Information Law pertains to existing records, and that an entity subject to that statute is not required to create a record in response to a request. Therefore, if, for example, legislation was debated in either house of the State Legislature, but the debate was not transcribed or preserved, there would be no obligation on the part of either house to create a record in response to your request.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10682

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 16, 1998

Mr. Chris Hynes
88-A-1221
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. Hynes:

I have received your letter of February 14, which reached this office on February 23.

As I understand the matter, during a proceeding in Queens, information was disclosed indicating that you were a suspect in a robbery in Brooklyn. Nevertheless, you wrote that you were neither arrested nor prosecuted for the robbery in Brooklyn. Despite the absence of an arrest or charge, the Office of the Kings County District Attorney denied your request for records relating to the matter on the basis of §160.50 of the Criminal Procedure Law. That provision pertains to situations in which the charges against an accused are dismissed in his or her favor, thereby resulting in sealing of the records relating to the event.

If indeed the records sought do not involve a charge or an arrest, in my opinion, §160.50 of the Criminal Procedure Act would not apply, and rights of access would be governed by the Freedom of Information Law. This is not to suggest that any such records would be available in their entirety, for that statute includes grounds for denial that authorize an agency to deny access [see §87(2)].

It is also noted that in your correspondence with the Office of the District Attorney, you referred to "Brady" and "Rosario" material, as well as a "Vaughn index." 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)]. More 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 287 (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.

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Regina Kelly
Yuriy Kogan

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 1998

Mr. Glenn Matta
83-A-5261
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. Matta:

I have received your letter of February 21, in which you sought guidance concerning a request directed to the Division of Parole under the Freedom of Information Law.

You wrote that you have requested "either the statistical data or raw data of individuals that had gone before the parole board within the past six years and had either been released or denied parole", and with respect ot those who had been denied, you also sought data indicating "the 'hold' period." Although some data was made available to you, you wrote that it was "far short of what [you] requested."

In this regard, it is emphasized that the Freedom of Information Law pertains to existing records. Further, §89(3) of that statute states in part that an agency is not required to create a record in response to a request.

Insofar as the data of your interest exist, I believe that the Division of Parole would be required to disclose [see Freedom of Information Law, §87(2)(g)(i)]. However, to the extent that the data sought does not exist in the form of a record or records, the Division would not be required by the Freedom of Information Law to prepare a new record on your behalf containing the information sought.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068Y

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 1998

Mr. Pedro Rosario, Jr.
94-A-2927
Shawangunk Correctional Facility
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. Rosario:

I have received your letter of February 23. You have asked whether you may obtain the criminal history record of a witness who testified at your trial.

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 a district attorney in possession of such records must disclose them [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.

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-1068S

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 1998

Mr. John Brown
92-A-3954
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. Brown:

I have received your letter of February 21. You referred to request for your "sentence minutes" directed to your facility that was denied. You appealed the denial on January 31, but as of the date of your letter to this office, you received no further response. As such, you asked that this office "intervene" on your behalf.

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 intervene in the legal sense or otherwise compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, the nature of the records sought, "sentence minutes", is unclear. If you are referring to your pre-sentence report, the Department of Correctional Services would not be required to disclose that record to you.

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 you are referring to different records, and if those records are maintained by the Department of Correctional Services, it appears that they would be available, for none of the grounds for denial would apply. Those records would also be available from the court that maintains the records. While 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).

Lastly, pursuant to §89(4)(a) of the Freedom of Information Law, an agency must respond to an appeal within ten business days of the receipt of an appeal. That provision states in relevant part that:

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

Further, it has been held that if an agency does not determine the appeal within the statutory time, the appeal may be deemed denied, and the appellant may seek judicial review of the denial 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci
S. Wuerschmidt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068 6

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 1998

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

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

Dear Mr. Greenfield:

I have received your letter of February 24 in which you sought advice relating to the Freedom of Information Law.

According to your letter, the Village of Atlantic Beach adopted a building code "and is charging $250 for a copy of the code book." You added that "[t]he Mayor has publicly stated that he made the price this high so that people would not buy the book", and that "[e]ven at $.25 per page, the book under NYSFOIL, would be less."

In this regard, I offer the following comments.

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

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

Based on the foregoing, the book in question in my view clearly constitutes a Village "record."

Second, pursuant to §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge a maximum of twenty-five cents per photocopy up to nine by fourteen inches. Therefore, if you or any other person are interested in obtaining copies of one or more pages of the book, the Village, in my opinion, could charge no more than twenty-five cents per photocopy.

Lastly, it is emphasized that no fee may be charged for the inspection of records that are available under the Freedom of Information Law. As such, you and others may inspect the book at no charge. Following your review, the Village would be obliged to provide photocopies of the pages or sections of your choice, again, at a fee not in excess of twenty-five cents per photocopy.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor, Village of Atlantic Beach
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10687

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 17, 1998

Hon. Holly E. Mabb
Town Clerk
Town of Kingsbury
210 Main Street
Hudson Falls, NY 12839-1814

The staff of the Committee on 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. Mabb:

As you are aware, I have received your letter of March 2 and the materials attached to it. You have sought guidance concerning two requests made under the Freedom of Information Law to the Town of Kingsbury.

One of the requests involved "copies of local laws, rules or regulations that allows the Town of Kingsbury to give property tax exemptions for any reason to any one or groups of people." The Town Attorney wrote in response that there are no local enactments on the subject, and that the authority to grant property tax exemptions is conferred by state laws. He added that copies of state statutes in the possession of the Town would be made available upon receipt of a revised request. You wrote that the applicant refused to submit a new request "and viewed [the] response as a denial of access to the records."

From my perspective, the Town Attorney's response was appropriate. In short, because only the State Legislature is authorized to enact laws granting property tax exemptions, there are no local enactments that could confer such exemptions. As such, the Town Attorney's response, in my view, could not be characterized as denial of access to records; the Town simply does not maintain the records sought by the applicant.

Further, although the Town Attorney offered to make copies of state laws concerning property tax exemptions, the request in my opinion involved an effort to have the Town engage in legal research, rather than a request for records under the Freedom of Information Law. If an applicant requests copies of specific provisions of law (i.e., §30 of the Town Law or §574 of the Real

Property Tax Law), such a request clearly involves particular records. A request for laws pertaining to tax exemptions involves the making of judgments and interpretations of law which, I believe, differs from a request for records.

The second request involves "copies of any expenditures by the Town in relation to the Dix Drive-In property purchase since Dec. 13/1993 to date, sources of money used for payments as of Type of accounts." The Town Attorney responded by indicating that additional detail would be needed to locate the records.

While records reflective of expenditures by the Town are clearly public, the issue in this instance pertains to 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 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.

In sum, based on the materials attached to your letter, it appears that the Town is acting in a manner consistent with the Freedom of Information Law, and, for reasons noted earlier, may be offering greater service that the law requires.

In an effort to enhance his understanding of the Freedom of Information Law, a copy of this opinion will be sent to the applicant for the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Antonio Cerro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1068

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 18, 1998

Mr. Nahshon Jackson
95-A-2578
Green Haven Correctional Facility
Drawer B
Stormville, NY 12582

Dear Mr. Jackson:

I have received your letter of January 25 in which you referred to a request sent to the Office of Court Administration for a copy of a certain form. You questioned whether this office received a copy of your appeal, which was sent to that agency on January 19, and asked that "the Committee intercede as it deems proper."

In this regard, having searched our files of appeals for the first three months of this year, staff was unable to locate your appeal or any determination thereon. I note that the Office of Court Administration recently moved to a new location. As such, it is possible that it received neither your request nor your appeal, or that delivery was delayed. The new address for that agency is 25 Beaver Street, New York, NY 10004. In an effort to assist you, I will send copies of your request and appeal to the appropriate person at the Office of Court Administration.

For future reference, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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 my understanding that the person designated to determine appeals under the Freedom of Information Law is Michael Colodner, Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1689

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 18, 1998

Mr. Martin T. Reid
Director of Issue Management
State University of New York
Office of Vice Chancellor for University
and Government Relations
System Administration
State University Plaza
Albany, NY 12246

Dear Mr. Reid:

I appreciate having received a copy of your determination of March 2 of an appeal under the Freedom of Information Law by Mr. Edward T. Owens. While I agree that the record sought, a report prepared by a consultant, is predecisional and falls within the scope of §87(2)(g) of the Freedom of Information Law, it is unlikely in my opinion that the report could be withheld in its entirety.

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. 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 cited 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). 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.).

The provision at issue, §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 discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld 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.

The Court in Gould 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.

I hope that you consider the preceding commentary to be constructive and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Edward T. Owens

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10698

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 18, 1998

Mr. Francisco Gomez
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13404-2500

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. Gomez:

I have received your letter of February 23 in which you complained that several agencies have failed to respond to your requests made under the Freedom of Information Law.

In this regard, I note that two of your requests were directed to individuals employed by the Immigration and Naturalization Service. That is a federal agency that is subject to the federal Freedom of Information Act; it is not subject to the New York Freedom of Information Law. The Committee on Open Government has no jurisdiction regarding a federal agency, and I cannot offer guidance concerning your requests to a federal agency.

Insofar as your request involves the Department of Correctional Services, while I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law, I note that the regulations promulgated by the Department of Correctional Services indicate that a request made for records kept at a correctional facility should be directed to the facility superintendent or his designee; a request for records kept at the Department's Albany offices may be made to Mr. Mark Shepard, Records Access Officer. It may be worthwhile to resubmit your request to the appropriate person.

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)].

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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1069

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 18, 1998

Mr. Keith W. McCart
[redacted]

The staff of the Committee 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. McCart:

I have received your letter of March 18 in which you wrote that the Superintendent of the Hoosick Falls Central School District:

> "...has refused to certify the correctness of the copies of these records stating that she has a letter from your office that says she does not have to certify the correctness of records."

As you are aware, §89(3) of the Freedom of Information Law 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.

Stated differently, the Freedom of Information Law deals with the extent to which records must be disclosed or may be withheld. Insofar as records are accessible under the Law, the public has the right to review them or obtain copies, irrespective of the accuracy of their contents. In an example given to the Superintendent during a telephone conversation, it was advised that if a record states that 2 + 2 = 5, the record would be public. Under §89(3), the certification would indicate that a copy of the record is a true copy, not that the content of the record is accurate.

Lastly, since you asked whether Superintendent Chase may have received a letter from this office on the matter, copies of advisory opinions are routinely sent on request to any person, and it is possible that copies of opinions have been forwarded to Ms. Chase in the past over the course of years. Further, as indicated above, the matter was discussed *via* telephone in response to her inquiry.

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: Nancy B. Chase

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10692

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 18, 1998

Mr. Joseph W. Sallustio, Jr.
[redacted]

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

Dear Mr. Sallustio:

I have received your letter of March 2, as well as the materials attached to it. You have questioned the propriety of a denial of your request for records maintained by the Rome City School District.

You sought "criteria used to determine qualified candidates and criteria method used to rank qualified candidates" for a particular position. In response, you were informed that:

> "...access to criteria and questions used during the interview process must be denied under Section 87(2)(h) of the Freedom of Information Law on the grounds that they are equivalent of examination questions and/or answers which will be used again by the District and are, therefore, not the final administration of such questions."

It is your view that the basis for the denial is in error.

From my perspective, insofar as the records sought exist, they 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, the provision cited in the response is, in my view, inapplicable. Section 87(2)(h) permits an agency to withhold records that:

> "are examination questions or answers which are requested prior to the final administration of such questions..."

The purpose of that provision is obvious. If questions used in an examination, whether it be a civil service exam or an examination given to students, are disclosed before they are finally given, the examination process and its integrity would be compromised. In short, if examination questions will be used in the future, the Law permits an agency to deny access to both the questions and the answers.

Consideration of the criteria that must be met in order to hold a position in my opinion is quite different from the administration of the kind of examinations described earlier. If a request involved a list of questions used in interviewing candidates for a position, I would likely agree that an agency could deny access. Again, disclosure now of a question to be used in an interview at some future date would enable the recipient of such a record to gain an unfair advantage over prior interviewees who could not obtain the question. Criteria, however, are standards that must be met in order to hold a position. The standards represent the policy of an agency in terms of the minimum qualifications that must be attained to hold a position or carry out certain duties. For that reason, and to provide the public with a guarantee of accountability and a means of ensuring that an individual hired is qualified, the criteria in my view must be disclosed.

Also relevant 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. Again, criteria established by an agency regarding the attributes necessary to hold a position would represent the agency's policy, essentially its rules, and, therefore, would be available under §87(2)(g)(iii).

Also potentially relevant 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."

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].

It has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position."

In short, for the reasons expressed above, it appears that the records sought should be disclosed.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Valerie Kelsey
Lorenzo Rizzo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1069 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 19, 1998

Mr. Christopher McNamara
[redacted]

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

Dear Mr. McNamara:

I have received your letter of March 3 concerning a request for copies of appearance tickets involving violations of the Village of Ossining building code and/or zoning law. You have questioned the propriety of the deletion of the names and addresses from the tickets.

From my perspective, it is likely that the names and addresses should have been disclosed. In this regard, 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 or perhaps other provisions of the Criminal Procedure Law. However, if it is determined that a person has engaged in a violation, i.e., of the building code, the records would be available from the court in which the proceeding occurred, such as the Village Justice Court (see Uniform Justice Court Act, §2019-a). 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).

Although that decision did not pertain to the kinds of tickets to which you referred, I believe that the principle would be applicable in this instance. In short, unless they have been sealed pursuant to statute, the records in question, including the names and addresses, would in my opinion be accessible from either the court or other Village office that maintains the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie A. Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1069Y

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 19, 1998

[redacted]
Buffalo Psychiatric Center
400 Forest Avenue
Buffalo, NY 14213-1298

Dear [redacted]:

I have received your correspondence of February 28. It appears that you may have requested records from this office and perhaps others.

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. In short, I cannot make the records of your interest available to you, because this office does not possess them.

Insofar as requests involve records maintained by agencies subject to the Freedom of Information Law, they should be directed to the "records access officer" at the agency that you believe would have the records of your interest. The records access officer has the duty of coordinating an agency's response to requests. If your requests involve records of mental health facility, a request should be made, as suggested in my letter to you of February 24, pursuant to §33.16 of the Mental Hygiene Law.

Lastly, since it appears that you are interested in obtaining records from attorneys, law firms, a court, and a bar association, I point out that the Freedom of Information Law applies to agency records, and that §86(3) of that statute defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law generally applies to records of units of state and local government; it does not apply to private attorneys, law firms or bar associations.

While the Freedom of Information Law does not apply to the courts, most court records are available under other provisions of law (see e.g., Judiciary Law, §255).

I hope that the foregoing serves to clarify your understanding of the 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-1695

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 19, 1998

Ms. Virginia Whitman
[redacted]

The staff of the Committee on 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. Whitman:

I have received your letter of March 3, as well as the materials attached to it.

You have asked whether it is your "legal right" to obtain certain information from the Town of Stillwater. The information sought involves revenues and expenditures for certain periods relating to the Town Water District and Sewer District. While some of the information sought was disclosed, in several instances, you were informed that final figures had not yet been tabulated or that final calculations had not been prepared.

In this regard, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, insofar as the information sought does not exist in the form of a record or records, the Town would not, in my opinion, be obliged to prepare records on your behalf in response to your request.

Second, however, to the extent that records do exist, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, records reflective of revenues and expenditures are clearly accessible, for none of the grounds for denial of access would apply.

It is noted that you would have the right to inspect or copy records of expenditures prior to the compilation of final figures following the expiration of a fiscal or calendar year. In essence, through those other records, you would have the capacity to prepare your own totals or analyses covering any period of time within a fiscal or calendar year.

Of possible interest or relevance may be §29(4) of the Town Law, which states 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."

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: Hon. Paul Lilac, Supervisor
Hon. Rose Petronis, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 19, 1998

E-Mail

TO: Marilyn Brewster<general@zoran.computech-net.net>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Brewster:

I have received your e-mail communication of March 4. You have asked whether there is a law that enables you to obtain personnel files pertaining to yourself from a former employer.

In this regard, if you are seeking records from a private company in New York, there is no law that specifically deals with the issue of access by an employee to personnel records pertaining to herself. In that circumstance, the employer would have the ability, in its discretion, to disclose or withhold records from the employee or former employee, unless access is governed by a contract or collective bargaining agreement, for example.

If your former employer is an entity of government, the records would be subject to the Freedom of Information Law. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Further, if your former employer is a state agency, you would have rights of access to most records maintained by the agency pertaining to you under the Personal Privacy Protection Law.

The full text of those statutes and additional information concerning their scope can be reviewed through our website at the following address: http://www.dos.state.ny.us/coog/coogwww.html

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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March 19, 1998

Mr. Ray Shanley
Executive Director
Utica Community Action, Inc.
253 Genesee Street
Utica, NY 13501

Dear Mr. Shanley:

I have received a letter dated March 4 from Matt Leingang of the Utica Observer-Dispatch in which he asked that I write to you for the purpose of "explaining directly to the anti-poverty agency why it should follow the spirit of the Freedom of Information Law." He indicated that Utica Community Action, Inc. has repeatedly denied requests to review financial information, particularly records reflective of travel expenses incurred by yourself and other employees. Mr. Leingang included materials that you prepared indicating that your agency "will not permit the Observer-Dispatch access to its records..."

Mr. Leingang indicated that he shared a copy of an advisory opinion prepared in 1996 concerning the status of a different community action agency under the Freedom of Information Law. Although you may be familiar with that opinion, I will reiterate several of the points offered therein.

From my perspective, it is not entirely clear that a community action agency is subject to the requirements of the Freedom of Information Law. Nevertheless, it is clear in my view that a community action agency has an obligation to provide information to the public.

By way of background, the New York Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

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

As such, the Freedom of Information Law generally applies to records maintained by entities of state and local government. It is my understanding that community action agencies are not-for-profit corporations. Although it appears that they perform a governmental function, it is questionable whether they constitute "governmental entities" or, therefore, are agencies subject to the Freedom of Information Law.

It is my understanding, however, that community action agencies have been 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.

Perhaps most importantly, §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 expresses an intent to ensure accountability to the public by providing "reasonable public access to books and records of the agency."

Whether the Freedom of Information Law applies or otherwise, I believe that it offers guidance concerning the disclosure.

That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. It is noted that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within the scope of the grounds for denial that follow. The phrase quoted in the preceding sentence in my opinion indicates that a single record might be accessible or deniable in whole or in part.

Insofar as records of a community agency agency include the names, addresses or other identifying details pertaining to those receiving assistance based on an income eligibility requirement, I believe that those items may be withheld or deleted, as the case may be (see e.g., Tri-State Publishing Co. v. City of Port Jervis, Community Development Agency, Supreme Court, Orange County, March 4, 1992). Those kinds of details pertaining to participants in your programs would if disclosed constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

On the other hand, the provision of federal law cited earlier specifically refers to "books" of an agency, and I believe that the reference to "books" is intended to mean books of accounts and similar records that detail the manner in which a community action agency expends money. If money is spent in the performance of one's duties, that kind of information in my opinion would unquestionably be public. Disclosure of that information would enhance the accountability of an agency to the public and serve as a means of meeting the goals of the legislation cited earlier.

Lastly, the materials sent by Mr. Leingang suggest that you have chosen to disclose to some but not to others. In this regard, as a general principle, the Freedom of Information Law does not distinguish among applicants for records. Stated differently, when records are accessible, they must be made equally available to any person, notwithstanding one's status or interest [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)].

In sum, based on the direction provided in federal law governing the activities of community action agencies, I believe that the Utica Community Action, Inc. is obliged to disclose in a manner that guarantees accountability to the public.

If you would like to discuss the matter or if I can be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Matt Leingang

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10698

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March 20, 1998

Mr. Thomas J. Walsh
[redacted]

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

Dear Mr. Walsh:

I have received your letter of March 2, as well as the materials attached to it.

The correspondence indicates that you submitted two requests to the Hicksville Union Free School District on February 5, one for "all records of vending machine sales & receipts for the period 7/1/96 to the present", and the other for "all written communication for the period 7/1/95 to the present to or from" two firms concerning "the disallowance of reimbursement of funds for the pre-school programs." The communications appear to involve consulting firms or auditors. 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, a possible 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 District maintains its records. If, for example, all records concerning vending machine sales are kept in a particular file, locating the records may be a simple task. On the other hand, if records of sales and/or receipts are kept with other financial records, not by subject area, but perhaps in chronological order, locating the records in question might involve a search of thousands of records, one by one, in order to retrieve those of your interest. In that situation, the request would not, in my view, meet the standard of reasonably describing the records.

Lastly, insofar as records exist and can be located in accordance with the standard described above, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

From my perspective, records of sales and receipts would be accessible, for none of the grounds would be applicable. If my assumption concerning the communications with the two firms is accurate, it is likely that some aspects of the records would be available, while others might justifiably be withheld. Pertinent to the matter 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.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be

> able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: District Clerk
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1699

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 20, 1998

Mr. Keith Hart
82-B-379
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. Hart:

I have received your letter of February 28 in which you referred to an appeal directed to the New York City Police Department that had not been determined as of the date of your letter to this office. The appeal involved a request for copies of mugshots. Although the Department made photocopies, all but one were erroneous; they were apparently not copies of the records requested.

In this regard, as you may be aware, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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 an agency fails to respond to an appeal within ten business days as required by §89(4)(a), such failure may be considered a denial of the appeal. In that circumstance, the appellant is deemed tho have exhausted his administrative remedies and may initiate a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388 (1982)].

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-1070

41 State Street, Albany, New York 12231
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March 20, 1998

Mr. Ted Pagan
96-R-6297
ANI-C1
Gowanda Correctional Facility
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:

I have received your letter of February 28. You have complained that your requests for records of the Nassau County Police and Sheriff's Departments had not been answered.

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

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 20, 1998

Mr. Joseph Sorce
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 March 2, which pertains to your requests to obtain a "Grand Jury Control Calendar."

If my interpretation of the matter is accurate, the record in question would likely be confidential, whether it is maintained by a court or by the office of a district attorney.

As you may be aware, the courts and court records are not subject to the Freedom of Information Law. Nevertheless, court records are frequently available under other provisions of law. Records maintained by an office of a district attorney, which is an "agency", clearly fall within the coverage of the Freedom of Information Law [see definitions of "judiciary" and "agency", subdivisions (1) and (3) of §86].

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

Of likely relevance is 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, 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.

It is suggested that you discuss the issue with your attorney.

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-10702

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 20, 1998

Ms. Doris Ulman
Attorney At Law
16 Doe Drive
Suffern, NY 10901

The staff of the Committee on 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. Ulman:

I have received your letter of March 4. In your capacity as attorney for the South Nyack/Grand View Joint Police Board, you have sought advice concerning a request for copies of personnel records pertaining to a former police officer.

The records sought include:

"1. Application for employment:
2. Certificates or diplomas for any police training;
3. Civil Service test results;
4. Commendations or awards;
5. Any letters of appreciation or praise from citizens, fellow officers, public officials, etc.;
6. Any formal or informal complaints made by civilians;
7. Any formal or informal departmental complaints;
8. Records and documents relating to administrative leave;
9. Records and document relating to retirement."

You have asked whether the records sought are "exempt from public disclosure pursuant to Public Officers Law Section 89(2)(b)(i) and/or Civil Rights Law 50-a and related cases." You added that the "subject police officer has not consented to disclosure."

From my perspective, some aspects of the records must be disclosed; others could be withheld. In this regard, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 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, 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)].

If the subject of the records is no longer a police officer, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision as expressed in its legislative history and decisions rendered by the Court of Appeals would no longer be present.

The other provision that you cited, §89(2)(b)(i), states that an agency may withhold "employment, medical or credit histories or personal references of applicants for employment" on the

ground that disclosure would constitute "an unwarranted invasion of personal privacy." That is one among many conceivable examples of situations in which disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b) of the Freedom of Information Law. Those provisions may be pertinent as a basis for withholding some elements of the records, and not only those that pertain to the former officer.

With respect to access to an application for employment, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a related context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my view, to the extent that a resumé contains information pertaining to the requirements that must have been met to hold the position, it should be disclosed, for I believe that disclosure of those aspects of a resumé would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see §87(3)(b)]. However, reference to former private employers could in my opinion be withheld. Further, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

I note that a recent judicial decision cited and relied upon the preceding commentary contained in an opinion rendered by this office concerning access to applications for employment (Kwasnik v. City of New York, Supreme Court New York County, September 26, 1997), and that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

On the basis of those decisions, I believe that in addition to portions of an application for employment, certificates or diplomas for police training would be available. Similarly, civil service test results indicating that a candidate passed exams would be public, for the results are typically included in eligible lists that are public (see Rules of the Department of Civil Service, §71.3). Reference to a failing grade may in my view be withheld as an unwarranted invasion of personal privacy.

Privacy considerations also may arise in the context of communications sent by members of the public, such as complaints. It has consistently been advised that identifying details concerning a complainant may be withheld to protect that person's privacy.

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.

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 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)]. Three of the decisions cited above, Powhida, Farrell and Scaccia involved police officers, and in each case, the names of the officers and the penalties imposed were determined to be public.

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. If a complaint is internal or departmental, such a record would also constitute intra-agency material that could likely be withheld.

It is assumed that a commendation or award would represent a final agency determination that is relevant to the performance of an employee's duties. Therefore, as in the case of a final determination indicating a finding of misconduct, I believe that it, too, would be available.

With regard to records relating to administrative leave or retirement, without additional information concerning the nature or content of such records, I cannot offer specific guidance. However, it is likely that all such records would consist of intra-agency materials. Insofar as they include statistical or factual information, I believe that they would be available, unless a different ground for denial, such as §87(2)(b), could properly be asserted [see Gould v. New York City Police Department, 89 NY2d 267, 276-277 (1996)]. With regard to leave records, I note that a decision cited earlier, Capital Newspapers v. Burns, supra, required the disclosure of records indicating the days and dates of sick leave claimed by a particular police officer. As such, as a general matter, leave and attendance records would be likely be available in great measure. Similarly, records reflective of public employees' salaries or other payments, such as overtime, would clearly be available based on the principles cited earlier [see also, §87(3)(b)].

Lastly, assuming that §50-a of the Civil Rights Law is not applicable, which I believe to be so, the absence of consent given by the subject of the records is, in my view, irrelevant. Moreover, it is emphasized that the Freedom of Information Law is permissive. As stated by the Court of Appeals in Capital Newspapers, even though an agency may withhold records or portions of records in accordance with the grounds for denial, it is not obliged to do so and may choose to disclose (id., 567).

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-1703

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 20, 1998

Mr. Cuyler Burke
[redacted]

The staff of the Committee on 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. Burke:

I have received your note in which you asked that I review materials relating to your request to the Sag Harbor Board of Education for its "rules and regulations of Public Conduct On School Property (school law section 2801)."

Although certain policies were disclosed to you, none appears to have been adopted pursuant to the provision of law that you cited. Consequently, you contend that the Superintendent of Schools is in violation of §240.65 of the Penal Law and §89(8) of the Public Officers Law, and that the District's records access officer is "liable for refusal to ensure, by law, compliance with FOIL..."

In this regard, the provision to which you referred, §2801 of the Education Law, states in relevant part that the board of education of every school district "shall adopt rules and regulations for the maintenance of public order on school property and shall provide a program for the enforcement thereof", that such rules and regulations "shall govern the conduct of students, teachers and other staff as well as visitors and other licensees and invitees", and that they "shall be filed with the regents and the commissioner of education not later than ninety days after the effective date of this act." The effective date was September 1, 1972.

Based on the foregoing, it is clear that the Board was obliged to have adopted rules and regulations concerning conduct on school property. It is equally clear, in my view, that any such rules and regulations must be disclosed under the Freedom of Information Law, for none of grounds for denial of access to records would be pertinent. In short, an agency's rules and regulations must be disclosed.

Notwithstanding the foregoing, for purposes of clarification, I offer the following remarks.

First, in my opinion, neither §240.65 of the Penal Law nor its companion, §89(8) of the Freedom of Information Law (which is Article 6 of the Public Officers Law) would likely be applicable. The former 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, or when an agency cannot locate a record that must be maintained.

Second, §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; the Board of Education, the governing body of the District, is responsible for ensuring compliance with the Freedom of Information Law and the rules and regulations promulgated under that statute.

Third, an agency is not required to respond instantly to a request or on the day that a request is made or submitted. Under §89(3) of the Freedom of Information Law, an agency has up to five business days to respond to a request. That provision states in relevant part that:

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

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

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
John Barnes, Superintendent of Schools
Corinne Jones, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10704

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 20, 1998

Mr. James J. Fotis
Corrections and Criminal Justice Coalition
7700 Leesburg Pike, Ste 421
Falls Church, Virginia 22043

Dear Mr. Fotis:

I have received your letters of March 19, both of which involve requests made to this office for records relating to federal grants awarded to New York State agencies relating to prison construction, corrections and law enforcement.

In this regard, the Committee on Open Government is authorized to provide advice concerning the State's Freedom of Information Law. The Committee is not a repository of records, and it is not empowered to compel an agency to grant or deny access to its records. In short, I cannot make the records of your interest available, because this office does not possess them.

For future reference, requests should be made to the agencies that you believe would maintain the records. In addition, 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." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be directed to that person. 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.

I point out, too, that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to rights of access to existing records. Similarly, while that statute may require an agency to disclose records, it does not require that an agency provide answers in response to questions. In a related vein, §89(3) of the Law states in part that an agency is not required to create a record in response to a request, unless otherwise specified in §87(3). In one of your requests, for example, you wrote that you "need a breakdown" of grant monies given to the state for certain years. If such a breakdown has been prepared, I believe that it would be available. However, if no such record has been created, an agency would not be obliged to prepare a new record consisting of a breakdown on your behalf.

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

Lastly, while I have no knowledge of whether the kinds of grants to which you referred have been awarded, it is suggested that agencies likely to be familiar with the area of your interest would be the Division of Criminal Justice Services and the Department of Correctional Services.

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-10705

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 23, 1998

Mr. Jack White
Beekman Bulletin
R2, Box 400
Poughquag, NY 12570

The staff of the Committee on Open 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 March 5. You referred to several requests made in February under the Freedom of Information Law to the Town of Beekman, none of which had been answered as of the date of your letter to this office.

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10706

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 23, 1998

Ms. Sonja H. DePalma
[redacted]

The staff of the Committee on 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. DePalma:

I have received your letter of March 3 in which you described a series of frustrations relating to your efforts to obtain vital records through a genealogical search from the Town of Berkshire.

In this regard, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, the provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered concerning searches for and copies of those records. Specifically, subdivision (3) of §4174 refers to searches for and the 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."

The manner in which the records of your interest are maintained and the extent to which they are organized well varies from one municipality to the next. Similarly, although I do not believe that a town clerk is required to permit you to search through the records, many clerks do so.

An alternative source of the records is likely the State Department of Health. In general, its Bureau of Vital Records maintains duplicates of records of birth, death and marriage regarding all such events occurring outside of New York City. You may call that office at (518)474-3055 or write

for further information to the Bureau of Vital Records, New York State Department of Health, Empire State Plaza, Corning Tower, Albany, NY 12237.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10709

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 23, 1998

Mr. Jeffrey H. Greenfield
NGL Realty Co.
112 Merrick Road
Box 847
Lynbrook, NY 11563-0847

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

Dear Mr. Greenfield:

I have received your letter of March 7 and the correspondence attached to it.

The matter involves a request that you submitted to the Village of Atlantic Beach on January 21 for a copy of a "survey which was done for the construction of new beach houses which Mayor Mahler referred to in his call of January 20 to Lisa at the Plaza Beach Club." You wrote that the Village "has refused to acknowledge" your request asked that I "advise them of their obligation under the law to provide same."

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

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

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

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

Second, with respect to the duty to disclose, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 survey was prepared by or for the Village, it would constitute "intra-agency material." Pursuant to §87(2)(g)(i), those portions of such material consisting of "statistical or factual" information must be disclosed. If it was not prepared by or for the Village, but rather by a private person or entity, it does not appear that any basis for a denial of access would apply.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this response 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
Mayor Mahler
Emily Siniscalchi, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10708

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 23, 1998

Mr. Dana Sydnor
97-A-4590-A2-53
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 March 4. As I understand the matter, you have sought advice concerning your ability to obtain certain grand jury minutes under the Freedom of Information Law.

In this regard, if my interpretation of the matter is accurate, the records in question would likely be beyond the scope of public rights of access, whether they are maintained by a court or by the office of a district attorney.

As you may be aware, the courts and court records are not subject to the Freedom of Information Law. Nevertheless, court records are frequently available under other provisions of law. Records maintained by an office of a district attorney, which is an "agency", clearly fall within the coverage of the Freedom of Information Law [see definitions of "judiciary" and "agency", subdivisions (1) and (3) of §86].

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

Of relevance is 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, minutes of grand jury proceedings, as well as 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.

It is suggested that you discuss the issue with your attorney.

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-232
FOIL-AO-10709

41 State Street, Albany, New York 12231
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March 23, 1998

Mr. Alvin J. DuBois, Jr.
89-A-7513
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. Dubois:

I have received your letter of March 6, as well as the materials attached to it.

You referred to a request made to the Albany County Sheriff's Department under the Freedom of Information and Personal Privacy Protection Laws. Although you mailed the request with a return receipt requested, you had not received such a receipt. You added that you intend to seek to amend the records. Under the circumstances, you asked whether you are "doing anything incorrectly."

In this regard, I offer the following comments.

First, I believe that the County Clerk is the designated records access officer for all agencies within Albany County government. Since there is no evidence that your request was received, it is suggested that you submit a new request to the County Clerk.

Second, 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 Albany County. Since one of your goals appears to involve the amendment of records, I note that the Freedom of Information Law is silent concerning that issue and provides no right to seek to amend records that may be inaccurate.

Third, several aspects of your request are phrased in terms of "the reason why" certain actions occurred. Here I point out that the Freedom of Information Law pertains to existing records, and that §89(3) provides in part that an agency is not required to create a record in response to a request for information. As such, agency staff would not be required to answer questions or prepare explanations indicating "reasons why" actions occurred. In the future, it is suggested that you seek existing records (i.e., records indicating the basis for your incarceration on a particular date).

It is possible that some of the information sought would be accessible pursuant to §500-f of the Correction Law, which pertains to county jails, and states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what 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."

Lastly, as a general matter, 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.

Several elements of your request involve communications between the Sheriff's Department and officials of entities of state and local government. Relevant to those aspects of your request 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 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
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1071O

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 23, 1998

Mr. Edwin Madden
97-A-2576
Green Haven Correctional Facility
Drawer B 1 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. Madden:

I have received your letter of March 2 concerning your efforts in obtaining records pertaining to your case from the office of the Kings County District Attorney. You indicated that you requested the records on November 9, and that the receipt of the request was acknowledged on November 21, indicating that you would shortly receive a response granting or denying your request. However, 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..."

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 apparently 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 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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.

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

Next, in your request, you asked for an "itemized listing" of all records maintained by the Office of the District Attorney relating to the matter. In this regard, the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Therefore, if no such list exists, the agency would not be required to prepare such a record on your behalf. Similarly, I am unaware of any provision of the Freedom of Information Law or judicial decision that would require that a denial at the agency level identify every record withheld or a description of the reason for withholding each document be given. Such a requirement has been imposed under the federal Freedom of Information Act, which may involve the preparation of a so-called "Vaughn index" [see Vaughn v. Rosen, 484 F.2D 820 (1973)]. Such an index provides an analysis of documents withheld by an agency as a means of justifying a denial and insuring that the burden of proof remains on the agency. Again, I am unaware of any decision involving the New York Freedom of Information Law that requires the preparation of a similar index. Further, one decision suggests the preparation of that kind of analysis might in some instances subvert the purpose for which exemptions are claimed. In that decision, an inmate requested records referring to him as a member of organized crime or an escape risk. In affirming a denial by a lower court, the Appellate Division found that:

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

Lastly, you asked that fees be waived because you are indigent. While the federal Freedom of Information Act includes provisions concerning fee waivers, the New York Freedom of Information Law contains no similar provisions. Further, 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)].

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: Chaim Sandler, Paralegal

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1071

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 24, 1998

Hon. George L. Cooke
Sullivan County Clerk
Sullivan County Government Center
Monticello, NY 12701

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

Dear Mr. Cooke:

I have received your letter of March 18 and the news article attached to it.

In brief, the article referred to a decision rendered by a federal judge indicating that the Office of the Ulster County District Attorney violated an accused burglar's civil rights by forcing a hospital to disclose psychiatric records to the District Attorney. You have expressed concern, with other County Clerks, that the holding "might apply to [y]our handling of pistol permit applications."

From my perspective, the decision involving the authority of the District Attorney is largely unrelated to the functions of County Clerks. It is emphasized that medical and psychiatric records pertaining to patients or clients are presumptively confidential. Several statutes in the Public Health Law (see e.g., §§18, 2803-c, 2805-g) pertain to the confidentiality of medical records, as does §33.13 of the Mental Hygiene Law pertaining to clinical records identifiable to those receiving mental health treatment or care. Those statutes prohibit the disclosure of those records by a provider of medical or mental health services, except in certain enumerated circumstances. As I understand the decision referenced in the article, the District Attorney attempted to compel a hospital to disclose records that were confidential by statute. Further, as we discussed, when a physician or other licensed mental health professional maintains records regarding a client or patient, the records are generally privileged; they cannot be disclosed without the consent of the subject of the records or pursuant to a statutory exception that authorizes disclosure.

In contrast, when a person seeks a license or permit concerning the ability to carry, possess, repair or dispose of a firearm, the licensing agency does not compel the disclosure of information that is confidential by statute; on the contrary, the applicant voluntarily furnishes information in order to gain the privilege of licensure. Moreover, the office of a county clerk does not, in my view, maintain

a relationship with applicants for licenses or licensees that is analogous to the privileged relationship between a physician and a patient. The fact that a license has been granted, whether it involves the practice of law or medicine, selling real estate, teaching school or possessing a firearm, is a matter of public record. In my view, in the context of your duties, there is neither a promise nor an expectation 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1072

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 24, 1998

Mr. Ronald Johnson
97-A-3849
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 undated letter, which reached this office on March 9. Since you asked to review the case law involving the statutes within its advisory jurisdiction, enclosed is a supplement to the Committee's annual report to the Governor and the Legislature that includes summaries of decisions rendered under those statutes.

You also referred to difficulty in obtaining records from the Yonkers Police Department relating to the investigation of your case. You indicated that the problem is that "you have to be more specific" in requesting records, and you asked whether the Department maintains a "check list" that might be used when seeking records.

In this regard, I am unaware of the manner in which the Department maintains its records or of the existence of any list or guide that might be used to seek records. Nevertheless, there is no requirement that an applicant for records specify the records in which he or she may be interested.

By way of legislative history, when the Freedom of Information Law was enacted in 1974, it required that an applicant seek "identifiable" records. That requirement resulted in difficulty and frustration, for in many instances, applicants could not name or identify with specificity the records of their interest. In 1978, when the current version of the Freedom of Information Law became effective, the standard for seeking records changed. Since that date, §89(3) of the Law has merely required that an applicant must "reasonably describe" the records sought. Under that standard, if agency staff can locate and identify the records based on the terms of a request, the applicant would have met the requirement of reasonably describing the records [see Konigsberg v. Coughlin, 68 NY2d 245 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Records Access Officer, Yonkers Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-233
FOIL-AO-1073

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March 24, 1998

Hon. George L. Cooke
Sullivan County Clerk
Sullivan County Government Center
Monticello, NY 12701

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

Dear Mr. Cooke:

I have received your letter of March 20. You have asked whether, in your capacity as Sullivan County Clerk, you "are prohibited from accepting any documents with a Social Security number included for public view." You also questioned whether a record that includes a social security number may be "exposed for public view" without the consent of individual to whom the record pertains.

In this regard, I know of no law that would restrict your ability to accept records into your custody. Further, the Freedom of Information Law deals generally with the obligation to disclose and the ability to withhold records; it is silent with respect to the kinds of records that may come into the possession of government.

It is noted that it has been established through judicial interpretation that an entity of local government is not prohibited from disclosing social security numbers, even when the subjects of the records objected to disclosure. In Seelig v. Sielaff [200 AD2d 298 (1994)], the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent pursuant to the Personal Privacy Protection Law. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency involved is an entity of local government and, therefore, is not subject to the Personal Privacy Protection Law or prohibited from disclosing social security numbers. 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).

I note that the same provision specifically excludes the judiciary from the coverage of the Personal Privacy Protection Law.

In short, while a state agency that is subject to the Personal Privacy Protection Law is obliged to protect against disclosures to the public that would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §§87(2)(b) and 89(2); Personal Privacy Protection Law, §96(1), neither an entity of local government nor a court is required to do so.

Lastly, it is emphasized that the Freedom of Information Law is permissive. Although 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. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

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- 1074

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

March 25, 1998

Mr. James Murray
95-A-4417
South Port Correctional Facility
Box 2000
Pine City, NY 14871

Dear Mr. Murray:

I have received your letter of March 19 in which you appealed to this office following a failure on the part of the Westchester County Attorney to respond to a request for a record.

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. In short, I cannot make the record sought available because this office does not possess it. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, 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." The records access officer has the duty of coordinating an agency's response to requests, and requests should ordinarily be directed to that person. 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.

I note that the person to whom you addressed your request is no longer County Attorney. While I believe that the person in receipt of your request should have responded in a manner consistent with the Freedom of Information Law, it is suggested that you resubmit your request to the records access officer at the County agency or department (i.e., the Sheriff's Department) that you believe would maintain the record.

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

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

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

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

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

I believe that the County Attorney is designated to determine appeals following denials of access to records by Westchester County agencies.

Lastly, I do not believe that access to the record in question, a "transcript of a 50-h hearing of the General Municipal Law", is governed by the Freedom of Information Law. Subdivision (3) of §50-h states in part that: "The transcript of the record of an examination shall not be subject to or available for public inspection, except upon court order upon good cause shown, but shall be furnished to the claimant or his attorney upon request." If you are the claimant, and if the transcript exists, it appears that you have the right to obtain a copy under §50-h of the General Municipal Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1071S

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March 25, 1998

Mr. Frank Lichtensteiger
[redacted]

Dear Mr. Lichtensteiger:

I have received a copy of your letter of March 6 addressed to the Chairman of the Board of Channel 13 in New York City and to its General Counsel. In brief, you appealed a denial of access to records based on your belief that the entity in question is subject to the Freedom of Information Law.

In this regard, the receipt of public money is not the determining factor relative to the coverage of the Freedom of Information Law. That statute 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, an agency is entity of state or local government.

To the best of my knowledge, Channel 13, although characterized as a public television station, is a not-for-profit entity that is separate from government. If that is so, it would not be subject to the Freedom of Information Law, despite its relationship with government.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Henry R. Kravis
Eleanor S. Applewhite

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2859
FOIL-AO- 16716

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March 25, 1998

Mr. Robert Wallace
Assistant to the Ombudsperson
The City College of the City University
of New York
Convent Avenue & 138th Street
New York, NY 10031

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

Dear Mr. Wallace:

I have received your letter of March 6. You have questioned the propriety of the actions of the Auxiliary Enterprise Corporation (AEC), a not-for-profit corporation associated with the City College at the City University of New York (CUNY).

In a memorandum of February 17, Nathan Dickmeyer, Chair of AEC and Vice President of the City College, contended that "[a]s a corporation separate from the College, we [the AEC] are not under any open records obligations." In addition, he wrote that an upcoming meeting of the AEC would be closed to the public. You have sought an opinion concerning the AEC's actions, as well as "possible remediative actions."

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information and Open Meetings Laws. The Committee is not empowered to compel compliance with either of those statutes. Nevertheless, it is my hope that the opinions rendered by this office are educational and persuasive, and that they serve to encourage entities to carry out their duties in accordance with open government statutes when those statutes are applicable.

In this instance, due to the means by which the AEC was created, I believe that it is subject to both the Freedom of Information Law and the Open Meetings Law. I am mindful of the decision rendered in Smith v. City University of New York [661 NYS 2d 599, ___ AD 2d ___ (1997)], which apparently has been cited by Mr. Dickmeyer as the basis for his contentions. That decision involved the status of a student government association under the Open Meetings Law, and I believe that it is clearly distinguishable from the instant situation.

Among the attachments to your letter is a copy of "Notes to Financial Statements" prepared in 1993 regarding the AEC, which states in relevant part that:

> "The City College Auxiliary Enterprises Corporation (the Corporation) was formed in compliance with the City University of New York's Bylaws, Section 16.10, as adopted by the Board of Trustees of the City University of New York. The purpose of the Corporation is to provide oversight, supervision and review of all auxiliary enterprises serving the students, faculty, administrative staff, alumni and others in the college community of the City College of The City University of New York.
>
> "The Corporation was organized exclusively for charitable, educational, or scientific purposes..."

In addition, in Mr. Dickmeyer's memo, he referred to the by-laws of the Corporation and its "Purposes", which include the following:

> "Through the provision of auxiliary enterprise services and the use and allocation of auxiliary enterprise revenues, to assist in developing, improving and increasing the programs, resources and facilities of The City College to enable it to provide more extensive educational opportunities and services to its students, faculty, administrative staff, alumni, and others in the college community."

He also cited Article V, Section 1, concerning the authority of the President of the College in relation to the AEC, which states that:

> "The Corporation shall operate consistent with the By-laws, policies and regulations of the City University of New York and any policies, regulations and orders of The City College. The President of The City College shall have review authority over all actions taken by the Corporation's Board. Said review authority shall be exercised in the manner prescribed under Article 16 of the By-laws of the Board of Trustees of the City University of New York."

Based on the foregoing, it is clear that the AEC is a creation of CUNY and the City College and that it exists for the purpose of carrying out functions for the City College or which the College would otherwise perform itself.

There are precedents indicating that when a not-for-profit corporation is essentially an arm of government, it falls within the scope of open government laws, despite its corporate status.

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.

In the first decision in which it was held that a not-for-profit corporation may indeed be an "agency" required to comply with the Freedom of Information Law, [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 State's highest 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, in the context of the facts presented, there appear to be "considerable crossover" in the activities of certain persons, notably Mr. Dickmeyer, in the performance of their duties for the AEC and the College.

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).

Perhaps most analogous to the situation described is a decision in which it was held that a community college foundation associated with a CUNY institution was subject to the Freedom of Information Law, despite its status as a not-for-profit corporation. In so holding, it was stated that:

> "At issue is whether the Kingsborough Community College Foundation, Inc (hereinafter 'Foundation') comes within the definition of an 'agency' as defined in Public Officers Law §86(3) and whether the Foundation's fund collection and expenditure records are 'records' within the meaning and contemplation of Public Officers Law §86(4).
>
> The Foundation is a not-for-profit corporation that was formed to 'promote interest in and support of the college in the local community and among students, faculty and alumni of the college' (Respondent's Verified Answer at paragraph 17). These purposes are further

amplified in the statement of 'principal objectives' in the Foundation's Certificate of Incorporation:

> '1 To promote and encourage among members of the local and college community and alumni or interest in and support of Kingsborough Community College and the various educational, cultural and social activities conducted by it and serve as a medium for encouraging fuller understanding of the aims and functions of the college'.

Furthermore, the Board of Trustees of the City University, by resolution, authorized the formation of the Foundation. The activities of the Foundation, enumerated in the Verified Petition at paragraph 11, amply demonstrate that the Foundation is providing services that are exclusively in the college's interest and essentially in the name of the College. Indeed, the Foundation would not exist but for its relationship with the College" (Eisenberg v. Goldstein, Supreme Court, Kings County, February 26, 1988).

As in the case of the foundation in Eisenberg, that entity, and, in this instance, the AEC, would not exist but for their relationship with CUNY. Due to the similarity between the situation you have described and that presented in Eisenberg, as well as the goals of the AEC and its relationship to the College, I believe that it is subject to the Freedom of Information Law.

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.

In this instance, it would appear that all records kept or produced by the AEC would be maintained for CUNY and the City College. Therefore, I believe that its records would fall within the scope of the Freedom of Information Law.

If the AEC 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 AEC 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 the degree of governmental control exercised by and its nexus with CUNY, I believe that it conducts public business and performs a governmental function for a governmental entity, CUNY.

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 those identified at the end of your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: President Yolanda Moses
Vice President Nathan Dickmeyer
Martha Flores, Chair, Graduate Student Council
Eduardo Hernandez, President, Student Government

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1017

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March 25, 1998

Mr. P.N. Prentice
[redacted]

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

Dear Mr. Prentice:

I have received your letter of March 11 concerning your efforts in obtaining information from the Hyde Park School District. Having reviewed an opinion addressed to you on December 18, which deals with essentially the same subjects, there is little that I can add to the commentary offered in that response.

It is noted, however, that one aspect of your letter to the Board of Education of March 11 referred to a request for "a list of any and all records kept by the school district which enumerate or project school age (and preschool) children in the district." In this regard, I point out that the Freedom of Information Law pertains to existing records, and that §89(3) provides in part that an agency is not required to create a record in response to a request. Therefore, if no such list exists, the District would not be obliged to prepare a new record on your behalf. If such a list does exist, I believe that it would be available [see §87(2)(g)(i)].

An exception to the general rule that an agency is not required to create a record to comply with the Freedom of Information Law pertains to a different kind of list. 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: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 26, 1998

E-Mail

TO: Gerald Creps <gcreps@scott.skidmore.edu>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Creps:

As you are aware, I have received your communication of March 12 in which you raised questions concerning the application of the Freedom of Information Law to the Saratoga County Rural Preservation Company (the Company) and the Saratoga Springs Housing Authority (the Authority).

You indicated that the Company claims to be a not-for-profit organization that is not subject to the Freedom of Information Law. You added that the Company is "listed on the I.R.S. website as public charity with a 50% deduction."

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, 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 organization that is not part of government.

There are situations, however, in which charitable organizations must report with respect to the amounts of charitable contributions received and the amounts expended on administrative costs, for example. If that is of interest to you, it is suggested that you contact the Charities Bureau, Department of Law, Empire State Plaza, Justice Building, Albany, NY 12223. That office can be reached by phone at (518) 486-9735.

The Authority, in my opinion, is clearly required to comply with the Freedom of Information Law. Section 3(2) of the Public Housing Law states that municipal housing authorities are public corporations, and §450 of the Public Housing Law specifies that the Saratoga Springs Housing Authority "shall constitute a body corporate and politic." Since the definition of "agency" includes public corporations, I believe that the Authority is clearly an "agency" required to comply with the Freedom of Information Law. Moreover, it has been held judicially that a municipal housing authority is subject to the Freedom of Information Law [Westchester-Rockland Newspapers, Inc. v. Fischer, 101 AD 2d 840 (1985)].

As it applies to agencies, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, I am unfamiliar with the nature of the records of your interest. Nevertheless, since you referred to section 8 housing, because tenants in section 8 housing must meet an income qualification, it has been consistently advised that insofar as disclosure of records would identify tenants, they may be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. However, following the deletion of identifying details pertaining to tenants, the remainder of the records, i.e., those portions indicating identities of landlords, contractors and the amounts that are paid, must generally be disclosed.

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: Saratoga Springs Housing Authority
Saratoga County Rural Preservation Company

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 26, 1998

Mr. Bernard Lewis
97-A-5797
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. Lewis:

I have received your letter of March 8. You indicated that you sent a request under the Freedom of Information Law to the New York City Police Department for a copy of the search warrant used in your arrest. As of the date of your letter to this office, you had received no response, and you have sought assistance in the matter.

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 New York City Police Department to determine appeals is Susan Petito, Special Counsel.

Second, with respect to your right to obtain the record, 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 a copy of the warrant would be available to you from either the police department that made the arrest or the court in which the warrant was introduced in a proceeding. While the courts are not subject to the Freedom of Information Law, court records are generally available under provisions of law (see e.g., Judiciary Law, §255). A request for a court record should be made to the clerk of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 26, 1998

Mr. Willie Walker
97-B-2418
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. Walker:

I have received your letter of March 7. You wrote that a private investigator was "appointed by the court to investigate [your] case for the defense." You have asked whether you can obtain the records of the private investigator 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 applies, in general, to records of entities of state and local government in New York. It would not apply to a private organization or a private investigator.

If, however, the investigator was appointed to assist a public defender, I believe that the records prepared for the public defender would fall within the coverage of the Freedom of Information Law. It is emphasized that §86(4) of that statute defines the term "record" expansively to include:

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

Based on the foregoing, if an investigator prepared or obtained records for a public defender, I believe that they would be records of the public defender that fall within the coverage of the Freedom of Information Law.

Section 716 of the County Law states in part that the "board of supervisors of any county may create an office of public defender, or may authorize a contract between its county and one or more other such counties to create an office of public defender to serve such counties." Therefore, a county office of public defender in my opinion is an agency subject to the Freedom of Information Law that is required to disclose records to the extent required by that statute.

In a case in which an attorney is appointed, while I believe that the records of the governmental entity required to adopt a plan under Article 18-B of the County Law are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, for reasons offered earlier, I believe that the records maintained by or for an office of public defender would fall within the scope of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

If you believe that the investigator prepared records for a public defender, it is suggest that you request them not from the investigator, but rather from the Office of the Public Defender, pursuant to the Freedom of Information Law.

I hope that I have been of assistance

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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March 26, 1998

Ms. Mardell A. Parker
Mr. Charles A. Parker, Sr.
[redacted]

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

Dear Ms. Parker and Mr. Parker:

I have received separate letters from you, both of which are dated March 10 and both of which involve requests to the Schoharie County Department of Social Services. It appears that your requests involve similar subject matter. Consequently, I will respond to both *via* the following comments.

First, you complained that the Commissioner of Social Services failed to respond to respond to your appeals. In this regard, §89(4)(a) of the Freedom of Information Law states in relevant part that:

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

It is noted that an appeal if an appeal is not determined within ten business days of its receipt, the appellant is deemed to have exhausted his or her administrative remedies and may seek judicial review of a constructive denial of the appeal by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD 2d 388, appeal dismissed, 57 NY 2d 774 (1982)].

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 most pertinent under the circumstances is §87(2)(a), which deals with records that "are specifically exempted from disclosure by state or federal statute." I would conjecture that the records sought are exempted from public disclosure by statute. If that is so, the Freedom of Information Law would not govern rights of access; rather, any capacity to gain access would be governed by provisions of the Social Services Law and/or applicable regulations.

I note that §136 of the Social Services Law requires that records identifiable to applicants for or recipients of public assistance be kept confidential. Another statute that requires confidentiality is §369(3) of the Social Services Law, which pertains to Medicaid and provides that:

> "Any inconsistent provision of this chapter or other law notwithstanding, all information received by public welfare and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons."

A third 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 or by the Department of Social Services.

Additionally, §422 of the Social Services Law pertains to the statewide central register of child abuse and maltreatment and/or 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.

Lastly, when an applicant for or recipient of public assistance seeks case files pertaining to himself or herself, 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."

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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March 26, 1998

Mr. Bruce Wamsley
[redacted]

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

Dear Mr. Wamsley:

I have received your letter of March 12, as well as the correspondence attached to it. You have sought assistance in relation to a request made under the Freedom of Information Law to the Rensselaer County Health Department on February 11 that had not been answered as of the date of your letter to this office.

In this regard, it is noted at the outset the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. However, in an effort to extend guidance to you, I offer the following comments.

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

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

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

Constructively Denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, notwithstanding the foregoing, it is emphasized that the Freedom of Information Law pertains to existing records. Some aspects of your request involve materials that were prepared as early as 1971, and in some instances, it is possible that the records sought may have been legally disposed of or destroyed. To the extent that the records sought no longer exist, the Freedom of Information Law would not apply.

Third, an issue of possible significance 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 State's highest court, 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 County'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 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.

Fourth, insofar as a request pertains to existing records and reasonably describes the records sought, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records sought would, in my opinion, be available. However, some aspects of the records could likely be withheld.

In several instances, you requested names and what appear to residence addresses of present or former public employees. Section 89(7) of the Freedom of Information Law specifies that an agency may withhold home addresses of present or former public officers and employees.

One of the grounds for denial, §87(2)(b) permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, the first of which includes employment history. In this regard, if, for example, an individual must have certain types of experience, educational accomplishments, licenses or certifications as a condition precedent to serving in a particular position, those aspects of a resume or application would in my view be relevant to the performance of the official duties of not only the individual to whom the record pertains, but also the appointing agency or officers. In a related context, when a civil service examination is given, those who pass are identified in "eligible lists" which have long been available to the public. By reviewing an eligible list, the public can determine whether persons employed by government have passed the appropriate examinations and met whatever qualifications that might serve as conditions precedent to employment. In my view, to the extent that a resumé contains information pertaining to the requirements that must have been met to hold the position, it should be disclosed, for I believe that disclosure of those aspects of a resumé would result in a permissible rather than an unwarranted invasion of personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

Although some aspects of one's employment history may be withheld, the fact of a person's public employment is a matter of public record, for records identifying public employees, their titles and salaries must be prepared and made available under the Freedom of Information Law [see

§87(3)(b)]. However, reference to former private employers could in my opinion be withheld. Further, information included in a document that is irrelevant to criteria required for holding the position, such as grade point average, class rank, home address, social security number and the like, could in my opinion be deleted prior to disclosure of the remainder of the record to protect against an unwarranted invasion of personal privacy.

I note that a recent judicial decision cited and relied upon the preceding commentary contained in an opinion rendered by this office concerning access to applications for employment (Kwasnik v. City of New York, Supreme Court New York County, September 26, 1997), and that it has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 218 AD2d 494 (1996)].

The privacy exception might also be pertinent with respect to letters to which you referred in your request. I am unaware of the nature or content of those communications. Nevertheless, insofar as they include information of a personal or intimate nature, they might justifiably be withheld.

Also significant 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.

It is clear that an agency's policies, procedures, determinations and the like must be disclosed. However, inter-agency or intra-agency materials that "interpret law" may be withheld if they are reflective of opinion, for example.

Lastly, since you questioned the ability to recover attorney's fees should a lawsuit be initiated, §89(4)(c) of the Freedom of Information Law deals with that issue and states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer. Rensselaer County Health Department
Mr. Pachenick, Office of Rensselaer County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10723

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March 26, 1998

Mr. Bernard DeVeaux
78-A-3862
Wallkill Correctional Facility
P.O. Box G
Wallkill, NY 12589-0286

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

Dear Mr. DeVeaux:

I have received your letter of March 5, which reached this office on March 12. You asked "what State or Federal agency is responsible for certifying sex offender programs in correctional facilities operated by the Department of Correctional Services in New York State."

In this regard, the primary function of the Committee on Open Government involves providing guidance concerning public access to government information. This office maintains no information and I have no knowledge concerning the certification of sex offender programs. It is suggested that you contact the appropriate staff at the Department of Correctional Services learn of certification of such programs.

You also asked whether you can know when any such programs were initially certified. If a record containing that information is maintained by an agency subject to the Freedom of Information Law, I believe that the portion of the record indicating the date of initial certification would be accessible. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be applicable as a basis for withholding the date of initial certification.

Assuming that the records in question are maintained by the Department of Correctional Services at its central offices in Albany, a request may be made to Mark Shepard, Records Access Officer. If records are kept at a facility, the Department's regulations indicate that a request may be made to the facility superintendent or his designee.

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

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March 30, 1998

Mr. Darryl Dickens
97-A-0167
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. Dickens:

I have received your letter of March 9. In brief, you indicated that your request and appeal sent to the New York City Police Department relating to your request for records concerning your arrest were not answered, and you asked that I "intervene" on your behalf.

In this regard, the Committee on Open Government is authorized to provide advice pertaining to 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. However, in an effort to assist you, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 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: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 30, 1998

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

I have received your letter of March 9. You have sought assistance in relation to a request for records sent to the Division of Parole that had not been answered as of the date of your letter to this office.

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

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

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

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

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

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

The person designated by the Division of Parole to determine appeals is Terrence Tracy, Counsel, Division of Parole, 97 Central Avenue, Albany, NY 12206.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Terrence Tracy
David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1072b

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March 30, 1998

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 March 10, as well the correspondence attached to it. As I understand your remarks, you have sought an opinion concerning the delay in response to a request for records of the Division of Parole.

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.

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: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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March 30, 1998

Mr. Joseph M. Norton
Hudson 403E
Dutchess Community College
Pendell Road
Poughkeepsie, NY 12601

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

Dear Mr. Norton:

I have received your letter of March 18, as well as the correspondence associated with it. You have questioned the intent of the law relating to the maintenance of a subject matter list.

In this regard, I offer the following comments concerning that and other issues that are pertinent to the correspondence, all of which pertain to your efforts in obtaining records from Dutchess Community College.

First, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. 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. It is suggested that you ask to review the retention schedule applicable to the College. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

A second issue of possible significance involves the extent to which your 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 College, 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. It is possible that records falling within the scope of the request may be maintained in several locations by a variety of units within the College, and that those units maintain their records by means of different filing and retrieval methods. If an office maintains all of its records regarding asbestos or hazardous materials in a single file or perhaps in a series of files that can be readily located, it may be a simple task to retrieve the records. If, however, records are not maintained in that manner, 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.

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

One element of your request involved records relating to employees' exposure to hazardous materials, and the College denied access to those records. While I believe that any identifying details pertaining to employees who might have been exposed to hazardous materials could be deleted on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b)], it is possible if not likely that, following appropriate deletions, other aspects of the records would be available under the law.

Lastly, although the records access officer denied access to certain records, he did not refer to your right to appeal the denial. Section 89(4)(a) of the Freedom of Information Law states in relevant part that:

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

Further, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), which govern the procedural aspects of the Law, state that:

> "(a) The governing body of a public corporation or the head, chief executive or governing body of other agencies shall hear appeals or shall designate a person or body to hear appeals regarding denial of access to records under the Freedom of Information Law.
>
> (b) Denial of access shall be in writing stating the reason therefor and advising the person denied access of his or her right to appeal to

> the person or body established to hear appeals, and that person or body shall be identified by name, title, business address and business telephone number. The records access officer shall not be the appeals officer" (§1401.7).

It is also noted that the state's highest court has held that a failure to inform a person denied access to records of the right to appeal enables that person to seek judicial review of a denial. Citing the Committee's regulations and the Freedom of Information Law, the Court of Appeals in Barrett v. Morgenthau held that:

> "[i]nasmuch as the District Attorney failed to advise petitioner of the availability of an administrative appeal in the office (see, 21 NYCRR 1401.7[b]) and failed to demonstrate in the proceeding that the procedures for such an appeal had, in fact, even been established (see, Public Officers Law [section] 87[1][b], he cannot be heard to complain that petitioner failed to exhaust his administrative remedies" [74 NY 2d 907, 909 (1989)].

In sum, an agency's records access officer has the duty individually, or in that person's role of coordinating the response to a request, to inform a person denied access of the right to appeal as well as the name and address of the person or body to whom an appeal may be directed.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Paul Higgins

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10728

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March 30, 1998

Mr. Leo Felton
92-A-2604
Attica Correctional Facility
Box 149
Attica, NY 14011

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

Dear Mr. Felton:

I have received your letter of March 11 in which you questioned the propriety of a denial of your request for records of the Division of Parole.

As I interpret your letter, you requested certain categories of cases based on a review of the Division's "master index" of records. You indicated that you and your family are not residents of New York, that your wife wants to relocate before you are paroled, and that you are attempting to know of the Division's policy "on inmates being paroled to states they have never held residence in."

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. You did not indicate the basis of the denial of your request. I would conjecture, however, that the denial involved a contention that disclosure would constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Law. If the case records that you requested include detailed personal information pertaining to inmates and their families, for example, the denial might have been appropriate.

Second, on the basis of your remarks, it would appear that you are not interested in knowing the names or identifying details relating to parolees who might have moved to other states. If that is so, rather than requesting the categories of cases noted in your letter, it may be worthwhile to be more direct and request records reflective of the Division's policy, guidelines or procedure regarding

inmates being paroled to jurisdictions in which they have not resided. If such a policy or similar record exists, I believe that it would be available under §87(2)(g)(iii) of the Freedom of Information Law. In the alternative, you might request records, without personally identifying details, involving recent determinations (i.e., those rendered during the past year) relating to the subject of your interest. I note that I am unaware of the manner in determinations are kept or filed, or whether the determinations of your interest can be readily located.

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-10729

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March 31, 1998

Mr. James D. Brewster
[redacted]

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

Dear Mr. Brewster:

I have received your correspondence of March 16, as well as a copy of an appeal under the Freedom of Information Law that you addressed to the Supervisor of the Town of Conquest on March 3. The appeal involves a request for "financial records from the 'corporation' that is contracted by tax dollars to provide fire protection to the residents of the Town..."

You have sought assistance in gaining access to the records in question. From my perspective, the records should likely be disclosed by either the Town or the "corporation". 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 state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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, if the corporation, which you indicated is a not-for-profit corporation, has transmitted any documentation to the Town, the documentation would constitute a "record" of the Town that is subject to rights of access conferred by the Freedom of Information Law.

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

or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, financial records of a not-for profit entity would likely be accessible, for none of the grounds for denial would apply.

Third, assuming that the "corporation" is a volunteer fire company, the State's highest court held nearly two decades ago that volunteer fire companies fall within the coverage of the Freedom of Information Law and must disclose their records in accordance with that statute.

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

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

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

However, in Westchester-Rockland Newspapers v. Kimball [50 NYS 2d 575 (1980)], a case involving access to records relating to a lottery conducted by a volunteer fire company, the Court of Appeals 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.

In sum, records of the corporation maintained by the Town would constitute Town records subject to the Freedom of Information Law, and if the corporation is a volunteer fire company, you could seek records directly from the company, for it, too, would be required to comply with the Freedom of Information Law.

In an effort to enhance compliance with and understanding of the matter, 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. Charles Knapp
Hon. Cindy Lamphere

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10730

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March 31, 1998

Mr. Paul Leon
87-B-0807
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Leon:

I have received your letter of March 15, as well as the correspondence attached to it. You have sought assistance in relation to an unanswered request for records sent in November to the Office of the Westchester County District Attorney.

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

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

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

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

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

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

Second, having reviewed your request, there are several items which in my view would be outside the scope of rights granted by the Freedom of Information Law or which the Office of the District Attorney need not provide. 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..."

Since one aspect of your request involves a pre-sentence report, relevant is §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports. Section 390.50(1) of the Criminal Procedure Law states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. It is suggested that you review that statute.

Another statute that exempts records from disclosure is §190.25(4) of the Criminal Procedure Law, which states in relevant part that:

> "Grand jury proceedings are secret, and no grand juror, or other person specified in subdivision three of this section 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 to "any matter attending a grand jury proceeding", I believe that records of or relating to such proceedings 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.

Lastly, 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 that the decision in Moore specified that the respondent office of a district attorney was "not required to make available for inspection or copying any suppression hearing or trial transcripts of a witness' testimony in its possession, because the transcripts are court records, not agency records" (id. at 680). From my perspective, some of the records that you described as having requested from the District Attorney would likely constitute court records that the agency is not required to provide.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1073I

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April 1, 1998

Ms. Nancy B. Chase
Superintendent of Schools
Hoosick Falls Central School
P.O. Box 192
Hoosick Falls, NY 12090

The staff of the Committee on 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. Chase:

As you are aware, I have received your letter of March 18, which pertains to certification of the correctness of a record made available under the Freedom of Information Law.

Attached to your letter is a request by a member of the public that you, by means of a notarized signature, certify the "authenticity, factuality, and accuracy" of certain records made available to that person.

In this regard, §89(3) of the Freedom of Information Law 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. In essence, the certification is supposed to signify that the applicant received an actual copy of a record maintained by an agency, irrespective of the accuracy or the "factuality" of the contents of the record. Further, there is no requirement in the law that the signature of the person who certifies that a copy of a record is a true copy be notarized.

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-1073 2

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April 2, 1998

Mr. Michael Amrick
[redacted]

Dear Mr. Amrick:

As you are aware, your letter of March 24 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 guidance concerning the State's Freedom of Information Law, a copy of which is enclosed.

With respect to your question, names and salaries of all public employees in New York are public.

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

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.

Although §87(2)(b) permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy", 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.

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

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FOIL-AO-10733

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April 6, 1998

Dr. Peter C. Paciolla
Superintendent of Schools
Mount Sinai Union Free School District
North Country Road
Mount Sinai, NY 11766

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

Dear Dr. Paciolla:

I have received your communication in which you sought clarification relating to comments attributed to me by a member of the Mount Sinai Union Free School District Board of Education.

In a memorandum sent to you by Board member Linda Towler, she wrote that I "told" her that "the superintendent's contract can be discussed in public because it is a public document." While I do not recall the specifics of our conversation of March 31, I do not believe that I would have so stated.

It is clear that a superintendent's contract, like any other contract between a school district and an individual, a firm or an employee organization, is accessible to the public under the Freedom of Information Law. However, it does not follow that a discussion relating to record accessible to the public must, of necessity, be conducted in public or that there may no basis for entry into executive session. I note that the grounds for withholding records under §87(2) of the Freedom of Information Law and the grounds for entry into executive session are not consistent in every instance; in some situations, a record may be withheld, but a discussion of the record must be conducted in public and *vice versa*. For instance, if you, in your capacity as Superintendent, prepare a memorandum in which you recommend a change in policy, that record could be withheld as "intra-agency material" under §87(2)(g) of the Freedom of Information Law. Nevertheless, when the Board discusses a change in policy at a meeting, there would likely be no basis for entry into executive session.

In the context of the matter at hand, again, I believe that a superintendent's employment contract is accessible to the public. However, a discussion pertaining to that person in relation to the contract might justifiably be considered in executive session under §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..."

In short, even though the contract is public, a discussion of one's employment history, for example, could clearly be conducted during an executive session.

Lastly, although a matter may be discussed in executive session, there is no requirement that it must be discussed in executive session. In this regard, 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. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, 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 hope that the foregoing serves to clarify the matter and that I have been of assistance. If you would like to discuss the matter further, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10734

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April 6, 1998

Mr. Jack Maddaloni
93-A-2518
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 March 17, as well as the materials attached to it.

You referred to a situation in which you requested records pertaining to your case nearly two years ago from the Office of the Bronx County District Attorney. At that time, you were informed that your trial folder could not be located. It appears that the records sought were later found and used by the same agency. Consequently, on March 16, you sent a new request for the records originally sought to the records access officer. You have sought "an opinion, advice, or actual intervention" in the matter.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to intervene, in the legal sense, on behalf of an applicant for records, or to enforce the law. From my perspective, however, by seeking the records from the records access officer with an explanation for the renewal of your request, you engaged in an appropriate course of action. In addition to remarks offered in an opinion addressed to you on June 17, 1997, I offer the following comments.

First, 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).

The extent to which the records sought have been disclosed to you or your attorney is unknown to me. Nevertheless, insofar as copies of the records are maintained by your attorney, I do not believe that the Office of the District Attorney would be obliged to redisclose its records.

Second, while the courts are not subject to the Freedom of Information Law, court records are frequently available under other statutes (see e.g., Judiciary Law, §255). As such, an alternative source of many of the records in which you are interested may be the court in which the proceeding was conducted.

Lastly, insofar as your request does not involve records previously disclosed to you or your attorney and the Office of the District Attorney can locate the records, I believe that that agency is obliged to respond in a manner consistent with the Freedom of Information Law. Since you complained about a "blanket denial" of a previous request, 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. 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 decision involving a blanket denial of a request by an agency, 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).

Th 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). 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.).

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

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April 6, 1998

TO: Terry Swierzowski <tswierzo@ps.fmcc.suny.edu>

FROM: Robert J. Freeman, Executive Director RJF

The staff of the Committee on 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. Swierzowski:

I have received your letter of March 20 in which you referred to a committee in the process of creating a new evaluation form to be used relative to Fulton-Montgomery Community College's support staff. You indicated that there are several performance factors and asked whether various elements of the evaluation would be accessible to the public under the Freedom of Information Law.

In this regard, I offer the following comments.

First, there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. 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.

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 to the records in question.

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].

From my perspective, the evaluation form as you described it essentially contains three components.

One component involves performance factors, descriptions 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 the forms contain information analogous to that described, I believe that those portions would be available. In terms of privacy, a duties description or statement of goals would clearly be relevant to the performance of the official duties of the incumbent of the position. Further, that kind of information generally relates to the position and would pertain to any person who holds that position. As such, I believe that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. In terms of §87(2)(g), a duties description or statement of goals would be reflective of the policy of an agency regarding the performance standards inherent in a position and, therefore, in my view, would be available under §87(2)(g)(iii). It might also be considered factual information available under §87(2)(g)(i).

The second component involves a reviewer's subjective analysis or opinion of how well or poorly the standards or duties have been carried out or the goals have been achieved. In my opinion, that aspect of an evaluation could be withheld under §87(2)(g) on the ground that it constitutes an opinion concerning performance.

A third possible component would appear to be 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.

It appears that there may be additional comments, and the same kind of analysis would be pertinent in consideration of disclosure of those aspects of the records. I would conjecture that many of the comments would reflect opinions that could be withheld. Insofar as the records include factual information, the only consideration would involve the extent to which disclosure would constitute an unwarranted invasion of personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

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April 6, 1998

E-Mail

TO: Ken Warren [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Warren:

I have received your communication of March 11 sent to the Department of State. The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and opinions concerning the New York Freedom of Information Law. In brief, you wrote that you have attempted without success to obtain "a training manual/policy manual" from the State Education Department pertaining to the Board of Pharmacy and the Office of Professional Discipline.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. I am unfamiliar with the contents of the manuals in which you are interested. However, from my perspective, it appears that two of the grounds for denial may be relevant in determining 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 manuals would consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that they would be available, unless a different basis for denial could be asserted.

The other 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."

Insofar as the manuals in question relate to professional discipline, investigations and the like, §87(2)(e)(iv) may be pertinent. 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 State's highest court, 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, for example, could likely be withheld. It is noted that in a decision which dealt with a request for certain regulations of the State Police, the Court of Appeals found that some aspects of the regulations were non-routine, and that disclosure could "allow miscreants to tailor their activities to evade detection" [De Zimm v. Connelie, 64 NY 2d 860 (1985)]. Nevertheless, other portions of the records might be "routine" and might not if disclosed preclude employees from carrying out their duties effectively.

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer

STATE OF NEW YORK
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April 6, 1998

Robert J. La Reddola, Esq.
28 East Old Country Road
Hicksville, NY 11801-4207

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

Dear Mr. La Reddola:

I have received your letter of March 20, as well as the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the Nassau County Police Department for a variety of records relating to pistol licenses.

As I understand the matter, in brief, you are interested in knowing the basis used by the Department for determining whether to issue a pistol license without administrative restrictions and in reviewing the licenses issued without such restrictions for the past ten years. According to the correspondence, although certain aspects of your request were granted, several categories of the documentation that you requested are apparently not maintained by the Department, notably standards concerning the issuance of a pistol license and the establishment of proper cause for obtaining a pistol license or certain kind of such license. The Department has contended that only the names and addresses of licensees are accessible under law, and consequently, it has denied access to the remainder of the information contained in licenses.

From my perspective, various aspects of your contentions are accurate; I disagree, however, with some of your conclusions or demands. In this regard, I offer the following comments.

First, as you are aware, this office advised in an opinion rendered on January 25, 1995, that the Penal Law, §400.00(5) as recently amended, requires that the names and addresses of licensees must be disclosed, and that since that provision does not specify whether other aspects of approved pistol licenses must be disclosed or withheld, rights of access to the remaining portions of such records should be determined pursuant to the Freedom of Information Law. This is not to suggest that the remainder of the records must be disclosed, but rather that they would be accessible or deniable, in whole or in part, based on the extent to which one or more of the grounds for denial

appearing in §87(2) of that statute may properly be asserted. In short, while I disagree with the Department's stance that only names and addresses are available, various aspects of the records might nonetheless be withheld.

It was suggested in the 1995 opinion that numerous aspects of approved applications could be withheld pursuant to §§87(2)(b) and 89(2)(b) on the ground that disclosure would constitute "an unwarranted invasion of personal privacy." Additionally, depending on the content of the record, §87(2)(f) might also be pertinent, for that provision authorizes an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." If, for example, disclosure of the nature of a licensee's work related duties would place that person in jeopardy, that kind of information might justifiably be withheld. It was also advised, however, that other information in an approved application would be available, such as the date and county of issuance, the expiration date of the license, the name and title of the licensing officer, and any restrictions.

Second, notwithstanding the foregoing, a potentially significant 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 Department, to the 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. If, for example, the Department maintains license records only alphabetically or chronologically, and staff would be required to review each such record in order to locate those of your interest, I do not believe that the request would reasonably describe the records. On the other hand, if the Department maintains the records, whether manually or electronically, in a manner that permits staff to retrieve those of your interest based on certain identifiers, filing methods or fields in a computer, I believe that the request would have reasonably described the records.

Third, in an appeal of December 10, it was concluded by your client that the Department "must produce a descriptive index of withheld documents identified as responsive to any denied request and prove the applicability of the claimed exemption(s)." Similarly, in the initial request of October 20, your client asked, with respect to any document that is withheld in whole or in part, that the Department "provide for each such withheld document the date and title of document, the identity of every person who prepared, signed or participated in its preparation, a description of its subject matter, the names and addresses of all persons to whom the document has been shown or disseminated, and the basis asserted for withholding or redacting the documents..." In short, the Freedom of Information Law does not require that an agency provide that degree of detail in response to a request or an administrative appeal. Further, 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 include a description of the reason for withholding each document. 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)].

Lastly, since the County has indicated that it does not maintain certain records that you requested, 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

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Baribault, Deputy Chief, Legal Affairs
Detective Sergeant Thomas J. King

FOIL-AO-10738

From: Robert Freeman
To: SMTP("gcreps@scott.skidmore.edu")
Date: 4/7/98 9:08am
Subject: Re: irs listing/close but no cigar -Reply/ -Reply

Mr. Creps:

I think that you may be confused. You refer to the Saratoga County Rural Preservation Company (SCRPC) as a "public corporation" because it filed a certificate of incorporation with the Department of State and also submits a statement to the Charities Bureau of the Attorney General's Office. That does mean that it is a governmental entity that falls within the coverage of the Freedom of Information Law. Usually, those kinds of filings indicate the opposite, that entities are private and not governmental in nature.

It is noted that the term "public corporation" is defined in New York law (see General Construction Law, section 66) to mean a municipal corporation, such as a county, city, town or village; a district corporation, such as a school district, a water district, etc.; or a public benefit corporation, such as a public authority, such as the Thruway Authority or a public housing authority. In each instance, a public corporation is a governmental entity.

While the SCRPC may have filed or be required to file documentation with certain government agencies, it is not a public corporation or a governmental entity. If that is so, it is not an "agency" subject to the Freedom of Information Law.

The opinion sent to you on March 26 distinguishes between the SCRPC and the Saratoga Springs Housing Authority. Again, the former is not an "agency" subject to the Freedom of Information Law; the latter, a public corporation, is subject to that statute.

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

cc: Daniel G. Chertok

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 7, 1998

John E. Fitzgerald, Esq.
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 March 20, as well as a copy of the City of Glens Falls Code of Ethics. You have sought an advisory opinion concerning public access to financial disclosure statements prepared by City officials and filed with the Glens Falls Ethics Board.

In this regard, I offer the following comments.

First, it appears that the City's Code of Ethics was updated in accordance with the Ethics in Government Act ("the Act"). The provisions of the Act pertaining to municipalities are found in the General Municipal Law, Article 18. 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.

Second, as you may be aware, the Freedom of Information Law pertains to all agency records, and §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.

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 this instance, I believe that 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), financial disclosure statements filed with the Commission were available, except those portions indicating categories of value or amount or when it was found that reported items "have no material bearing on the discharge of the reporting person's official duties." In my view, the same information could have been 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)].

By means of example, while the law might require a disclosure of the fact that a city official 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 or liabilities, but they may be withheld from the public insofar as they indicate the value or amount of the assets or liabilities.

If you would like to discus the matter further, 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
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April 7, 1998

John E. Fitzgerald, Esq.
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 March 20, as well as a copy of the City of Glens Falls Code of Ethics. You have sought an advisory opinion concerning public access to financial disclosure statements prepared by City officials and filed with the Glens Falls Ethics Board.

In this regard, I offer the following comments.

First, it appears that the City's Code of Ethics was updated in accordance with the Ethics in Government Act ("the Act"). The provisions of the Act pertaining to municipalities are found in the General Municipal Law, Article 18. 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.

Second, as you may be aware, the Freedom of Information Law pertains to all agency records, and §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.

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> (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;
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> (2) notices of delinquency sent under subdivision eleven of this section;
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>
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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:

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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 this instance, I believe that 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), financial disclosure statements filed with the Commission were available, except those portions indicating categories of value or amount or when it was found that reported items "have no material bearing on the discharge of the reporting person's official duties." In my view, the same information could have been 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)].

By means of example, while the law might require a disclosure of the fact that a city official 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 or liabilities, but they may be withheld from the public insofar as they indicate the value or amount of the assets or liabilities.

If you would like to discus the matter further, 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
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April 7, 1998

Mr. David D. Stone
[redacted]

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

Dear Mr. Stone:

I have received your recent undated letter in which you sought "documentation" concerning a variety of questions.

The first involves "tape recorder as a back up only at a meeting and clerk to take minutes." If I understand your comment correctly, it is common for a clerk to tape record meetings as an aid in the preparation of minutes. While a tape recording would likely contain the elements of minutes, minutes should be nonetheless reduced to writing in order that they constitute a permanent, written record that can be viewed by the public. Perhaps just as important, a municipality often might need a permanent written record readily accessible to its officials who must refer to or rely upon the minutes in the performance of their duties. I point out, too, that in an opinion rendered by the State Comptroller, it was found that, although tape recordings may be used as an aid in compiling minutes, they do not constitute the "official record" (1978 Op. St. Compt. File #280).

Second, the State Archives and Records Administration, pursuant to provisions of the Arts and Cultural Affairs Law, develops schedules indicating minimum retention periods for various kinds of records. A town or village clerk, in that person's capacity as "records management officer", would have a copy of the retention schedule, which indicates that tape recordings of meetings must be retained for a minimum of four months. The retention schedule may also be obtained from the State Archives and Records Administration by calling (518)474-6926.

Third, you sought a basis for a statement that minutes must be available within two weeks following a meeting. In this regard, subdivision (3) of §106 of the Open Meetings Law states 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."

As such, a public body has two weeks from a meeting to prepare minutes and make them available.

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

The next statement is that "monthly financial statements given to board also available to public on request." Here I direct your attention to the Freedom of Information Law. That statute, in brief, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, a monthly financial statement, i.e., a statement detailing revenues and expenditures, would be available for none of the grounds for denial would apply.

You asked whether a village attorney is required "to provide the local laws and answer legal questions proposed by residents in a timely manner." If a person is seeking copies of local laws, they would be available under the Freedom of Information Law. Those kinds of records can generally be obtained from a municipal clerk. I believe that a village attorney is designated or appointed to perform legal work for a village board of trustees and other village officials. I know of no requirement that a village attorney answer questions raised by residents.

Similarly, although the Freedom of Information Law requires that agencies respond to requests for and grant access to records and the Open Meetings Law provides a right to attend meetings of public bodies, neither law requires that government officials answer questions. This is not to suggest that government officials cannot answer questions, but rather that they are not required to do so under the two statutes cited. It is also noted 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 requests.

You referred to efforts in obtaining salary information. While the nature of your inquiry is not completely clear, I point out that a payroll list must be maintained by each agency. Specifically, §87(3)(b) of the Freedom of Information Law states in relevant part that:

> "Each agency shall maintain...

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

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

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.

Lastly, you referred to a requirement that you must fill out "the correct form" and to delays in responses to requests. In this regard, I do not believe that an agency can require that a request be made on a prescribed form. The Freedom of Information Law, §89(3), as well as the regulations promulgated by the Committee (§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.

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 7, 1998

Mr. Raymond Ring
[redacted]

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

Dear Mr. Ring:

I have received today a letter from Attorney General Dennis Vacco, as well as the content of an E-mail message that you sent to him. He has asked that I respond.

The Committee on Open Government, a unit of the Department of State, is authorized to provide advice and guidance concerning public access to government records, primarily under the Freedom of Information Law.

According to the material forwarded by the Attorney General, you asked whether divorce petitions filed in New York State courts are available to the public.

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."

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

Frequently, court records are available under other provisions of law. However, in this instance, the kinds of records in which you are interested must generally be shielded from the public.

Access to records relating to matrimonial proceedings is governed by §235(1) of the Domestic Relations Law, which states that:

> "An officer of the court with whom the proceedings in a matrimonial action or a written statement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of act, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination of perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court."

Based on the foregoing, as a general matter, the details of a matrimonial proceeding are considered confidential.

However, subdivision (3) of §235 states that:

> "Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a 'certification of disposition', duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action."

While any person may request a "certification of disposition" which indicates that a divorce has been granted, I believe that other records involving separation and divorce are exempt from disclosure, except as provided in subdivision (1) of §235.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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April 8, 1998

Mr. Indelicio Afanador
92-T-0211
Mid-Orange Correctional Facility
900 Kings Highway
Warwick, NY 10990

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

Dear Mr. Afanador:

I have received your letter of March 18 in which you assistance in relation to your unanswered requests records made to the Department of Correctional Services.

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

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

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

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

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

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

For your information, the person designated by the Department to determine appeals is Anthony J. Annucci, Counsel to the Department. Prior to an appeal, it is suggested that you speak to the inmate records coordinator in an effort to ascertain the status of your request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 8, 1998

Mr. Harry Maples
96-A-8007 B11 32T
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. Maples:

I have received your letter of February 24, which for reasons unknown, did not reach this office until March 23. You have sought assistance in obtaining records pertaining to your case from the Office of the Queens County District Attorney. You indicated that no response to the request had been given as of the date of your letter to this office.

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:

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In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 decision by the Court of Appeals to which you referred 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10744

41 State Street, Albany, New York 12231
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April 8, 1998

Mr. Larry Cross
[redacted]

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

Dear Mr. Cross:

I have received your letter of March 23. You have sought assistance in obtaining records relating to your arrest from the Town of Whitestown. You indicated that the Town, to date, is "ignoring" your requests.

In this regard, I note that you referred to the federal Freedom of Information and Privacy Acts in your requests. Those statutes pertain to records maintained by federal agencies; they are not applicable to records of a unit of local government. The statute that generally governs rights of access to records maintained by entities of state and local government is the New York Freedom of Information Law.

Since you have not received responses to your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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 [Gould v. New York City Police Department, 89 NY 2d 267 (1996)]..

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.

Based on Gould, 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 the records.

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 potentially 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: Supervisor
Chief of Police

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10745

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April 8, 1998

Ms. Linda A. Mangano
[redacted]

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

Dear Ms. Mangano:

I have received your letter of March 20 in which you asked whether, in my view, the document that you attached is a "list". The document is marked "August 1997", page 39, "Administrative Fee - Overnight Parking", "Village of Ossining Cash Receipts", and includes several columns of information. The first involves dates that appear chronologically, the remaining columns include names, addresses, whether a payment is made in cash or by check, vehicle plate number and the fee. You have asked whether when requesting a "list" contained within a file, the request "reasonably described" the information sought in a manner consistent with the Freedom of Information Law.

I cannot respond unequivocally, for I am unaware of the nature of any request that might have been made. The document in question appears to be a list, but the nature of a request would likely determine whether or the extent to which a request would have met the standard of reasonably describing the records. If a request was made for a list of cash receipts relating to overnight parking for a particular time period, since the document is arranged chronologically, it would appear that a request made on that basis would reasonably describe the records. On the other hand, if a request was made for records indicating payments made by particular individuals, by address or by license number, each line of each page of such cash receipts would have to be reviewed in order to locate the information sought. In that situation, it would be questionable, in my view, whether such a request would meet the requirement of reasonably describing 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-10746

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April 8, 1998

Hon. Patricia Haaf
Town Clerk
Town of Fallsburg
P.O. Box 830
South Fallsburg, NY 12779

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

Dear Ms. Haaf:

I have received your letter of March 24 in which you sought guidance concerning a request for "exact reproduced duplicate copies of all the audiotaped recordings" made of a meeting of the Town of Fallsburg Zoning Board of Appeals on March 19. The applicant also sought a "certification that the reproduced copies are exact copies." Alternatively, if the tapes cannot be reproduced, he asked to listen to and copy the recordings with his own recording device.

From my perspective, the Town is required to reproduce the tape recordings if it has the ability do so and the applicant pays the appropriate fee or to make the tape available for listening and copying. 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:

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

Based on the foregoing, assuming that the Town maintains a tape recording of the meeting in question, the tape would constitute a "record" that falls within the coverage of the Freedom of Information Law.

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

Third, if the Town has the ability to prepare a duplicate recording, I believe that it would be obliged to do so [see §89(3)] upon payment of the requisite fee. I note that §87(1)(b)(iii) indicates that the fee for copies of records other than photocopies should be based on the actual cost of reproduction. If the Town cannot copy the tape recording, an applicant would have the right to listen to the tape or copy it. In my view, the Town would not be required to relinquish custody of a tape recording or any record; however, in this instance, presumably the applicant could place his tape recorder next to the Town's recorder, and simply permit his machine to record the sound that emanates from the Town's machine.

Lastly, I believe that the Town is required, on request, to provide a certification described in 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..." In my view, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 8, 1998

Mr. Daniel S. Hyman
[redacted]

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

Dear Mr. Hyman:

I have received your letter of March 23, as well as the correspondence attached to it.

According to your letter, you reside in an affordable housing complex in the Village of Montebello, and you wrote that owners of properties within the complex are permitted to sell their property only to a person "on an official list, approved and maintained by the Village..." In response to a request identifying those on the waiting list, you were informed that "since there are income limitations to purchase a unit in this development, someone viewing the list would learn the income limitations of those on it." You have sought assistance in obtaining the list.

If I understand the matter accurately, the denial of access by the Village would, in my view, have been consistent with law. In this regard, I offer the following comments.

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

Of relevance under the circumstances is §87(2)(b) of the Freedom of Information Law, which enables an agency to withhold records or portions of records the disclosure of which would result in "an unwarranted invasion of personal privacy." While I believe that the Freedom of Information Law is intended to ensure that government is accountable, the privacy provisions of the Law in my view enable government to prevent disclosures concerning the personal or intimate details of individuals' lives. If, for example, applicants for housing must meet certain age or income requirements, it is likely, in my opinion, that a court would determine the names of applicants could be withheld. From my perspective, a disclosure that permits the public to determine the general income level of persons who apply for housing would constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a

certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, by means of analogy, 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., §697, Tax Law).

In short, if indeed there is an income qualification and only those persons whose income is below is certain level are identified on the list of your interest, I would agree with the Village's contention that disclosure would constitute an unwarranted invasion of personal privacy and that the list may be withheld.

I hope that the foregoing enhances your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Kathryn Ellsworth, Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1074 8

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April 9, 1998

Mr. Daniel Mundy
[redacted]

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

Dear Mundy:

I have received your letter of March 20, as well as the materials attached to it. You have sought assistance in relation to a request for records of the New York City Department of Citywide Administrative Services.

The request pertains to the assignment of a lease and a reference to "certain factual allegations." You wrote that you have "been mentioned in connection with this allegation within the community" and you sought "the substance of these allegations together with the source of same." The Department disclosed certain letters to you, but indicated that "any documents and records which might be deemed responsive to your request are exempt from disclosure pursuant to Section 87(2)(g) of the Public Officers Law."

Although I am unfamiliar with records at issue, I offer the following comments.

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

Second, the provision cited as the basis for denial deals with "inter-agency and intra-agency materials." In this regard, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). If the records sought consist of communications sent to the Department by members of the public, they would not constitute inter-agency or intra-agency materials, and the exception cited by the Department, in my view, would not apply.

If, however, §87(2)(g) is applicable, 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, the contents of inter-agency and intra-agency materials determine the extent to which they may be withheld. Of possible significance is a decision rendered by the Court of Appeals, the State's highest court, in which it was 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 v. New York City Police Department, 89 NY 2d 267, 276 (1996)].

The Court noted further that:

> "...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., 277).

Based on the foregoing, if internal memoranda include expressions of opinion, recommendations and the like expressed by agency staff, those portions clearly can be withheld. Reference to comments by others, however, would not, according to the decision, be protected by §87(2)(g). It is emphasized, however, that the Court was careful to point out that other grounds for denial of access might apply. For instance, since you sought the source of allegations, §87(2)(b) would appear to be pertinent. That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." If §87(2)(b) is applicable, the Department could withhold personally identifiable details contained within the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Ernest F. Hart
Kenneth M. Leibowitz

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 10, 1998

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Kloeber:

I have received your communication of March 25 in which you raised questions concerning the ability of agencies of government in New York to copyright records that are subject to the Freedom of Information Law and with respect to the effect of a "copyright restriction" that "effectively limits the use of that record even once it is obtained under FOIL."

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)].

In short, as suggested at the outset, insofar as there may be a conflict between an agency's assertion of copyright protection and the Freedom of Information Law, I believe that the Freedom of Information Law would prevail and govern.

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

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FOIL-AO-10750

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April 13, 1998

Ms. Susan L. Hillock
[redacted]

The staff of the Committee on 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. Hillock:

I have received your letter of March 27, as well as related materials. You have sought an advisory opinion concerning the propriety of an executive session held by the Town of Grand Island Planning Board on February 23 and a request for a list of properties to which reference was made at that meeting.

First, you wrote that "no formal motion [was] made, nor was there a vote taken prior to entering executive session." You added that prior to the executive session, the Board discussed a "list of business properties" and indicated that the matter involved "pending litigation."

In this regard, 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.

Second, the provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held by the Appellate Division that:

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

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

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

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

The Daily Gazette decision was cited by the Appellate Division in a case in which one of the issues involved the adequacy of a motion to conduct an executive session to discuss what was characterized as "a personnel issue." Specifically, 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 Plattsbrugh, 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).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of 'a personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person' (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to 'a personnel issue' is the functional equivalent of identifying 'a particular person' " [Gordon v. Village of Monticello, 207 AD 2d 55,58 (1994)].

Based upon the foregoing, there is judicial authority indicating that motions for entry into executive session cannot validly be as general or vague as that described in your letter.

Lastly, although you apparently requested the list of properties in February, as of the date of your letter to this office, the request had been neither granted nor denied.

Since there appears to be some question relating to the existence of the list, I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of that statute defines the term "record" broadly to include:

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

Based on the foregoing, if the list exists, I believe that it would constitute a Town 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 also 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)].

In an effort to enhance compliance with and understanding of the Open Meetings and Freedom of Information Laws, copies of this response will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Planning Board
Nancy J. Samrany, Town Clerk
Betty Lantz, Deputy Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 13, 1998

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:

I have received your communication of March 27 and the materials related to it. You have sought an opinion concerning a denial of access to certain records by the Office of the State Comptroller.

As I understand the matter, you requested records pertaining to the Hyde Park Fire and Water District from the Office of the State Comptroller. Following an exhaustive search, the Records Access Officer indicated that 477 pages of records falling within the scope of your request had been located, and that 473 were determined to be accessible. The remaining materials were determined to be deniable under §87(2)(g) of the Freedom of Information Law on the ground that they consist of opinions, advice and recommendations prepared by agency auditors and attorneys. You were informed that the accessible records would be made available upon payment of the appropriate fee.

From my perspective, the response by the Records Access Officer was fully 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 records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, the basis for the denial cited by the Records Access Officer, §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 response referred specifically to the kinds of information that may properly be withheld, I believe that the denial of access to those elements of the records was appropriate.

Lastly, I note that it has been held that an agency may require that fees be paid in advance of reproduction of requested records, particularly when, as in this instance, the volume is substantial (see Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982.)

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Jeffrey R. Gordon, Records Access Officer
Albert W. Brooks, Records Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO 1075 2

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April 13, 1998

Mr. Donald Strickland
85-D-0109
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. Strickland:

I have received your letter of March 24 in which you sought assistance in obtaining notes that relate to your arrest prepared by parole officers during a specified period.

In this regard, I offer the following comments.

First, if such notes exist, I believe that they would fall within the coverage of 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 or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memorandan, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules regulations and codes."

Based on the foregoing, if the notes that you are seeking were prepared and continue to exist, they would constitute "records" that fall within the scope of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. 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 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 [Gould v. New York City Police Department, 89 NY 2d 267 (1996)]..

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.

Based on Gould, 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 the records.

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:tt

cc: R. Juarbe, Sr.
David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 13, 1998

Ms. Carol D. Hansen
Village Clerk
Incorporated Village of Lynbrook
One Columbus Drive
Lynbrook, NY 11563-7021

The staff of the Committee on 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. Hansen:

I have received your letter of March 24, as well as the materials attached to it. You have questioned whether the Village of Lynbrook's "assessment roll [that] contains the names and addresses of almost six thousand homes and commercial establishments" must be made available, even for a commercial purpose.

Based on judicial decisions, the assessment roll would be accessible to any person, irrespective of its intended use. In this regard, I offer the following comments.

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

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

Based upon the language quoted above, if information is maintained in some physical form, it would in my opinion constitute a "record" subject to rights of access conferred by the Law. Further, the definition of "record" includes specific reference to computer tapes and discs, and it was held more than ten years ago that "[i]nformation is increasingly being stored in computers and access to such data should not be restricted merely because it is not in printed form" [Babigian v. Evans, 427 NYS

2d 688, 691 (1980); aff'd 97 AD 2d 992 (1983); see also, Szikszay v. Buelow, 436 NYS 2d 558 (1981)].

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Moreover, 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 some seventeen years ago, the issue was whether county assessment rolls had to be disclosed in computer tape format to an applicant seeking them for a commercial purpose. In holding that they must be made available, the court found that assessment rolls or equivalent records are public records and were accessible under other provisions of law before the enactment of the Freedom of Information Law. Specifically, in Szikszay, supra, 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 §89(6)].

The court also stated that:

> "...the records in question can be viewed by any person and presumably copies of portions obtained, simply by walking into the appropriate county, city, or town office. It appears that petitioner could obtain the information he seeks if he wanted to spend the time to go through the records manually and copy the necessary information. Therefore, the balancing of interests, otherwise required, between the right of individual privacy on the one hand and the public interest in dissemination of information on the other...need not be undertaken...
>
> "Assessment records are public information pursuant to other provisions of law and have been for sometime. The form of the records and petitioner' s purpose in seeking them do not alter their public character or petitioner's concomitant right to inspect and copy" (id.).

Based upon the foregoing, I believe that an assessment roll or its equivalent must be disclosed. I point out that the same conclusion was reached by Supreme Court in Nassau County in an unreported decision [Real Estate Data, Inc. v. County of Nassau, Supreme Court, Nassau County, September 18, 1981].

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-1075 4

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April 14, 1998

Ms. Joanne Cunningham
[redacted]

The staff of the Committee 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 Mrs. Cunningham:

I have received your letter of March 25, as well as materials forwarded by the Town of Hopewell in conjunction with your appeal as required by §89(4)(a) of the Freedom of Information Law.

You and others requested from the Town "copies of all documentation and correspondence pertaining to the complaint, investigation and findings in the matter of alleged criminal conduct by the former Highway Superintendent Kenneth Jones." Because there was "no actual or proven wrongdoing", the Town Board denied your appeal on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

From my perspective, the Town's denial of access was consistent with law. Although we discussed the matter during a telephone conversation, you asked that I confirm my opinion in writing. In this regard, I offer the following comments.

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

The provision cited by the Town, §87(2)(b), would justify, in my opinion, a denial of access. 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)].

Your correspondence also includes reference to a request for the Town's "subject matter list." Here I point out that, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. One 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:tt

cc: Town Board
Mary Ann Trickey, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10755

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April 14, 1998

Ms. Lynne Bernstein
Trustee
Byram Hills School District
29 Hickory Pass
Bedford, NY 10506

The staff of the Committee 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. Bernstein:

As you are aware, I have received your memorandum of March 30 concerning the release of "student directory information." Attached to the memorandum is a copy of District policies concerning directory information and the "school mailing list."

The policy essentially defines the scope of directory information and states that the District "shall not release information to a third party group or individual without the individual consent of the student." In relation to the foregoing, you raised the following questions:

> "1. Must our policy state the mechanism for obtaining permission to release directory information (or request not to release such information)? Are we required to establish and publish administrative procedures for doing so?
>
> "2. Is our policy adequate in referring to "consent of the student" rather than of the parents? (We are a K-12 district.)."

In this regard, by way of background, the Family Educational Rights and Privacy Act (FERPA; 20 USC §1232g) 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 "eligible student" is defined in the Code of Federal Regulations to mean "student who has reached 18 years of age or is attending an institution of post-secondary education" (34 CFR §99.3).

An exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education (§99.3) 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 to eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Specifically, §99.37 of the regulations promulgated pursuant to FERPA state in relevant part that:

> "(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --
>
> (1) The types of personally identifiable information that the agency or institution has designated as directory information;
>
> (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
>
> (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information."

The regulations also indicate that a consent to disclose can only be given by the parent of a student under the age of eighteen; students have no rights under FERPA until they reach the age of eighteen. As such, if a student is under the agency of eighteen, his or her consent, from my perspective, is irrelevant.

With respect to the mailing list, the policy states that:

> "The board, acting through the superintendent's office, may allow use of the school district's mailing list to district or community organizations for school-related, student-oriented, or educational activities not inconsistent with the regular school program.
>
> "Material to be disseminated must not be commercially solicitous, politically partisan, or religion oriented.
>
> "The board retains the right to refuse permission when in its judgment such refusal is in the best interest of the district."

Based on our discussion, it is your belief that the record in question is essentially a list of the addresses of all taxpayers within the District. If that is so, I believe that the policy is, in some respects, inconsistent with the Freedom of Information Law. A list of taxpayers or residents would not signify any parental or similar connection with the School District; it would simply refer to residents of the District. In that circumstance, FERPA would not be applicable and the Freedom of Information Law would govern rights of access. 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.

The only situation in which a mailing list could be withheld would involve §89(2)(b)(iii) of the Freedom of Information Law, which authorizes an agency to withhold a list of names and addresses, if the list would be used for "commercial or fund-raising purposes." In all other circumstances, the list would be public. I note that the policy indicates that the list "must not be" disclosed if it is sought for "politically partisan" purposes and that the Board can choose to deny access when disclosure would not be "in the best interest of the district." From my perspective, such restrictions could not legally be justified. In a case in which a school district resident sought a district-wide mailing list for a political purpose, i.e., to express his opposition to the district's proposed budget, the Court determined that the list must be disclosed (Samuel v. Mace and Penfield Central School District, Supreme Court, Monroe County, December 18, 1991).

If the District maintains a list of parents of students, such a record would fall within the scope of FERPA. As indicated earlier, that statute pertains to information personally identifiable to a student. According to the federal regulations, "personally identifiable information" includes not only the student's name but the name of student's parents or other family member and the address of the student or his or her family (§99.3). Consequently, I do not believe that a list of parents of students could be disclosed without consent given by parents identified in the list.

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

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April 14, 1998

Mr. Curtis G. White
91-A-3833
Marcy Correctional Facility
P.O. Box 5000 - S. Block
Marcy, NY 13403-5000

The staff of the Committee on Open 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 April 12 in which you requested records from this office and raised questions concerning the Freedom of Information Law in relation to the City of Albany Police Department.

You asked initially whether the Department is "susceptible to section 87(2) for their procedures used and/or documents used for processing arrested persons." In this regard, the City of Albany, including its departments, constitutes an "agency" required to comply with the Freedom of Information Law. While I am unfamiliar with the contents of the records that you are seeking, 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.

Second, you asked whether the Department maintains a "master list detailing procedures used for processing arrested persons", and, if there is such a list, you asked that this office make it available to you. Here I point out that the Committee on Open Government is authorized to provide advice concerning access to government records, primarily under the Freedom of Information Law. The Committee does not maintain possession or control of records generally. In short, I cannot provide the records sought, because this office does not possess them.

A request for the records of your interest should be directed 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 for records. In the context of your inquiry, I believe that the records access officer for the City of Albany is the City Clerk, and it is suggested that you send a request to her.

Lastly, one aspect of your request involves a "master list". In this regard, reference to a "master index" appears in a section of the regulations promulgated by the Department of Correctional Services that 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.

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-10756

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April 14, 1998

Mr. Robert Friedman
Town Attorney
Town of Clarence
One Town Place
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 Mr. Friedman:

I have received your letter of March 27 and appreciate your kind words. You have sought an advisory opinion concerning certain aspects of the revised Code of Ethics adopted by the Town of Clarence.

You asked initially which portions of the Annual Statement of Disclosure should be redacted prior to disclosure under the Freedom of Information Law. Having reviewed the content of the Annual Statement of Disclosure, it is, in great measure, reflective of provisions appearing in §812 of the General Municipal Law and §73-a of the Public Officers Law. In general, the disclosure statements filed under those statutes are accessible to the public, except to the extent that they indicate the value, or category of value within certain ranges, of an asset or liability. The substantive portions of the Town's disclosure statement do not include a requirement that the amount or value of an asset or liability be indicated. As such, I believe that the portions of the statement appearing on pages 20 and 21 of the brochure should be disclosed.

On page 19, a person required to submit the statement must include the names of his or her spouse and dependents. It is questionable in my view whether the names of a spouse or dependents must be disclosed. I would contend that disclosure of those names would constitute an unwarranted invasion of personal privacy and, therefore, could be withheld.

Next, you asked whether the Code should be amended to delete certain provisions "as being in violation of FOIL because of the requirements of confidentiality or non-disclosure." From my perspective, the provisions to which you referred are inconsistent with the Freedom of Information Law in terms of their language. In several instances, however, there may be no inconsistency in terms of the result.

The difficulty in my view is that there are several references in the Code 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.

More specifically, §19.8(A)(2) indicates that a request for an advisory opinion shall be confidential. Assuming that a request is made by a Town officer or employee, a request would constitute intra-agency material. In addition, the contents of such a request could likely be withheld as an unwarranted invasion of personal privacy. Section 19.8(A)(3) refers to advisory opinions

rendered by the Ethics board being confidential. Again, while I do not believe that they may be validly characterized as "confidential", they would nonetheless constitute intra-agency materials that could be withheld under §87(2)(g). Section 19.8(C)(5) refers in part to a complaint that is dismissed which "shall remain confidential." For reasons discussed earlier, if a complaint is dismissed or allegation cannot be substantiated, it has been determined that such records may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. Rather than being "confidential", the record would be deniable. Section 19.11(B) refers to a certain document being considered "confidential." Again, while the kinds of records listed could likely be withheld, the term "confidential" is in my view technically inaccurate.

Section 19.1(C) states that unless the disclosure is required or authorized by law or made by the subject of an Annual Statement of Disclosure, it is a violation of the Code for any other person to disclose the Statement. The kind of circumstance referenced in that provision in my view is separate and distinct from a situation in which a person seeks records under the Freedom of Information Law. In short, the Freedom of Information Law in my view has little bearing upon the provision in question, which deals with the Town's control of its 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
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April 14, 1998

Ms. Gay H. Williams
City Attorney
City of Oswego
City Hall
Oswego, NY 13126

Mr. Miles Becker
[redacted]

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

Dear Ms. Williams and Mr. Becker:

I have received correspondence from both of you recently that pertains to two requests made under the Freedom of Information Law for the same or similar records. One request was made by Mr. Becker; the other by Mr. Luis Perez of the Syracuse Newspapers. As I understand the matter, both requests involve records indicating services rendered by and monies paid to an attorney or his firm by the City of Oswego. Ms. Williams appears to have denied both requests in their entirety.

From my perspective, while some aspects of the records sought might justifiably have been withheld, it is likely that many others should be disclosed. In this regard, I offer the following comments.

First, in Mr. Becker's letter to Ms. Williams reference was made to a denial based upon §96 of the Public Officers Law. Section 96 is part of the Personal Privacy Protection Law. That statute does not apply to a unit of local government, such as the City of Oswego [see definition of "agency" for purposes of the Personal Privacy Protection Law, §92(1)].

Second, 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 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, 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). 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.).

Third, in Ms. Williams' response to an appeal by Mr. Perez she cited the decision rendered in Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)]. As I interpret her determination, she relied upon Orange County Publications as a means of engaging in a broad denial of access. As I read that decision, the Court narrowly construed exceptions to rights of access.

That decision involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a 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" (id., 599). 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'" (id.). 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:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992];

> see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

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, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

The preceding remarks are intended to enhance compliance with and understanding of the Freedom of Information Law. A copy will also be sent to Mr. Perez. Should any questions arise regarding the foregoing, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mr. Luis Perez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 15, 1998

Mr. Raymond Shanley, Esq.
Executive Director
Utica Community Action, Inc.
253 Genesee 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, unless othewise indicated.

Dear Mr. Shanley:

I have received your letter of March 24 in which you raised a variety of issues and questioned the accuracy of an opinion addressed to you on March 19. In brief, although the status of community action agencies under the Freedom of Information Law is unclear, it was advised that due to the legislative history associated with those agencies, that statute should serve to provide guidance concerning disclosure and accountability.

You have contended that "there is no question that Utica Community Action, Inc. is not bound by the Freedom of Information Act...", because the legislation that created community action agencies, the Economic Opportunity Act of 1964, was repealed and supplanted with the Community Services Block Grant Act part of (Public Law 97-35, the Omnibus Budget Reconciliation Act of 1981). Although the Economic Opportunity Act of 1964 was repealed, a key element of the Act was essentially preserved, and I believe that elements of the original intent of the Act must, therefore, also be preserved. Specifically, §673 of the Community Services Block Grant Act (42 USC 2790) states in subdivision (1) that:

> "The term 'eligible entity' means any organization which was officially designated as a community action program under the provisions of section 210 of the Economic Opportunity Act of 1964 for fiscal year 1981, unless such community action agency or a community action program lost its designation under section 210 of such Act as a result of a failure to comply with the provisions of such Act."

Based on the foregoing, unless their designation was revoked, the entities subject to the 1964 Act are the same as those subject to the successor legislation, and their functions continued without change. Moreover, the relationships established under the original Act with units of state and local government, and with the communities they serve, were extended.

To suggest, as you do, that a community action agency is analogous to other private corporations in my view does not reflect either reality or the terms of the law. The functions of those agencies as described in §675(c) are historically governmental in nature. That statute specifies that one-third of the members of their boards must be public officials, and another third must be chosen "in accordance with democratic selection procedures..." From my perspective, those characteristics distinguish community action agencies from private corporations generally. In short, community action agencies would not exist but for their relationships with entities of state and local government.

You appear to have expressed the view that the receipt of government funds "might be construed" to mean that an entity in receipt of such funding, "whether in the form of grants, contracts, or indirect assistance (e.g., tuition)," might lead to a contention that all recipients are subject to the Freedom of Information Law. That was not inferred in the letter addressed to you, and the receipt of government funds is not a key ingredient in determining whether the Freedom of Information Law is applicable. I do not believe that anyone would contend, for example, that the private firm with which an agency has a contract to supply goods or services, such as the firm that contracts with an agency to supply computers or computer repair services, is subject to that statute. Similarly, since you referred to religious organizations that receive government money, it is my view that the receipt of government funds neither changes the essential nature of the organization nor transforms it into a governmental entity that would fall within the coverage of the Freedom of Information Law. Community action agencies, unlike many other recipients of governmental funding, maintain a statutory relationship with state and local government and carry out functions in conjunction with government; they would not exist absent that relationship.

Lastly, despite your opinion of the Utica Observer-Dispatch, I reiterate the principle expressed in the response to you of March 19, that the status or interest of an applicant for records that would otherwise be public should be irrelevant. The content of records, coupled with the direction provided in the grounds for denial appearing in the Freedom of Information Law, should serve as the basis for determining the extent to which records should be disclosed, not the identity or interest of the person seeking 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-10759

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April 15, 1998

Ms. Margaret A. Beck
Town Clerk
Town of Pittsford
11 South Main Street
Pittsford, NY 14534

The staff of the Committee on 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. Beck:

I have received your letter of March 27 in which you referred to an article concerning access to marriage licenses that appeared in the Town Recorder.

Specifically, you referred to my comment that in many instances, at least one of the applicants for a license is a resident of the municipality in which the license is sought. You wrote that that has been so in only thirty-four percent of the applications in the Town of Pittsford. As such, you questioned why the municipality of an applicant's residence should be disclosed.

In my view, the issue, as discussed at some length in the article, involves whether disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, the municipality of one's residence is not so intimate a detail of a person's life that disclosure would be offensive or viewed as so private or secret that its release would rise to the level of being an "unwarranted" invasion of one's privacy. Unlike a social security number, a unique identifier, or medical information, the municipality of residence is simply not so personal that an agency, in my opinion, could meet the burden of demonstrating that disclosure represents so significant an invasion of privacy that it could be characterized as "unwarranted."

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-10760

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April 15, 1998

Mr. William F. Cavanaugh
[redacted]

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

Dear Mr. Cavanaugh:

I have received your letter of March 28, as well as a copy of a letter sent to Mayor Eugene J. Murray of the Village of Rockville Centre.

The matter involves records relating to a "structural steel certification" pertaining to the recreation center expansion project. You wrote that the Village Attorney offered one reason for denial initially, that the records were prepared by a consultant, but that a different reason was given later, that the records were prepared by a Village employee. Under the circumstances, I do not believe that there is a distinction in terms of the result.

In this regard, I offer the following comments.

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

Second, the provision which in my view governs rights of access is §87(2)(g). That provision pertains to internal government communications, i.e., communications between officials of different agencies or those involving communications between officials of a single agency. It is emphasized that the State's highest court has held that records prepared by a consultant retained by an agency should be treated as if they were prepared by agency staff. Consequently, records prepared for an agency by a consultant could be characterized as "intra-agency" materials [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 490 NYS 2d 488 (1985)].

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.

As we have discussed, a consultant cannot make a determination on behalf of an agency. A consultant generally offers advice and guidance, perhaps expert in nature, to agency decision makers. Those decision makers have the ability to accept, reject or modify the advice, opinions or recommendations of a consultant.

Lastly, you asked whether there is any limitation on the ability of a village "changing [its] reasons for denying a request for records." In short, there is no such limitation. Situations frequently arise in which a request is initially denied for one reason, and the appeal is denied for different or additional reasons. Similarly, if an agency's denial is reviewed by a court, the agency is not bound by the reasons for its denial of access previously expressed.

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: Hon. Eugene J. Murray, Mayor
Martha Krisel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 15, 1998

Mr. Isaiah Brown
97-A-7589
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Brown:

I have received your letter of March 24 and the materials attached to it. You have sought my views regarding the propriety of a denial of access on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" in response to your request for claims made for death benefits of a person enrolled in the New York City Employees' Retirement System.

In my opinion, it is clear that the identities of claimants may be withheld to protect their privacy. I point out that §89(7) of the Freedom of Information Law specifies that nothing in that statute requires the disclosure of "the name or home address of a beneficiary of a public employees' retirement system."

Further, in numerous judicial decisions, it has been determined, in essence, that details of a public employee's life that are irrelevant to the performance of his or her official duties may be withheld as an unwarranted invasion of personal privacy. The identities of a beneficiary or a person who claims to be a beneficiary would be irrelevant to the performance of a public employee's duties. Consequently, I believe that the denial of your request was appropriate.

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: John J. Murphy, Executive Director
Records Access Officer

There is not

an Advisory opinion

H 10702

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2875
FOIL-AO- 10763

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April 15, 1998

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 25, which deals largely with the status of library boards of trustees under the Freedom of Information and Open Meetings Laws.

It is emphasized at the outset that many libraries are characterized as "public", in that they can be used by the public at large. Nevertheless, some of those libraries are governmental in nature, while others are not-for-profit corporations. The latter group frequently receives significant public funding. Because they are not governmental entities, they would not be subject to the Freedom of Information Law. Boards of trustees of all such libraries would, however, be subject to the Open Meetings Law.

In this regard, I offer the following comments.

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

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

Based on the foregoing, the Freedom of Information Law generally applies to records maintained by governmental entities.

Second, in conjunction with §253 of the Education Law and the judicial interpretation concerning that and related provisions, I believe that a distinction may be made between a public library and an association or free association library. The former would in my view be subject to the Freedom of Information Law, while the latter would not. Subdivision (2) of §253 states that:

> "The term 'public' library as used in this chapter shall be construed to mean a library, other than professional, technical or public school library, established for free purposes by official action of a municipality or district or the legislature, where the whole interests belong to the public; the term 'association' library shall be construed to mean a library established and controlled, in whole or in part, by a group of private individuals operating as an association, close corporation or as trustees under the provisions of a will or deed of trust; and the term 'free' as applied to a library shall be construed to mean a library maintained for the benefit and free use on equal terms of all the people of the community in which the library is located."

The leading decision concerning the issue was rendered by the Appellate Division, Second Department, which includes Valley Cottage within its jurisdiction. Specifically, in French v. Board of Education, the Court stated that:

> "In view of the definition of a free association library contained in section 253 of the Education Law, it is clear that although such a library performs a valuable public service, it is nevertheless a private organization, and not a public corporation. (See 6 Opns St Comp, 1950, p 253.) Nor can it be described as a 'subordinate governmental agency' or a 'political subdivision'. (see 1 Opns St Comp, 1945, p 487.) It is a private corporation, chartered by the Board of Regents. (See 1961 Opns Atty Gen 105.) As such, it is not within the purview of section 101 of the General Municipal Law and we hold that under the circumstances it was proper to seek unitary bids for construction of the project as a whole. Cases and authorities cited by petitioner are inapposite, as they plainly refer to *public*, rather than free association libraries, and hence, in actuality, amplify the clear distinction between the two types of library organizations" [see attached, 72 AD 2d 196, 198-199 (1980); emphasis added by the court].

In my opinion, the language offered by the court clearly provides a basis for distinguishing between an association or free association library as opposed to a public library. For purposes of applying the Freedom of Information Law, I do not believe that an association library, a private non-governmental entity, would be subject to that statute; contrarily, a public library, which is established by government and "belong[s] to the public" [Education Law, §253(2)] would be subject to the Freedom of Information Law.

It is noted that confusion concerning the application of the Freedom of Information Law to association libraries has arisen in several instances, perhaps because its companion statute, the Open Meetings Law, is applicable to meetings of their boards of trustees. The Open Meetings Law, which is codified as Article 7 of the Public Officers Law, is applicable to public and association libraries due to direction provided in the Education Law. Specifically, §260-a of the Education Law states in relevant part that:

> "Every meeting, including a special district meeting, of a board of trustees of a public library system, cooperative library system, public library or free association library, including every committee meeting and subcommittee meeting of any such board of trustees in cities having a population of one million or more, shall be open to the general public. Such meetings shall be held in conformity with and in pursuance to the provisions of article seven of the public officers law."

Again, since Article 7 of the Public Officers Law is the Open Meetings Law, meetings of boards of trustees of various libraries, including association libraries, must be conducted in accordance with that statute.

Since you referred to the absence of notice of meetings, I point out that §104 of the Open Meetings Law provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. If, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

I hope that 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-1076 4

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April 16, 1998

Mr. Isaiah Brown
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr. Brown:

I have received your letter of March 25. You have complained that your appeal under the Freedom of Information Law directed to the New York City Police Department has not been answered.

In this regard, as you are aware, §89(4)(a) of the Freedom of Information Law requires that an agency determine an appeal within ten business days of its receipt of an appeal by either granting access to the records or fully explaining in writing the reasons for further denial. I note that it has been held that a failure to determine an appeal within the statutory time serves as a constructive denial of the appeal. In that circumstance, the applicant for the records would have exhausted his or her administrative remedies and have the ability to seek judicial review 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)].

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

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April 16, 1998

Mr. William Keegan
92-A-0276
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. Keegan:

I have received your letter of March 26 in which you sought an advisory opinion concerning your right of access to records requested from the New York City Police Department relating to your indictment. You added that your request, which was made on January 26, 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 provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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

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April 16, 1998

Mr. Michael Mimnaugh
[redacted]

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

Dear Mr. Mimnaugh:

I have received your letter of March 26. You complained with respect to a delay in the disclosure of records by the records access officer of the Town/Village of Ossining.

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.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10767

41 State Street, Albany, New York 12231
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April 16, 1998

Mr. D. Jones
93-A-1836
Greene Correctional Facility
P.O. Box 975
Coxsackie, NY 12051-0975

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

Dear Mr. Jones:

I have received your letter of March 23 concerning your inability to obtain certain records from the Office of the New York County District Attorney.

Since you appear to believe that records should have been available pursuant to the Rosario decision, I note that the principles expressed in Rosario are separate from those reflected in the Freedom of Information Law.

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, 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, 81 NY 2d 267 (1996)].

It is also noted that an agency, such as an office of a district attorney, is not generally required to disclose records a second time that had been previously disclosed to either an individual or that person's representative. As stated in a judicial decision concerning that issue:

> "...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" [Moore v. Santucci, 151 AD 2d 677, 678 (1989)].

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-1076 8

41 State Street, Albany, New York 12231
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April 17, 1998

Mr. Jerry Ison
95-A-5811
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. Ison:

I have received your letter of March 25, to which you referred as an "appeal", and in which you sought assistance in obtaining "911 tape transcripts" from the New York City Police Department concerning an event that occurred in August, 1993.

In this regard, it is noted at the outset that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to determine appeals or otherwise compel an agency to grant or deny access to records. The provision concerning the right to appeal a denial of access to records, §89(4)(a), states in relevant part that:

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

For your information, the person designated to determine appeals at the Department is Susan Petito, Special Counsel.

Since the event occurred in 1993, I point out that the Freedom of Information Law pertains to existing records. If neither a tape recording nor a written transcript of the recording continues to exist, the Freedom of Information Law would not be applicable.

If a tape recording or transcript of a 911 call is maintained by an agency, I believe that the Freedom of Information Law would govern rights of access. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, several of the grounds for denial would be pertinent in determining the extent to which the record of your interest must be disclosed.

One such ground for denial might be §87(2) (b) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof when disclosure would result in " an unwarranted invasion of personal privacy." It is possible that recordings or transcripts could be withheld under the cited provision, for there may be privacy considerations concerning those identified in the records.

Another ground for denial of possible relevance is §87(2)(e), which states that an agency may withhold records that:

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

The language quoted above indicates that it is based largely upon potentially harmful effects of disclosure. The assertion of §87(2)(e) would be limited to the capacity to withhold in conjunction with the harmful effects of disclosure described in subparagraphs (i) through (iv) of the provision.

Also of possible significance is §87(2)(f), which permits an agency to withhold records to the extent that disclosure would "endanger the life or safety of any person." Since I am unfamiliar with the events to which the record relates or the effects of its disclosure, the applicability of §87 (2)(f) is conjectural.

Lastly, tape recordings or other records generated through an "E911" system maintained by agencies outside of New York City are confidential pursuant to §308(4) of the County Law. Since the County Law does not apply to New York City, that provision, in my view, would not serve as a basis for withholding the record sought.

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

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April 17, 1998

Mr. Steven M. Mortman
Associate General Counsel
NYC Department of Citywide Administrative
Services
Municipal Building - 16th Floor - South
New York, NY 10007

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

Dear Mr. Mortman:

I appreciate receiving your letter of March 27 and the determination rendered in response to a request by Kevin M. Kearney, Esq. From my perspective, the denial of access to the records sought might have been unduly broad.

Specifically, certain records were apparently withheld in their entirety pursuant to §87(2)(g) of the Freedom of Information Law because they consist of "pre-decisional material utilized in the deliberative process." In addition, one memorandum was characterized as "exempt...by reason of executive privilege."

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.

As you are likely aware, §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.

One of the contentions offered by the New York City Police Department in a recent decision rendered by the Court of Appeals 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 record 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) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, I believe that they must be disclosed.

I point out that 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). 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.).

Lastly, from my perspective, although the official information privilege or its equivalent might be properly asserted in other contexts, it does not exist with respect to the ability to withhold records under the Freedom of Information Law. As stated by the Court of Appeals in 1979: "[T]he common-law interest privilege cannot protect from disclosure materials which that law requires to be disclosed" [see Doolan v. BOCES, 48 NY 2d 341, 347]. In short, either records or portions thereof fall within the grounds for denial appearing in §87(2) of the Freedom of Information Law or they do not; if they do not, there would be no basis for denial, notwithstanding a claim of privilege.

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: Robert Silberstein
Kevin M. Kearney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1077O

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April 17, 1998

Ms. Karen L. Summerlin
Assistant Vice president
SUNY New Paltz
75 S. Manheim Blvd.
New Paltz, NY 12561-2499

The staff of the Committee 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. Summerlin:

As indicated in a telephone message, Ms. Dionie Goldin has sent a copy of your denial of her request for records pertaining to a certain employee's educational background to this office. According to the judicial interpretation of the Freedom of Information Law, the information sought should be made available to the public.

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

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, Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., May 20, 1981 Seelig v. Sielaff, 200 AD 2d 298 (1994)].

I note that it has been specifically held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)].

Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

In short, I believe that a public employee's educational background, as well as other items pertinent to that person's employment, must be disclosed.

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:tt

cc: Dionie Goldin
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1022

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April 21, 1998

Mr. Richard Champion
97-B-1527
Eastern Correctional Facility
P.O. 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. Champion:

I have received your letter of March 29 in which you sought guidance concerning a request for records directed to the Oneida County Sheriff's Department. The records sought involve "notes, reference material and reports used by the psychiatrist" who testified for the prosecution at your trial. You indicated that neither your request nor your appeal had 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 an agency must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Second, it is unclear from your letter whether the psychiatrist is a County employee or is a private practitioner who was asked or retained to testify as an expert. If that person is a county employee, the materials of your interest would in my view constitute agency records subject to rights of access conferred by the Freedom of Information Law [see definition of "record", §86(4)]. 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.

On the other hand, if the psychiatrist is not employed by the County, only the records that he or she prepared for the County would be County records; the remaining documentation, such as reference materials, would not, in my opinion, be subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sheriff
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10772

41 State Street, Albany, New York 12231
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April 21, 1998

Mr. Mujahid Farid
79-A-0362
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. Farid:

I have received your letter of March 31 and the correspondence attached to it. It is apparently your belief that the records relating to a homicide investigation must be disclosed based on a decision rendered by the State's highest court.

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. Further, while the decision that you cited [Gould v. NYC Police Department, 89 NY 2d 267 (1996)] rejected a blanket denial of access to certain records, the Court specified that other grounds for denial might apply. 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 that decision, which dealt with "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 potentially 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 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: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1072

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April 21, 1998

Mr. Raymond A. Polanco
#30187.048
P.O. Box 26030
Beaumont, TX 77720-6030

Dear Mr. Polanco:

I have received your letter of April 1. You indicated that you have attempted to contact a number of "public departments" without success. As such, you have requested the names, addresses and telephone numbers of the records access officers at those departments, as well as their regulations concerning the inspection and copying of records.

In this regard, I offer the following comments.

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

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

Based on the foregoing, as a general matter, the Freedom of Information Law is applicable to entities of state and local government. Two of the "departments" to which you referred, Bell Telephone Company and Pro Net Communications Company, are private entities that are not subject to the Freedom of Information Law.

Second, since you wrote that you attempted to call those agencies, I note that the Freedom of Information Law permits an agency to require that a request be made in writing, reasonably describing the records sought [see §89(3)].

The names, addresses and telephone numbers of the records access officers of the governmental entities are as follows:

Alexandra Sussman, Records Access Officer
NYS Department of Motor Vehicles
Swan Street Building
Empire State Plaza
Albany, NY 12228
(518) 474-0875

Sgt. Louis Lombardi, Records Access Officer
New York City Police Department
One Police Plaza
New York, NY 10038
(212) 374-5541

Gerald Koszer, Records Access Officer
New York City Department of Finance
Office of Legal Affairs
345 Adams Street, 3rd Floor
Brooklyn, NY 11201

According to the Official Directory of the City of New York, parking violations operations are carried out by a unit within the Department of Finance. I am unaware of whether that unit has its own records access officer. The address is, however, Parking Violations Operations, 770 Broadway, New York 10003 (212) 477-4430.

This office does not maintain copies of agencies' rules and regulations. They can be obtained directly from the agencies.

Lastly, when a proper request is received by an agency, the Freedom of Information Law provides direction concerning the time and manner in which the agency must respond. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-1074

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 21, 1998

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 letter of March 30 in which you raised the following questions:

> "1. If you receive a document from an agency and they have decided to redact something, is the agency obligated to inform the FOIL requester that something has been 'cut out', 'omitted', or 'redacted.' Of course, if it's 'blacked out' it would be noticeable.
>
> 2. If something is removed from a document, must an agency give the requester the REASON for withholding that portion of the document."

In this regard, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) state in §1401.2(b) 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...
>
> (ii) deny access to the records in whole or in part and explain in writing the reasons therefor."

Based on the foregoing, if any portion of a record sought has been withheld, I believe that the agency is obliged to inform the applicant that that is so. Absent the provision of information of that nature, the applicant would effectively be precluded from asserting his or right to appeal a partial denial of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marie Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2877
FOIL-AO- 10775

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April 21, 1998

Mr. Richard J. Klein
[redacted]

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

Dear Mr. Klein:

I have received your letters of April 3 and April 13 and the news articles attached to them. You have raised a series of questions in relation to both articles.

According to the first article, the Allegany County Administrator sent a letter to members of the Allegany County Legislature directing them to vote on a certain resolution by mail. The second article indicates that: "With an 8-6 tally from a confidential survey - the same number who voted against in February, - Allegany County lawmakers once again rejected the $14 a ton offer made in October..."

In this regard, first, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone or via mail. However, a series of communications between individual members or telephone calls among the members which results in a collective decision, a meeting held by means of a telephone conference, or a vote taken by mail would in my opinion be inconsistent with law. From my perspective, voting and action by a public body may only be only be carried out at a meeting during which a quorum has physically convened.

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 or mail, 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 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."

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 or by mail.

Second, the letter sent to the members of the Legislature by the County Administrator would constitute "intra-agency material" that falls 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. As described in the newspaper, while I do not believe that members of the Legislature could be characterized as "staff", it would appear that portions of the letter analogous to "instructions to staff that affect the public" should likely be disclosed.

Third, with respect to the "tally from a confidential survey", when action is taken by a public body, it must be memorialized in minutes, for §106 of the Open Meetings Law provides that:

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

> minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, it is clear in my opinion that minutes must include reference to action taken by a public body.

Further, if a public body reaches a consensus upon which it relies, I believe that minutes reflective of decisions reached must be prepared and made available. In Previdi v. Hirsch [524 NYS 2d 643 (1988)], 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 Legislature reached a "consensus" that is reflective of its 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. I note that §87(3)(a) of the Freedom of Information Law states that: "Each agency shall maintain...a record of the final vote of each member in every agency proceeding in which the member votes." As such, members of public bodies cannot take action by secret ballot.

In an effort to enhance compliance with and understanding of the open government laws, copies of this opinion will be sent to County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: County Legislature
John Margeson, County Administrator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10776

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 22, 1998

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:

I have received your letter of April 3 and appreciate your kind words concerning my presentation in Clarence. You have asked for my comments concerning a memorandum prepared by the Town Clerk of the Town of Lancaster, Mr. Robert Thill, concerning the manner in which staff should deal with letters that you file with his office and requests for records made under the Freedom of Information Law.

From my perspective, there is nothing unreasonable about the direction given in the memorandum.

When you file a letter with the office of the Town Clerk, staff was instructed to "date stamp" the records. In my view, that is common practice. When filed, "[r]ecords are then public records subject to inspection and copying at a cost of $0.25 a page." As you may recall, the definition of the term "record" in §86(4) of the Freedom of Information Law is expansive. Once a letter or other document is filed with or otherwise comes into possession of the Town, it is a "record" subject to rights of access. Staff was also instructed not to stamp records that you allege "are copies of the records [you] just gave [to staff]", and that staff should make copies "only of the stamped public records [they] just created." It appears that the direction in this instance is intended to insure that only records filed with the Town should be accepted or reproduced, rather than copies of the same records that you might bring into Town Hall.

With respect to requests for records, Mr. Thill directed that a request be made in writing on the Town's form or on your stationary. In this regard, under §89(3) of the Freedom of Information Law, an agency may require that a request be made in writing. The Clerk also provided the following direction:

> "Do not immediately respond to the request. Inform him Mr. Thill will respond in five days. [Exception] If the request is so absolutely simplistic that you can do in a moment with disrupting your work."

The provision cited above, §89(3), states that an agency must respond to a request within five business days of its receipt. Therefore, the reference to "five days" is not inconsistent with law. It has been advised, however, that if records are clearly public and readily retrievable, they should be made available without delay in order to give effect to the spirit of the law. That appears to be Mr. Thill's goal in relation to "simplistic" requests.

He also directed that all requests be given to him, that a form should not be marked "approved", and that copies of requests should be "time stamped" if you asked that they be stamped. In my view, since it is the records access officer's duty to "coordinate the agency's response to requests" (see regulations of the Committee on Open Government, 21 NYCRR §1401.2), Mr. Thill's instruction is, in my view, consistent with his responsibilities.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Robert P. Thill, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-10777

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April 22, 1998

Kendall R. Pirro, Esq.
659 Putnam Road
Schenectady, NY 12306

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

Dear Mr. Pirro:

I have received your letter of April 2 and the materials attached to it. In your capacity as the attorney for the Rotterdam Junction Volunteer Fire Company, you have asked whether the Company is subject to the Open Meetings Law. Based on your analysis of the matter, it is your view that volunteer fire companies do not fall within the requirements of that statute. I respectfully disagree.

It is true that there are no judicial decisions that have dealt specifically with the issue. Nevertheless, there are several decisions, including a decision rendered by the Court of Appeals, indicating that volunteer fire companies are "agencies" subject to the Freedom of Information Law, despite their status as not-for-profit corporations. As you may be aware, §86(3) of the Freedom of Information Law defines the term "agency" to mean a "governmental entity performing a governmental or proprietary function". Based on those decisions, I believe that volunteer fire companies are also subject to the Open Meetings Law. In this regard, I offer the following comments.

In general, volunteer fire companies are not-for-profit corporations that perform their duties by means of contractual relationships with municipalities. As not-for-profit corporations, it was questionable for the purpose of determining the applicability of the Freedom of Information Law whether 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 corporate status, 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)].

Another decision rendered locally 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."

Based on the decisions cited above, it is clear in my view that volunteer fire companies conduct public business and perform a governmental function.

As you are aware, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of the Law defines "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

By reviewing the components in the definition of "public body", I believe that each is present with respect to the membership meetings and meetings of the board of a volunteer fire company. Either would consist of two or more members. I believe that either would be required to conduct its business by means of a quorum under the Not-for-Profit Corporation Law and by-laws. Further, for reasons expressed earlier, in my view, a volunteer fire company at its meetings conducts public business and performs a governmental function. Such a function is carried out for a public corporation, which is defined in §66 of the General construction Law to include a municipality, such as a town or village, for example. Since each of the elements int he definition of "public body" pertains to a volunteer fire company, I believe that either the board or the membership, when it acts as a governing body, would constitute a "public body" subject to the Open Meetings 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- 10778

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April 22, 1998

Hon. April M. Vecchiarella
City Clerk
City of Salamanca
225 Wildwood Avenue
Salamanca, NY 14779

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

Dear Ms. Vecchiarella:

I have received your letter of April 2. You indicated that the City of Salamanca Board of Public Utilities has received requests for "consumption, billing and payment data contained in individual customers' utility bills." Although much of the information contained in or relating to the bills has been disclosed in the past, you wrote that the Board's General Manager "has received a verbal directive from staff at the New York State Public Service Commission stating that such information should not be available to the public and can only be provided to persons who have a financial interest in knowing this data..."

From my perspective, the records in question should generally be made available to any person. In this regard, I offer the following comments.

First, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public 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

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, the status or interest of the applicant, with one exception, 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.

It is likely that the only ground for denial pertinent to an analysis of the matter would be §87(2)(b). That provision permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy." In my view, with one exception to the considered later, the City could not justify a denial of access based upon a contention that disclosure would result in an unwarranted invasion of personal privacy. Data regarding consumption, billing and payment would not reflect intimate personal information, and it has been advised that similar kinds of records, such as water bills, must be disclosed. By means of analogy, real property assessment data is clearly public, even though it indicates that identity of the owner of real property, the assessed value of the property, details relating to the property, whether payment has been made in part or in full and whether the owner is in arrears in the payment of tax. In my opinion, that kind of information is likely more intimate than the kind of data sought. Therefore, I believe that it must generally be disclosed.

The only exception that might permit a denial of access would involve §89(2)(b)(iii) of the Freedom of Information Law, which states that an unwarranted invasion of personal privacy includes the "sale or release of lists of names and addresses if such lists would be used for commercial or fund-raising purposes." 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)].

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-10779

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 21, 1998

Mr. Shon Murray
97-R-0486
P.O. 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. Murray:

I have received your undated letter, which reached this office on April 3.

You wrote that you requested a complaint report filed with the 42nd precinct in the Bronx, but that you have not received a response. As such, you asked that I "instruct the 42 Pct. to make available a copy of said copy of document pursuant to Freedom of Information Law."

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee is not empowered to "instruct" an agency to grant or deny access to records or otherwise compel an agency to comply with law.

Second, 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." 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. 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 Records Access Officer, New York City Police Department, One Police Plaza, New York, NY 10038.

It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the record sought. Therefore, a request should contain sufficient detail to enable agency staff to locate and identify the records sought.

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. Consequently, the contents of the record sought and the effects of disclosure would determine the extent to which it should be made available to you.

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-10780

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 22, 1998

Mrs. Ann M. Perron
[redacted]

The staff of the Committee on 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. Perron:

I have received your letter of March 29. Once again, you referred to difficulty in obtaining phone numbers used by the Village of Ossining. You asked: "What is a person supposed to do if a municipality responds to a FOIL request but the requester knows FOR SURE that a lot of information has been withheld" (emphasis yours).

In this regard, there are often situations in which a request may not be fully clear or in which there may a misinterpretation that results in a response inconsistent with expectations. In such a situation, particularly if you know, with certainty, that some of the information sought was not made available, it is suggested that you confer with the records access officer or other official who may have familiarity with the records.

Further, if an agency denies access to records, the applicant has the right to appeal pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Marie Fuesy, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10781

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 22, 1998

Mrs. Ann M. Perron
[redacted]

The staff of the Committee on 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. Perron:

I have received your letter of March 29, in which you complained with respect to a delay in disclosure of records by the Village of Ossining.

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)].

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Fuesy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO- 2880
FOIL-AO- 10782

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 23, 1998

Ms. Carol L. Chur
League of Women Voters of the
Greater Buffalo Area
4988 Spaulding 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. Chur:

I have received your letter of March 29, and I appreciate your kind words regarding my presentation in Clarence last month.

Due to the inability of several members of League of Women Voters to attend, you have raised a variety of questions relating to the Freedom of Information and Open Meetings Laws. In the following paragraphs, I will attempt to respond to each.

You asked whether a reason or "legitimate purpose" must be given when seeking access to "an ethics code financial disclosure statement." 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, the status or interest of the applicant, is in my opinion irrelevant.

Next, you referred to the ability of an agency to withhold records when disclosure would constitute an "unwarranted invasion of personal privacy." By way of brief background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. One of the grounds for denial, §87(2)(b), specifies that an agency may withhold records to the extent that disclosure would result in such an invasion of privacy. In addition, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy.

While the standard concerning privacy is flexible and subject to conflicting or subjective interpretations, 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].

There are frequently situations in which a single record includes both public and deniable information, in which case an agency may delete certain portions and disclose the remainder. For example, following my trip to Clarence, I submitted a voucher for reimbursement that included the purpose of the trip, the destination, mileage, cost of meals, tolls, etc. Each of those items clearly related to the performance of my duties. However, to be reimbursed, I am required to include my social security number. The social security number is irrelevant to the performance of my duties and, therefore, could be deleted from the voucher on the ground that disclosure would result in an unwarranted invasion of privacy prior to disclosure of other aspects of that record.

In another area involving privacy, you asked whether a "whistleblower", a person who reports a "violation of an ethics code", for example, has any right to privacy. It has long been advised that identity of a whistleblower or complainant may be withheld to protect that person's 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.

You asked whether advisory opinions rendered by an ethics board must be disclosed. In my view, they may be withheld under §87(2)(g). That provision permits an agency to withhold records that:

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

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

You questioned whether a town government may charge a fee for any reason other than copying records. The specific language of the Freedom of Information Law [§87(1)(b)(iii)] and the

regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that, absent statutory authority, an agency may charge fees only for the reproduction of records. Section 87(1)(b) of the Freedom of Information Law states:

> "Each agency shall promulgate rules and regulations in conformance with this article...and pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the availability of records and procedures to be followed, including, but not limited to...
>
> > (iii) the fees for copies of records which shall not exceed twenty-five cents per photocopy not in excess of nine by fourteen inches, or the actual cost of reproducing any other record, except when a different fee is otherwise prescribed by statute."

The regulations promulgated by the Committee 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.

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

Next, you raised questions concerning the contents of minutes of an executive session during which a town board determined to fine an elected official $10,000 and remove that person from office. In this regard, the Open Meetings Law provides direction concerning the contents of minutes of both open meetings and executive sessions. Pertinent to your inquiry would be §106, which states in relevant part that:

> "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, the identity of the person disciplined, and the nature of the discipline (i.e., the fine, the amount, and removal from office) would in my view have to be included in minutes prepared and made available within one week of the executive session. The Board's action would be a final agency determination available under §87(2)(g)(iii); further, the action would clearly be relevant to the performance of one's official duties. As such, disclosure would not result in an unwarranted invasion of personal privacy.

With respect to related documentation acquired or developed during the investigation of the matter or the proceeding leading to disciplinary action, I cannot offer specific guidance, for the contents of the documentation and the effects of disclosure would be pertinent in determining the extent to which the materials must be disclosed or may be withheld. For instance, there may be privacy considerations relating to the subject of the action, that person's family, witnesses, whistleblowers, other town officials, etc.

With respect to the Open Meetings Law generally, you asked whether a motion for entry into executive session must include a "specific reason" and, "if the session involves a personnel matter, can the person's name be revealed." As you are likely aware, the Open Meetings Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

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

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

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

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a 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.

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 could but 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, 620 NY 2d 573, 575; 207 AD 2d 55 (1994)].

Based on the foregoing, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Again, such a motion could but would not in my opinion have to identify the person or persons who may be the subject of a discussion [see Doolittle v. Board of Education, Supreme Court, Chemung County, July 21, 1981; also Becker v. Town of Roxbury, Supreme Court, Chemung County, April 1, 1983]. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

The provision that deals with litigation is §105(1)(d), which permits a public body to enter into an executive session to discuss "proposed, pending or current litigation". In construing the language quoted above, it has been held that:

> "The purpose of paragraph d is "to enable is to enable a public body to discuss pending litigation privately, without baring its strategy to its adversary through mandatory public meetings' (Matter of Concerned Citizens to Review Jefferson Val. Mall v. Town Bd. Of Town of Yorktown, 83 AD 2d 612, 613, 441 NYS 2d 292). The belief of the town's attorney that a decision adverse to petitioner 'would almost certainly lead to litigation' does not justify the

> conducting of this public business in an executive session. To accept this argument would be to accept the view that any public body could bar the public from its meetings simply be expressing the fear that litigation may result from actions taken therein. Such a view would be contrary to both the letter and the spirit of the exception" [Weatherwax v. Town of Stony Point, 97 AD 2d 840, 841 (1983)].

Based upon the foregoing, I believe that the exception is intended to permit a public body to discuss its litigation strategy behind closed doors, rather than issues that might eventually result in litigation.

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

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

As such, a proper motion might be: "I move to enter into executive session to discuss our litigation strategy in the case of the XYZ Company v. the Town of X."

Since you asked when litigation involving a municipality "can" be discussed in an open meeting rather than an executive session, 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)].

With regard to quorum requirements, §41 of the General Construction Law, which is entitled "Quorum and majority", 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 quorum of a public body is a majority of its total membership, notwithstanding absences or vacancies. Further, a public body, such as 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. In the case of a board consisting of five members, a quorum or majority would be three, and three affirmative votes would be needed to carry any motion or take any action.

With respect to notice of meetings, §104 of the Open Meetings Law provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning or faxing notice to the local news media and by posting notice in one or more designated locations.

I point out that §104 does not specify which news media organizations must be given notice. In many instances, there are may be several news media organizations, i.e., newspapers, radio and television stations, that operate in the vicinity of a public body. So long as notice of a meeting is given to at least one news media organization prior to a meeting, I believe that a public body would be acting in compliance with the requirement that notice be given to the news media.

In my opinion, every law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to the intent of the law. It would be unreasonable in my view for a town board in Erie County to transmit notice to the Washington Post or a New York City radio or television station, for those outlets would not likely reach residents of the town, nor would they assign a reporter to attend a meeting of the board. If notice is posted and given to a newspaper that has a significant circulation in the town or to a radio station situated in or near the town, I believe that the board would be in compliance with the Open Meetings Law. In short, there is nothing in the Open Meetings Law that would require that notice of meetings be given to a particular newspaper. If a newspaper has a significant circulation in a municipality, it would appear to be reasonable to provide notice to that newspaper.

In addition to giving notice to the news media, it is emphasized that the Open Meetings Law requires that notice be "conspicuously posted in one or more designated public locations." Consequently, I believe that a public body must designate, presumably by resolution, the location or locations where it will routinely post notice of meetings. To meet the requirement that notice be "conspicuously posted", notice must in my view be placed at a location that is visible to the public.

Lastly, you asked whether meetings "may be held at a time when most members of the public cannot attend -- for example in the morning hours when people are at work, versus in the evening hours." While there is nothing in the Open Meetings Law that specifies when meetings should or must be held, I believe that public bodies must implement the law in a reasonable manner. In a recent decision that dealt in part with meetings of a board of education held at 7:30 a.m., it was stated that:

> "It is...apparent to this Court that the scheduling of a board meeting at 7:30 a.m. -- even assuming arguendo that such meetings were properly noticed and promptly conducted -- does not facilitate attendance by members of the public, whether employed within or without the home, particularly those with school age or younger children, and all but insures that teachers and teacher associates at the school are unable to both attend and still comply with the requirement that they be in their classrooms by 8:40 a.m." (Matter of Goetchius v. Board of Education, Supreme Court, Westchester County, New York Law Journal, August 8, 1996).

While a meeting scheduled for 7 a.m. or 11 p.m. would may represent unreasonable times, I believe that meetings scheduled to be held during what may be characterized as regular business hours would be found by a court to be reasonable, even though many people work during those hours. Numerous public bodies conduct meetings during regular business hours, including the State Senate and Assembly, the Board of Regents, the Public Service Commission and the Committee on

Open Government. In short, not everyone's schedule can be accommodated, and if a meeting is held during traditional business hours or the evening, a court, in my view, would find those times to be reasonable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 27, 1998

Mr. Adam A. Jamison
95-A-7704 3, 37 Cell
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. Jamison:

I have received your letter of April 6 and the materials attached to it.

You have sought assistance in obtaining records from the Office of the Bronx County District Attorney and have alleged that a certain report made available to you was forged. You asked that this office "obtain the 'file' of the prosecution relating to the case" 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 obtain records on behalf of applicants or otherwise compel an agency to grant or deny access to records. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, it appears to be your contention that certain records should have been made available in discovery and they now must be made available under the Freedom of Information Law. Here I point out that 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 (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. Records that are available in discovery may not be available under the Freedom of Information Law, and *vice versa*.

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.

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 the records at issue 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.

It is also noted that the first ground for denial in the Freedom of Information Law, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute". One such statute, §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.

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).

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

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

I hope that 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: Peter Coddington
Arnold P. Keith, Jr.
E.F. Bernhardt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 27, 1998

Mr. Steven L. Smith
[redacted]

Dear Mr. Smith:

I have received your letter of April 5. You complained that your requests for records made to the Westchester County Jail have not been answered. You "appeal[ed] this stonewall and seek permission to file an Article 78."

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 an appeal or to grant permission to initiate a judicial proceeding. 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, I believe that the person designated to determine appeals is the Westchester County Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: County Attorney
Warden Amicucci

STATE OF NEW YORK
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April 27, 1998

Mr. Christopher Nenni
97-B-1906 A3-19
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. Nenni:

I have received your letter of April 1. You have sought assistance concerning a request for records made to the Orleans County Sheriff's Department.

As I understand the matter, you alleged that certain county records were "altered and/or falsified, which led to an internal investigation" by the Department that apparently focused on a particular employee. Neither your request for records relating to the investigation nor your appeal had 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 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.

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 determinations 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.

Insofar as records exempt from disclosure under §50-a of the Civil Rights Law are available only by means of a court order, that statute provides in part that:

> "2. Prior to issuing such court order the judge must review all such requests and give interested parties the opportunity to be heard. No such order shall issue without a clear showing of facts sufficient to warrant the judge to request records for review.
>
> 3. If, after such hearing, the judge concludes there is sufficient basis he shall sign an order requiring that the personnel records in question be sealed and sent directly to him. He shall then review the file and make a determination as to whether the records are relevant and material in the action before him. Upon such a finding the court shall make those parts of the records found to be relevant and material available to the persons so requesting."

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 27, 1998

Mr. Erick Campbell
95-A-4593
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. Campbell:

I have received your letter of April 5 in which you sought assistance concerning a request for an "Inmate Review Worksheet" and "Security Classification Guidelines." The request was denied on the grounds that the "documents are evaluative in nature and/or the release would endanger the life or safety of any person." You wrote, however, that you are required to sign evaluations and that inmates are "encouraged" to participate in their evaluations.

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, while I am unfamiliar with records in question, it appears that the provision of primary relevance in determining 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. If the "guidelines" to which you referred are reflective of the policy or rules of the Department of Correctional Services, I believe that they would be available under §87(2)(g)(iii), unless a different ground for denial could properly be asserted. However, insofar as the records consist of opinions, advice, recommendations and the like, I believe that the records could 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.

Of possible significance is §87(2)(f), which authorizes an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." The proper application of that provision would be dependent on circumstances and the effects of disclosure.

Third, notwithstanding the foregoing, if records were shown to you, or if you reviewed and signed them, I believe that they should be made available, for the agency would have effectively waived the grounds for denial.

Lastly, when a request is denied, the applicant may appeal the denial 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."

For your information, the persons designated 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:jm

cc: D. Roberts

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10787

41 State Street, Albany, New York 12231
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April 27, 1998

Mr. Paul M. Henry
President
Tax Reduction Services, Inc.
P.O. Box 2111
Greenport, NY 11944

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

Dear Mr. Henry:

I have received your letter of April 7 and the materials attached to it.

Having requested "Small Claims Assessment Review hearing data in computer format", you were informed by John Eiseman of the Office of Court Administration that:

> "Court records, including records of SCAR proceedings, are public, but access to computerized records is limited to the format in which they are created and stored. While the Court does have certain computerized records concerning SCAR proceedings in Suffolk County, the data is not available in the format you requested."

You have asked whether "if, in fact, the court records are not subject to FOIL and if the fees charged on the rate schedule are reasonable."

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 courts and court records fall beyond the coverage of the Freedom of Information Law or the limitations on the assessment of fees appearing in that statute. As Mr. Eiseman indicated, however, court records are available under other provisions of law (see e.g., Judiciary Law, §255).

Further, the commentary offered by Mr. Eiseman is generally consistent with situations in which the Freedom of Information Law is applicable. For purposes of the Freedom of Information Law, §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 by an agency, 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, for example, it has been advised that if the information sought is available under the Freedom of Information Law and may be retrieved by means of existing computer programs, an agency is required to disclose the information. In that kind of situation, the agency in my view would merely be retrieving data that it has the capacity to retrieve. Disclosure may be accomplished either by printing out the data on paper or perhaps by duplicating the data on another storage mechanism, such as a computer tape or disk. On the other hand, if information sought can be retrieved from a computer or other storage medium only by means of new programming or the alteration of existing programs, those steps would, in my opinion, be the equivalent of creating a new record. Since §89(3) 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)]. Similarly, if data cannot be generated in the format requested, the agency would not be obliged, in my opinion, to alter the means by which it produces data.

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: John Eiseman

STATE OF NEW YORK
DEPARTMENT OF STATE
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April 27, 1998

Mr. James J. Herlan
[redacted]

The staff of the Committee 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. Herlan:

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

You requested from the Town "records or portions thereof pertaining to the Ontario county District Attorney's investigation of possible wrongdoing by Mr. Kenneth Jones, including his personnel file." Because there was "no actual or proven wrongdoing", the Town Board denied your appeal on the ground that disclosure would result in "an unwarranted invasion of personal privacy."

From my perspective, the Town's denial of access was consistent with law.

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

The provision cited by the Town, §87(2)(b), would justify, in my opinion, a denial of access. 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)].

Your correspondence also includes reference to a request for the Town's "subject matter list." Here I point out that, with certain exceptions, an agency is not required to create or prepare a record to comply with the Freedom of Information Law [see §89(3)]. One 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:tt

cc: Town Board
Mary Ann Trickey, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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April 27, 1998

E-Mail

TO: oldfield@cat.syr.edu

FROM: Robert J. Freeman, Executive Director

The staff of the Committee 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. Oldfield:

I have received your communication of April 20 in which you questioned your right to gain access to records pertaining to you by Mental Health Legal Services (MHLS).

In this regard, as I understand the matter, the Freedom of Information Law would not govern rights of access to records. In brief, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent under the circumstances is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as suggested by Ms. Arlene Hughes, Director of MHLS Rochester Office, is §33.13 of the Mental Hygiene Law. Section 33.13 requires that clinical records pertaining to clients or patients be kept confidential, except when that statute authorizes disclosure. The authority to disclose is specific and limited. Further, a recipient of the records subject to §33.13, such as MHLS, is bound by the same confidentiality requirements as the originator of the records.

Ms. Hughes indicated that an individual may make a pro se application for records, that she has discussed the matter with you, and that you have arranged an appointment with her to resolve the matter.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Arlene Hughes, Director

STATE OF NEW YORK
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April 27, 1998

Ms. Melinda McCuiston
National Coalition for Abstinence Education
P.O. Box 536
Colorado Springs, CO 80901-0536

Dear Ms. McCuiston;

As you are aware, Attorney General Vacco has forwarded your letter of March 27 to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and guidance concerning the NY Freedom of Information Law. In brief, you complained that your request of February 27 sent to the Department of Health to the attention of Earl Seguine had not been answered.

In this regard, I contacted Mr. Seguine on your behalf in order to learn more of the matter, and he indicated that he never received your request. I also contacted the Department's records access officer. An agency's records access officer has the duty of coordinating responses to requests for records. Having reviewed requests made on February 27, cross checking under your name, the name Peter Brandt, and the name of your organization, I was informed that your request appears not to have reached the Department of Health.

It is suggested that you transmit your request to Mr. Gene Therrault, Records Access Officer, Department of Health, Empire State Plaza, Albany, NY 12237, or that you fax the request to his attention at (518) 486-9144. Further, I will forward a copy of this response, as well as a copy of your request, to Mr. Therrault.

Having reviewed your request, I offer the following additional comments.

First, a potential 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 Department maintains the records of your interest. If the Department 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 Department maintains records falling within the scope of your request in a number of locations or units within the Department and by means of different filing and retrieval systems within. In short, it is questionable whether every element of your request "reasonably described" the records as required by law.

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

Of particular relevance in terms of rights of access as well as the Department's ability to deny access is §87(2)(g). Although that provision permits the withholding of inter-agency or intra-agency materials, depending upon the contents of those materials, it does not appear that §87(2)(g) could be cited to withhold communications between the Department and a federal agency or a non-governmental entity. Section 86(3) of the Freedom of Information Law defines "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or

> proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

The language quoted above indicated that an "agency" is an entity of state or local government in New York. While there is no case law of which I am aware that deals specifically with the status of communications with a federal agency, since the definition of "agency" does not include a federal agency, it does not appear that §87(2)(g) could be cited as a means of withholding records communicated between the Department and a federal governmental entity, for such an entity would not be an agency for the purpose of the Freedom of Information Law.

However, §(87(2)(g) likely would justify a denial of access to elements of internal departmental communications and those with other agencies. Specifically, that provision prevents an agency to withhold records that :

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

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

Lastly, while there are fee waiver provisions in the federal Freedom of Information Act and perhaps some other state laws, there are no such provisions in the NY Freedom of Information Law. Pursuant to §87(1)(b)(iii) of that statute, an agency may charge up to twenty-five cents per photocopy, or the actual cost of reproduction of records that cannot be photocopied (i.e., computer tapes or disks).

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

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April 27, 1998

Mr. Louis Chaney
95-A-8905
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

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

Dear Mr. Chaney:

I have received your letter of April 5 in which you sought assistance in obtaining a certificate of conviction relating to a 1983 arrest that resulted in a youthful offender adjudication.

While I am not an expert on the subject, it appears that you cannot obtain a certification of conviction because the youthful offender adjudication is not equivalent to a conviction. I direct your attention to §720.35 of the Criminal Procedure Law, which states in relevant part that:

> "1. A youthful offender adjudication is not a judgment of conviction for a crime or any other offense, and does not operate as a disqualification of any person so adjudged to hold public office or public employment or to receive any license granted by public authority but shall be deemed a conviction only for the purposes of transfer of supervision and custody pursuant to section two-hundred fifty-nine of the executive law.
>
> 2. Except where specifically required or permitted by statute or upon specific authorization of the court, all official records and papers, whether on file with a court, a police agency or the division of criminal justice services, relating to a case involving a youth who has been adjudicated a youthful offender, are confidential and may not be made available to any person or public or private agency, other than an institution to which such youth has been committed, the division of

> parole and a probation department of this state the requires such official records and papers for the purpose of carrying out duties specifically authorized by law."

Based on the foregoing, a youthful offender adjudication is not a conviction. Further, I believe that authorization from the court would be required to obtain any records relating to a youthful offender adjudication.

It is suggested that you discuss the matter with your attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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April 27, 1998

Mr. Ted Laux
[redacted]

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

Dear Mr. Laux:

I have received your letter of April 9 and the materials attached to it.

By way of background, on March 11, you requested "budget data presented by Tom Jones to BOE at 3/5/98 meeting" of the Board of the Lansing Central School District. The request was denied, and you appealed. The appeal was also denied, and it was stated that the "draft budget proposals" that you requested would not be disclosed" until after the budget was determined. After the budget was approved, the documentation was disclosed. You have enclosed it for my review, and you contend that it should have been made available when you requested it.

I agree. In this regard, I offer the following comments.

First, the characterization of a record as "draft" or "preliminary" is not determinative of rights of access. I point out that the Freedom of Information Law pertains to all agency records, and that §86(4) of the Law defines the term "record" to mean:

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

Based on the foregoing, when information is maintained by an agency in some physical form (i.e., drafts, worksheets, computer disks, etc.), I believe that it would constitute a "record" subject to rights of access.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my opinion, two of the grounds for denial would be relevant to an analysis of rights of access to the records sought. Neither, under the circumstances, would in my view have justified a denial of access.

Section 87(2)(g) of the Freedom of Information Law permits an agency to withhold records that:

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

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

In a case involving "budget worksheets", it was held that numerical figures, including estimates and projections of proposed expenditures, are accessible, even though they may have been advisory and subject to change. In that case, I believe that the records at issue contained three columns of numbers related to certain areas of expenditures. One column consisted of a breakdown of expenditures for the current fiscal year; the second consisted of a breakdown of proposed expenditures recommended by a state agency; the third consisted of a breakdown of proposed expenditures recommended by a budget examiner for the Division of the Budget. Although the latter two columns were merely estimates and subject to modification, they were found to be "statistical tabulations" accessible under the Freedom of Information Law as originally enacted [see Dunlea v. Goldmark, 380 NYS 2d 496, aff'd 54 AD 2d 446, aff'd 43 NY 2d 754 (1977)]. At that time, the Freedom of Information Law granted access to "statistical or factual tabulations" [see original Law, §88(1)(d)]. Currently, §87(2)(g)(i) requires the disclosure of "statistical or factual tabulations or data". As stated by the Appellate Division in Dunlea:

> "[I]t is readily apparent that the language statistical or factual tabulation was meant to be something other than an expression of opinion or naked argument for or against a certain position. The

> present record contains the form used for work sheets and it apparently was designed to accomplish a statistical or factual presentation of data primarily in tabulation form. In view of the broad policy of public access expressed in §85 the work sheets have been shown by the appellants as being not a record made available in §88" (54 Ad 2d 446, 448)."

The Court was also aware of the fact that the records were used in the deliberative process, stating that:

> "The mere fact that the document is a part of the deliberative process is irrelevant in New York State because §88 clearly makes the back-up factual or statistical information to a final decision available to the public. This necessarily means that the deliberative process is to be a subject of examination although limited to tabulations. In particular, there is no statutory requirement that such data be limited to 'objective' information and there no apparent necessity for such a limitation" (id. at 449).

Based upon the language of the determination quoted above, which was affirmed by the state's highest court, it is my view that the records in question, to the extent that they consist of "statistical or factual tabulations or data", are accessible, unless a provision other than §87(2)(g) could be asserted as a basis for denial.

Further, another decision highlighted that the contents of materials falling within the scope of section 87(2)(g) represent the factors in determining the extent to which inter-agency or intra-agency materials must be disclosed or may be withheld. For example, in Ingram v. Axelrod, the Appellate Division held that:

> "Respondent, while admitting that the report contains factual data, contends that such data is so intertwined with subject analysis and opinion as to make the entire report exempt. After reviewing the report in camera and applying to it the above statutory and regulatory criteria, we find that Special Term correctly held pages 3-5 ('Chronology of Events' and 'Analysis of the Records') to be disclosable. These pages are clearly a 'collection of statements of objective information logically arranged and reflecting objective reality'. (10 NYCRR 50.2[b]). Additionally, pages 7-11 (ambulance records, list of interviews) should be disclosed as 'factual data'. They also contain factual information upon which the agency relies (Matter of Miracle Mile Assoc. v Yudelson, 68 AD2d 176, 181 mot for lve to app den 48 NY2d 706). Respondents erroneously claim that an agency record necessarily is exempt if both factual data and opinion are intertwined in it; we have held that '[t]he mere fact that some of the data might be an estimate or a recommendation does not convert

> it into an expression of opinion' (Matter of Polansky v Regan, 81 AD2d 102, 104; emphasis added). Regardless, in the instant situation, we find these pages to be strictly factual and thus clearly disclosable" [90 AD 2d 568, 569 (1982)].

Similarly, the Court of Appeals has specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

In short, even though statistical or factual information may be "intertwined" with opinions, the statistical or factual portions, if any, as well as any policy or determinations, would be available, unless a different ground for denial could properly be asserted. Having reviewed the materials, I believe that they consist entirely of statistical or factual information that should have been disclosed pursuant to §87(2)(g)(i).

The remaining provision of possible significance, §87(2)(c), states that an agency may withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." If a proposed expenditure refers to services that must be negotiated with contractors or that are subject to bidding requirements, disclosure of those figures might enable contractors to tailor their bids accordingly, to the potential detriment of the District and its taxpayers. To the extent that disclosure would "impair" the process of awarding contracts or collective bargaining negotiations, those portions of budget-related records could be withheld. Since the records were disclosed following the approval of the budget, §87(2)(c) does not appear to have been pertinent in this instance.

Lastly, §84 of the Freedom of Information Law contains that statute's statement of intent. That provision states in part 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.
>
> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information

should not be thwarted by shrouding it with the cloak of secrecy or confidentiality."

As you requested, 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: Andy LaVigne, President, Board of Education
Andrea Price, Superintendent
Tom Jones, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10793

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 27, 1998

Mr. Mark J. Chmiel
[redacted]

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

Dear Mr. Chmiel:

I have received your letter of April 8 in which you sought assistance concerning an unanswered request for records made to the Starpoint Central School District. The records sought involve " regulations, policies or statutes in connection with the requirements of the District to provide school bus transportation to residents of the District."

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.

To the extent that the records sought are maintained by the District and can be found, I believe that they must be disclosed, for none of the grounds for denial would apply.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10794

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 27, 1998

Mr. Dawiyd Raasikh Barrow, El
general delivery
Bronx General Post Office
Bronx, NY

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

Dear Mr. Barrow:

Your letter of October 19 addressed to the Commission of Investigation has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law. In brief, you complained that a court clerk failed to reply to your request under the Freedom of Information Law.

In this regard, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) 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 be applicable.

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: Catherine O'Hagan Wolfe

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10795

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 27, 1998

Mr. Mark Silberman, 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. Silberman:

I have received your letter of April 5 and the correspondence attached to it.

According to your letter, the building in which you reside is one of a number of buildings composing the Save Our Neighborhood Association ("SONA") in the Park Slope section of Brooklyn. SONA is involved in a dispute with the Berkeley Carroll School and the New York City Economic Development Corporation ("EDC"). You indicated that the School "has received approval form the EDC for IDA Facility Revenue Bonds to build a large athletic facility on a site within a mostly residential neighborhood..." SONA requested "certain documents relating to the school's application for the IDA bonds." Although some of the records sought were made available, others have been withheld on the basis of §87(2)(c) of the Freedom of Information Law.

You have asked that I "intervene to ensure that the EDC discloses all information that it is required to under FOIL."

In this regard, it is noted at the outset that the Committee on Open Government is authorized to offer opinions and 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. It is my hope however, that opinions rendered by the Committee are educational and persuasive and that they serve to enhance compliance with the Freedom of Information Law. With those goals, I offer the following comments.

As you may be aware, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 EDC has relied to withhold records, §87(2)(c), permits an agency to deny access to 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 under that provision 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.

It is noted 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)].

Based on the correspondence, your attorney has contended, in essence, that §87(2)(c) does not serve as a valid ground for denial. She wrote that:

> "The information we seek is unrelated to any contract; no contract between IDA and the School is contemplated, negotiated or entered into. We seek information about an application by a private entity (the School) for access to a bond facility provided by a public entity (the IDA), and documents supporting the IDA's decision to issue such bonds. IDA and EDC and the process by which bonds are issued exist pursuant to a statutory regime granting such authority. IDA issues these bonds for a specific

purpose after an extensive application and review process, which includes a public hearing. That hearing has already been held in this matter" (emphasis hers).

In response, the EDC's appeals officer wrote that:

> "Contrary to your contention that the information you are seeking is unrelated to any contract and that no contract between IDA and the School is contemplated, the proposed project does contemplate the execution of numerous agreements between the parties, including among others a lease agreement. Thus, the release of documents requested in paragraph 3 could unduly impair and compromise IDA's ability to negotiate the terms and conditions of the bond issuance and the agreements required for such issuance."

If I understand the matter accurately, §87(2)(c) would not apply. While agreements must be reached between the school and the IDA, I do not believe that their relationship as contracting parties, for reasons discussed earlier, are of the sort envisioned by §87(2)(c). In each of the kinds of the situations described earlier, 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, assuming that the records at issue are known to both parties, 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 records.

In an effort to resolve the matter, a copy of this opinion will be forwarded to the EDC.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Judy E. Fensterman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10796

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 27, 1998

Mr. John Keegan
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 Mr. Keegan:

I have received your letter of April 14 in which you sought an opinion concerning a request made under the Freedom of Information Law.

According to your letter, you requested from the Acting Saratoga County Attorney "documents in the settlement of Mastropietro vs. Saratoga County and the Town of Halfmoon." In response, the Acting County Attorney wrote that he had:

> "reviewed the file maintained in our office and found that it does not retain the requested documents. This matter was defended by outside attorneys, and we have received nothing from them as to any resolution, either by ruling or by settlement."

From my perspective, if the records sought are maintained by outside counsel for the County, they are County records subject to the Freedom of Information Law. In this regard, I offer the following comments.

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, 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, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, it has been 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 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 sum, insofar as the records sought are maintained for the County, I believe that the County would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark M. Rider, Acting County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1079?

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 27, 1998

Mr. Steven Jude
91-A-6880
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. Jude:

I have received your letter of April 3. You wrote that it is your belief you can obtain the names of inmates who had been in the Special Housing Unit in February at the Auburn Correctional Facility. However, you indicated that you do not know where to send the request.

In this regard, I agree with your contention, for the court so held in Bensing v. LeFevre [506 NYS 2d 822 (1986)]. Further, 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. It is assumed that the records in question would be maintained at the Auburn Correctional Facility.

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-10798

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 29, 1998

Mr. Tyrone Holton
95-A-3200
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

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

Dear Mr. Holton:

I have received your undated letter in which you indicated that you need to obtain the first names, addresses and social security numbers of certain employees of a correctional facility in order to serve them with summonses in a federal lawsuit.

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, if records contain the first names of public employees, those names must be disclosed. However, residence addresses and social security numbers may clearly be withheld. Section 89(7) of the Freedom of Information Law specifies that home addresses of public employees need not be disclosed. Further, it has been determined that social security numbers may be withheld on the ground that disclosure would result in "an unwarranted invasion of personal privacy" under §87(2)(b) [see Seelig v. Sielaff, 201 AD2d 298 (1994)].

Second, the fact that you may want the items in question for purposes of litigation is irrelevant when they are sought under the Freedom of Information Law. As stated by the State's highest court, the Court of Appeals, in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to

records under the Freedom of Information Law is as a member of the public, and is neither enhanced... nor restricted... because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)].

In short, I do not believe that the Freedom of Information Law would provide a right of access either to residence addresses or social security numbers.

I hope that the foregoing clarifies 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-10799

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 30, 1998

Mr. Anthony Swiggett
86-a-8227
Attica Correctional Facility
P.O. B. 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. Swiggett:

I have received your letter of April 13. You sought my comments concerning the status of a request for records that may relate to litigation. You asked for the name of the "appropriate investigating agency or department" that might review the actions of the inmate records coordinator at your facility.

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

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

> confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

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

Second, as a general rule, if there is reason to believe that an employee has acted inappropriately, it is suggested that you contact that person's supervisor or the Superintendent.

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-10800

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 30, 1998

Mr. Daniel Foley
95-A-6596
I-1-12 B
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. Foley:

I have received your letter of April 4, which reached this office on April 15. You have sought guidance concerning your right to obtain records "pertaining to the taxes paid by Franklin Correctional Facility's inmate organization, the 'Higher Education Society', during the 1996-1997 fiscal year..." You indicated that you requested the records from the records access officer at the central offices of the Department of Correctional Services and that you received no response.

In this regard, I offer the following comments.

First, it does not appear that organization that is the subject of your inquiry is subject to the Freedom of Information Law. That statute generally pertains to governmental entities. The Higher Education Society does not appear to be part of any government agency.

Second, if the Society is a not-for-profit corporation with tax exempt status, I believe that it would be required to prepare an IRS (Internal Revenue Service) form 990, which is essentially a brief financial statement. It is my understanding that a form 990 is available from the IRS and that it must be made available, on request, by the not-for-profit corporation directly.

Third, if the Department of Correctional Services does not maintain the records of your interest, the Freedom of Information Law would not apply. I note that the Department's regulations indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee. It may be worthwhile to submit such a request.

Lastly, since you wrote that you received no response to your request, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10801

41 State Street, Albany, New York 12231
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April 30, 1998

Mr. Adam Jamison
95-A-7704
Clinton Correctional Facility
P.O. Box 2001, D, 3, 37
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. Jamison:

I have received your letter of April 13. It is assumed that you have received my lengthy response of April 27 to your earlier correspondence. Notwithstanding that response, I offer the following remarks concerning you more recent letter.

First, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not intervene, in the legal sense, or obtain records from agencies on behalf of applicants for records.

Second, it appears that you misunderstand the provision relating to the subject matter list. You expressed interest in acquiring such a list concerning all records maintained by the prosecution in a particular case. Pertinent is §87(3) of the Freedom of Information Law, which states in relevant part that:

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

The "subject matter list" required to be maintained under §87(3)(c) is not, in my opinion, required to identify each and every record of an agency or those within a case file; rather I believe that it must refer, by category and in reasonable detail, to the kinds of records maintained by an agency.

In short, an agency is not required to maintain a subject matter list regarding individual cases or case files.

Third, you referred to possible violations of §95 of the Public Officers Law. That provision is part of the Personal Privacy Protection Law. Based on the definition of the term "agency" appearing in §92(1) of that statute, "offices of district attorneys" are outside the coverage of the statute. Stated differently, neither §95 nor any other aspect of the Personal Privacy Protection Law applies to an office of a district 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:tt

cc: Peter Coddington

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10802

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

April 30, 1998

Hon. James M. McMahon
Minority Leader
Oswego County Legislator
3276 Fulton Ave.
Central Square, NY 13036

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

Dear Mr. McMahon:

I have received your letter of April 17, as well as the correspondence attached to it. You wrote that you requested records from Oswego County on March 25, but that as of the date of your letter to this office, you had received neither an "inventory" of the records nor the information sought.

By way of background, in the request, which involves a lawsuit initiated by the County, you wrote as follows:

> "All memorandum, correspondence and related papers of communications initiating and continuing the above suit. I request an inventory if the list exceeds 75 pages.
>
> "Additionally, all costs directly and indirectly associated to the above suit, such as court filing fees, clerical staff time, use of County property, research time of County Legal Staff to include County Attorney, printing of court documents, and any other cost related to above sited [sic] suit. Again, if list exceeds 75 papers, I request an inventory."

While it is unclear whether the receipt of your request was acknowledged in writing within five business days as required by §89(3) of the Freedom of Information Law, the County's Records Access Officer responded as follows:

> "While I am sure you are aware of the possibility that certain of the information you requested might be nonexistent, such as filing fees as

> the County is exempt, the County Attorney suggested that you review the file personally and decide what exactly you require.
>
> "If you will call the County Attorney's Office (349-8296) on Wednesday, April 22, arrangements will be made for your perusal of the file."

In this regard, it appears that the Records Access Officer has made a good faith offer to enable you review the some of the records that you requested. However, she did not address those aspects of your request pertaining to an inventory or costs associated with the lawsuit.

From my perspective, the issue involves the extent to which the information sought exists in the form of a record or records. 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. I know of no general requirement that an agency maintain or prepare an "inventory" pertaining to the contents of a file. If no inventory exists, the County, in my view, would not be required to prepare such a record on your behalf. Similarly, if no records exist that detail the costs associated with the lawsuit, such as clerical or research time expended by staff, the Freedom of Information Law would not apply. In private law firms, records regarding the time expended in relation to a particular function are often meticulously kept for billing purposes. In a government agency, however, where there is no billing, similar records are not ordinarily maintained. This office, for example, will not prepare any record, analysis or breakdown of the staff time associated with preparing this response.

On the other hand, insofar as records do exist that indicate the expenditure of money by the County or time by its employees, I believe that 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. To the extent that expenditure or similar records pertaining to the lawsuit are maintained by the County, none of the grounds for denial would, in my view, serve to justify a denial of access.

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Marguerite B. Lincoln, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10803

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

May 1, 1998

Mr. Russell V. Pollard
[redacted]

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

Dear Mr. Pollard:

I have received your letter of April 15 and the materials attached to it. In brief, the documentation pertains to your efforts in obtaining up to date information concerning staffing at Fulton-Montgomery Community College.

Having reviewed the materials, I offer the following comments.

First, as a general matter, the Freedom of Information Law pertains to existing records, and §89(3) of the Law provides in part that an agency is not required to create a record in response to a request. Therefore, insofar as information sought does not exist in the form of a record or records, an agency would not be obliged to prepare a new record in response to a request for information. Similarly, among the documents that you sent are forms that you apparently prepared for College officials to complete by providing information relating to various personnel transactions. Again, I do not believe that the Freedom of Information Law would require that an agency prepare a new record by inserting information onto your forms.

Second, it is noted, however, that 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 d. 218 (1991)].

If information sought cannot be retrieved or extracted without significant reprogramming, an agency would not, in my opinion, be obliged to develop new programs or modify its existing programs in an effort to generate the data of your interest. Nevertheless, often information stored electronically can be extracted by means of a few keystrokes on a keyboard. While some have contended that those kinds of minimal steps involve programming or reprogramming, I believe that so narrow a construction would tend to defeat the purposes of the Freedom of Information Law, particularly as information is increasingly being stored electronically,and that an agency is required to engage those steps to extract and disclose its data.

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

Although that statute generally does not require that agencies maintain or create records, an exception to that rule relates to the information of your interest. 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 d. 517, 51 AD d. 765, (1976); Gannett Co. v. County of Monroe, 59 AD d. 309 (1977), aff'd 45 NYS d. 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 d. 292, aff'd 67 NY d. 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 d. 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 d. 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.

Other data, assuming that it can be retrieved in conjunction with an agency's information or filing systems, in the nature of payroll information, including reference to dates of employment, changes in titles or rates of pay and the like, must in my opinion be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Priscilla Bell, President
Charles McWilliams, Dean

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10804

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May 7, 1998

Mr. Noel Cruz
97-A-2769
Gowanda Correctional Facility
P.O. Box 311
Gowanda, NY 14070-0311

Dear Mr. Cruz:

I have received your letter of April 6, which reached this office on May 4. The letter consists of a request for a certain record maintained by your facility, and you indicated that the same request was made at your facility but that you had received no response.

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 or control of records generally, and it does not maintain the record of your interest.

It is noted, 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 Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

Since you referred to a waiver of fees, I point out that the federal Freedom of Information Act, which applies only to federal agencies, includes provisions pertaining to the waiver of fees. The New York statute, however, contains no such provisions. Further, it has been held that an agency may charge its established fees for copying even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 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-1080S

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May 7, 1998

E-Mail

TO: RBKublin[redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear R.B. Kublin:

I have received your communication in which you raised a question "as to when a response would be due to a request under the New York State FOIL."

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-10806

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

May 7, 1998

Mr. Bret Winchip
[redacted]

Dear Mr. Winchip:

I have received your letter of May 3 in which you questioned whether "the State of New York subscribes to the FOIA..." In this regard, the "FOIA" is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. That statute has no application with respect to records maintained by units of local government.

Nevertheless, each state has enacted a law dealing with public access to government records. Here, the primary statute is the New York Freedom of Information Law. That Law applies to agencies, 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, it is clear that records maintained by a city fall within the coverage of the Freedom of Information Law.

Enclosed are copies of the statute, and a memorandum that includes the Committee's website address and a description of materials available online.

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-1080 7

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May 7, 1998

Mr. Frank Graham
79-A-2961
Eastern Correctional Facility
Box 338
Napanoch, NY 12458

Dear Mr. Graham:

I have received your letter of April 29 in which you appealed a denial of access to records maintained by the New York City Police Department. In addition, you asked that this agency "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 does not have the authority to determine appeals, to compel an agency to grant or deny access to records, or to intervene, in the legal sense, on behalf of an applicant.

Based upon your correspondence, it is apparently your belief that all of the records that you are seeking must be made available based upon a decision rendered by the State's highest court.

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. The decision to which you referred [Gould v. NYC Police Department, 89 NY 2d 267 (1996)] rejected a blanket denial of access to certain records, the Court specified that other grounds for denial might apply. 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 that decision, which dealt with "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 potentially 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 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: Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10808

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May 8, 1998

Ms. Geri Pomerantz
Staff Attorney
Prisoners' Legal Services of New York
205 South Avenue - Suite #200
Poughkeepsie, NY 12601

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

Dear Ms. Pomerantz:

As you are aware, I have received your letter of April 10 and the materials attached to it. You have sought an advisory opinion concerning the denial of requests by your clients for records of the Department of Correctional Services.

In brief, you referred to the "3-tier disciplinary system" established in the regulations promulgated by the Department of Correctional Services. You wrote that "Tier III hearings [are] reserved for the more serious alleged transgressions", and you added that:

> "A taped record and several documents are generated as a result of a Tier III hearing, including but not limited to a Misbehavior Report, written disposition, hearing record sheet, and any documentary evidence considered by the Hearing Officer.
>
> "When a Hearing Officer dismisses all charges brought against a prisoner, all references to the charges must be expunged from the prisoner's institutional records and the hearing record is retained in a file marked 'sealed' at the prison. Such records are retained for a period of three years...

> "A prisoner has a regulatory right to appeal an adverse Tier III hearing. The Commissioner's designee, Donald Selsky, Director of Special Housing, decides those appeals. When a hearing is reversed upon appeal, at least three documents are created by the Office of Special Housing: (1) Review of Superintendent's Hearing, indicating the date the hearing was reviewed and the decision upon administrative appeal (e.g., 'reversed'); (2) a memorandum from Donald Selsky to the facility Superintendent setting forth the reason for the reversal of the Tier III hearing (e.g., 'The determination was not supported by substantial evidence'); and (3) a memorandum from Donald Selsky to the Inmate Records Coordinator at the facility advising that the hearing was reversed and directing the expungement of the appropriate material from the inmates' records...In accordance with DOCS' procedures, records of administratively reversed Superintendent's Hearings should be submitted to Donald Selsky for retention, and all references to the reversed hearing should be removed from the inmate's records. Hearing tapes, however, are retained at the prison and marked 'expunged'."

You represent prisoners who were found to have engaged in misconduct, but whose charges were later dismissed at Superintendent's Hearings. One request involved an attempt to obtain "the document setting forth the reason for the administrative reversal of the tier III hearing." That request was denied on the ground that "once records are expunged, they are deemed to no longer exist" and that "no document exists which is responsive to your request." Another involved an effort to obtain a record of the Superintendent's hearing. Again, the request was denied on the ground that the records were "deemed not to exist." You have contended, based on the policies and practices of the Department, that the records are retained for a period of time and should be disclosed to prisoners or their legal representatives, even though they are essentially sealed from public view and are "deemed not to exist".

In this regard, I offer the following comments.

First, assuming that the requested materials do in fact exist, I believe that they would constitute "records" subject to the Freedom of Information Law, even if they are "sealed" and despite the claim that they are "deemed not to exist." It is emphasized that the Freedom of Information Law pertains to all agency records and that §86(4) of the Law defines the term "record" expansively to mean:

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

In a case in which an agency claimed, in essence, that it could choose which documents it considered to be "records" for purposes of the Freedom of Information Law, the state's highest court rejected that contention. 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)].

If they continue to exist, a claim that the materials are not records subject to the Freedom of Information Law would in my opinion clearly conflict with the interpretation of that statute by the State's highest court.

Second, in a related vein, 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 justify withholding a record. In this instance, I am unaware of any statute that would render the report exempted from disclosure by statute. It is also noted that it has been held that a rule or regulation promulgated by an agency cannot be cited as a "statute" that would serve to exempt records from disclosure [see Morris v. Martin, Chairman of the State Board of Equalization and Assessment, 440 NYS 2d 365, 82 AD 2d 965, reversed 55 NY 2d 1026 (1982) and Zuckerman v. NYS Board of Parole, 385 NYS 2d 811, 53 AD 2d 405 (1976)].

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 this instance, those seeking the records are the subjects of the records. While I believe that the Department could withhold the records if requested by others (i.e., on the ground that disclosure would constitute an unwarranted invasion of personal privacy), it does not appear that any of the grounds for denial could properly be asserted to withhold the records from the subjects of the records.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci
William M. Gonzalez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1080 9

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May 8, 1998

Ms. Judy Cwiklinski
[redacted]

The staff of the Committee 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. Cwiklinski:

Your letter of April 18 addressed to Governor Pataki has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer guidance concerning public access to records, primarily under the State's Freedom of Information Law.

You expressed concern that the Steuben County Clerk "is taking it upon herself to try and make un-available certain public records, and has threatened confiscating certain holdings of the Steuben County Historical Society." To learn more of the matter, I have spoken with a number of present and former County officials, and copies of this response will be forwarded to them in an effort to enhance understanding of and compliance with law.

First, although the Freedom of Information Law pertains generally to access to government records and the fees that may be charged for copies of records, provisions of the Public Health Law deal specifically with birth and death records and fees for services rendered relating to searches for and copies of those records; the Domestic Relations Law includes provisions pertaining to marriage records. In brief, §4173 of the Public Health Law permits the disclosure of birth records by a registrar only upon issuance of a court order, or to the subject of the birth record or the parent or other lawful representative of a minor. Similarly, §4174 of the Public Health Law limits the circumstances under which the Commissioner of the Department of Health or registrars of vital records may disclose death records and specifies that those records are not subject to the Freedom of Information Law. As such, birth and death records are generally confidential and exempt from the disclosure requirements found in the Freedom of Information Law. Section 19 of the Domestic Relations Law pertains to marriage records maintained by town and city clerks and provides that some aspects of those records are available to the public, while others may be withheld unless there is a showing of a "proper purpose" that would justify disclosure.

Second, in general, registrars of vital records are officials of cities, towns and villages designated by the governing bodies of those municipalities. Unless there is special authorization conferred by §4120 of the Public Health Law, neither a county nor a county clerk performs a legal function in relation to the maintenance of or access to vital records.

Third, the Public Health Law includes provisions that deal directly with genealogical records. Specifically, subdivision (3) of §4174 refers to searches for and the 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., a registrar designated in a city, town or village. 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."

Further, the Commissioner of Health has promulgated "Administrative Rules and Regulations" pertaining to genealogical research, and enclosed is a summary of those provisions that have been obtained on your behalf.

According to the summary received from the Department of Health, birth records need not be disclosed unless the subject of the birth record is known to have been deceased prior to 1924; death records need not be disclosed regarding deaths occurring after 1949. The summary also includes a restriction regarding the disclosure of marriage records. However, in an opinion recently rendered by this office with which the Department of Health has agreed, it was advised that basic information contained in marriage records, such as the names of the parties, the dates of a marriage or marriage application, the duration of the marriage and the municipality of residence of licensees should be made available to any person, unless a request is made for commercial or fund-raising purposes. More intimate information would only be disclosed upon a showing of a "proper purpose."

It is my understanding that a former County Clerk or Historian acquired copies of vital records from the municipal registrars in the County and developed an index to the records in order to facilitate access by genealogists and perhaps others. The records were stored in the office of the County Clerk because the County Historian did not have an office or building in which they could be stored. When a facility was made available to the County Historian approximately nine years ago, the records were moved from the office of the County Clerk to the new facility.

It is emphasized that there was never any legal obligation on the part of the County Clerk to acquire or maintain the records; they were merely stored in that office for purposes of convenience.

Having discussed the matter with the current County Clerk, Ms. Judith Hunter, she indicated that the County has only death and marriage records. As stated earlier, some elements of the marriage records are generally public; it was suggested to her that other aspects of those records, such as the ages of license applicants, the names of their parents, and similar personal information be deleted prior to disclosure, unless a proper purpose has been demonstrated. With regard to death records, it is my understanding that some are copies of records transmitted by local registrars to the County; others are derived from public sources, such as published obituaries, headstones, and the like. Insofar as it can be ascertained that death related items were obtained from public sources, I believe that those items would be available to the public. Similarly, to the extent that it is known which references to deaths were derived from official death records less than fifty years old, based on provisions of the Public Health Law and Administrative Rules and Regulations cited earlier, those records should in my view be kept confidential or deleted from the database. If it cannot be determined whether references to deaths were derived from public sources as opposed to confidential records, to ensure that confidentiality laws are not breached, I believe that such references regarding deaths occurring less than fifty years ago should be considered confidential. Further, to ensure compliance with confidentiality statutes, it was suggested to the Clerk that the County acquire items regarding deaths occurring within fifty years only from public sources.

Lastly, I note that the receipt by the County Historian of death records from the legal custodians of those records years ago may not have been inconsistent with law, for the provision requiring the confidentiality of those records is the result of an amendment that became effective in 1990. Consequently, the death records that are now confidential by statute might validly have made available to the County prior to 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

Robert J. Freeman
Executive Director

RJF:tt
Enc.
cc: Hon. Judith Hunter, County Clerk
Daniel O'Donnell, County Administrator
Peter Carucci, Bureau of Vital Records, Department of Health

STATE OF NEW YORK
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May 11, 1998

Mr. Andrew Waul
78-A-2915 / A-3-40
Auburn Correctional Facility
Box 618
Auburn, NY 13021

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

Dear Mr. Waul:

I have received your letters of March 31 and April 16. Please accept my apologies for the delay in response. You have raised a series of questions concerning your efforts in gaining access to records to be considered by the Board of Parole in a parole release interview.

In this regard, I offer the following comments.

First, you referred to regulations promulgated by the Division of Parole (9 NYCRR §8000) and the Department of Correctional Services (7 NYCRR §5.35). When records are requested from an official of the Division of Parole, I believe that its regulations, not those of the Department of Correctional Services, would be applicable.

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 Division to determine appeals is Terrence X. Tracy, Counsel to the Division.

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.

As you are aware, 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 my view, 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 discloses the records to be considered at the hearing that are not exempt from disclosure, I believe that its response would consistent with law.

I am unaware of any judicial decisions that have dealt directly with access to the records in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
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May 11, 1998

Mr. Eugene Anthony Murray
90-A-8564
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. Murray:

I have received your letter of April 12, which reached this office on April 22. You have sought assistance in obtaining records from the New York City Police Department.

In this regard, I offer the following comments.

First, since you indicated that an appeal had not been answered, I note that the provision pertaining to the right to appeal a denial of access to records, §89(4)(a) of the Freedom of Information Law, requires that an agency respond to an appeal within ten business days of its receipt. That provision states in relevant part that:

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 specific 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 records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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.

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

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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May 12, 1998

Ms. Janice C. Cole
Town Clerk
Town of Unadilla
44 Main Street
P.O. Box 45
Unadilla, NY 13849

The staff of the Committee on 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. Cole:

I have received your letter of April 27 in which you raised a series of questions dealing with the custody of Town records and particularly with the authority of a town historian.

In this regard, the issues that you described are, in my view, tangentially related to the Freedom of Information Law. As you are aware, that statute deals primarily with public rights of access to government records and the ability of government to withhold records or portions thereof in accordance with a series of grounds for denial. Nevertheless, in an effort to assist you, I offer the following comments.

First, I believe that the Town Board has the ultimate responsibility concerning Town property, for §64(3) of the Town Law provides that the Board "[s]hall have the management, custody and control of all town lands, buildings and property of the town..."

Second, in a somewhat related vein, §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.

Third, all Town records fall within the coverage of the Freedom of Information Law. Section 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."

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..."

Based on the foregoing, I do not believe that a town historian has custody or control of town records; rather, those areas of authority are, in my view, conferred upon the town board and the town clerk.

In terms of determining which records are "historical", that issue is beyond the jurisdiction or expertise of this office. It is suggested that you contact your regional representative of the State Archives and Records Administration. That person, in my opinion, would likely be well equipped to respond effectively to many of the concerns raised in your letter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
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May 12, 1998

Mr. Michael Mimnaugh
[redacted]

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

Dear Mr. Mimnaugh:

I have received your letter of April 22 in which you referred to earlier correspondence.

You have asked the following question:

> "When a request under FOIL is made, and when a person is informed the documents are (entirely) ready, what is considered a 'reasonable period of time' for the **REQUESTER** to pick up these documents?" (emphasis yours).

In addition, in relation to the foregoing, you referred to the following "scenario":

> "I requested 3 documents. I was informed 2 were ready and the third would be obtained from the Finance Dept. I advised Village clerk that I'd pick them ALL up when they are ALL ready. The clerk then gave ME a 'deadline'; pick up the TWO documents within 7 days. My determinant was: if the third document was not yet available can an agency demand that I pick up only partial fulfillment?"

In my opinion, a clerk may provide a deadline to an applicant who has requested records. In many instances, an agency needs to use records in the performance of its duties. Removing those records for the purpose of making them available under the Freedom of Information Law may be disruptive and impede the agency's capacity to perform its duties appropriately. In that circumstance and others, it has been suggested that an agency should notify the applicant that records are available and that if the applicant does not review them or obtain copies prior to a certain date, the request will be considered to have been withdrawn. When that occurs, the agency regains the ability to freely use the records in the performance of its duties.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Marie Fuesy, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 13, 1998

Mr. Danny Anderson
[redacted]

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

Dear Mr. Anderson:

I have received your letter of April 21 in which you questioned the propriety of the fee sought to be assessed by the Department of State for a list of notaries public.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge a fee based on the actual cost of reproduction with respect to the duplication of records other than photocopies. Having discussed the issue of fees with officials of the Department of State in the past, I believe that the Department makes every effort to comply with that standard. It is my understanding that the cost is reflective of the computer time involved in generating the data.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph T. Amello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AC-1081S

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May 14, 1998

Mr. Ian Alterman
[redacted]

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

Dear Mr. Alterman:

As you are aware, I have received your letter of April 27 in which you sought an "updated opinion" concerning the status of community boards under the Open Meetings Law and the ability of members of those boards to elect their officers by secret ballot. You have contended, in brief, that community boards are not public bodies because their functions are advisory and that the creation of a record of votes of the members conflicts with "logic, common sense, history, practice and, ultimately, each person's right to privacy with respect to the election process."

Having reviewed earlier opinions on the subjects of your concern, I respectfully disagree with your contentions. In this regard, I offer the following comments.

First, the Open Meetings Law is applicable to meetings of public bodies, and §102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Judicial decisions indicate generally 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)].

Each of the entities at issue in the decisions cited above were ad hoc in that they were charged with a narrow task to be performed within a limited duration; following the performance of the task, the entities would cease to exist. In contrast, community boards are creations of law, specifically Chapter 70 the New York City Charter, §§ 2800 and 2801; their existence is ongoing, and only an amendment to the City Charter would terminate their authority to carry out their duties.

In those decisions, none of the entities was designated by law to carry out a particular duty and all had purely advisory functions. More analogous to the matter 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).

As I understand the provisions of the City Charter, community boards perform a variety of what might be characterized as advisory functions. However, in at least one area of responsibility, they perform a legally necessary step in the decision making process. Paragraph (17) of §2800(d) states that each community board shall:

> "Exercise the initial review of applications and proposals of public agencies and private entities for the use, development or improvement of land located in the community district, including the conduct of a public hearing and the preparation and submission to the city planning commission of a written recommendation..."

Based on the foregoing, before the City Planning Commission can act with respect to land use, a community board must conduct a public hearing and submit a written recommendation to the Commission. Although a community board does not render a final and binding decision, it performs an obligatory function in the process leading to a determination.

In addition, under paragraphs (f) and (g) of §2800, a community board has the power to hire a district manager and others. As such, it enjoys the authority to make certain decisions in order to carry out its duties.

In sum, because community boards perform necessary functions pursuant to the City Charter, I continue to believe and advise that they constitute public bodies required to comply with the Open Meetings Law.

Second, I do not believe that voting by members of community boards in the performance of their official duties can be equated with citizens casting votes in a general election. In the former situation, the members are essentially representatives of the public appointed by a borough president

to carry out governmental duties in the public interest. In the latter, voters can make choices, as individuals, not as representatives of others, as a means of expressing their views.

In terms of the law, §87(3)(a) of the Freedom of Information Law provides that:

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

Based upon the foregoing, when a final vote is taken by an "agency", which is defined to include a state or municipal board [see §86(3)], such as a community board, a record must be prepared that indicates the manner in which each member who voted cast his or her final 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 have voted with respect to particular matters. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)].

If, in the context of your remarks, a vote to elect an officer does not result in a majority for any candidate, and the vote is not "final", I do not believe that the votes of each member must be recorded. Under §87(3)(a), the members' votes must be memorialized only in the case of a "final" vote.

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:tt

STATE OF NEW YORK
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May 15, 1998

Hon. Ronald Stafford
Member of the Senate
Room 502
The Capitol
Albany, NY 12247

Dear Senator Stafford:

I have received a copy of a letter of May 11 addressed to you by Joseph A. Colistra, Superintendent of Schools of the Peru Central School District. In brief, he referred to a request under the Freedom of Information Law for a copy of a yearbook photograph and expressed concern that there was no way of knowing the intent of the applicant for the record.

Mr. Colistra contacted me regarding the request, and although we discussed the issue, I do not believe that his rendition of my remarks was entirely accurate.

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, including a school district, must be disclosed, unless there is a ground for denial of access appearing in §87(2) of the Law. Moreover, soon after the Freedom of Information Law was enacted, it was determined that if a record is accessible under the Law it must be made equally available to any person, without regard to one's status or interest [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. That principle was confirmed by the Court of Appeals, which found that the interest of an applicant and the intended use of records are irrelevant to rights of access [M. Farbman & Sons. v. New York City Health & Hosps. Corp., 62 NY 2d 75 (1984)]. In short, the nature of the record determines whether it is accessible to the public; the identity of the applicant and the intended use of a record are not considerations that can validly be considered in determining rights of access.

I have dealt with the person who made the request in the past, and I believe that he has made similar requests of other districts. I, too, have been concerned regarding the use of the records. Nevertheless, I believe that I am required to offer what I believe to be the correct answer under the law, irrespective of my personal views. Certainly I did not suggest to Mr. Colistra that I take no responsibility for opinions rendered by this office. Every opinion is prepared seriously; every opinion is prepared as if it will be reviewed by a court. Our only goal is to offer a correct response based upon applicable law and judicial interpretations.

In terms of the substance of the matter, yearbooks are widely distributed and can be purchased by everyone. While we cannot know of the interests of every person who might look at or purchase a yearbook, very simply, there is nothing secret or private about its contents. Further, yearbook photographs are frequently used by others in a variety of contexts. As an example, I enclose a copy of a section of yesterday's edition of the Albany Times-Union pertaining to Scholar Athlete Awards. The special supplement includes not only the photographs of scholar athletes and the schools that they attend; it also includes their grade point average, class rank, SAT scores, academic honors and athletic achievements. The publication of the kind of record requested from the Peru Central School District is not uncommon. To suggest that information derived from a yearbook that can be purchased by anyone could justifiably be withheld would, in my view, be inconsistent with law.

I hope that the foregoing serves to enhance your understanding of the matter. If you would like to discuss the issue, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Joseph A. Colistra, Superintendent

STATE OF NEW YORK
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May 18, 1998

Ms. Maureen Poerio
Mount Sinai Union Free
School District
North Country Road
Mount Sinai, NY 11766

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

Dear Ms. Poerio:

I have received your recent communication in which you asked that I review an item of correspondence in order to advise whether, in my opinion, it must be disclosed under the Freedom of Information Law.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions; unlike a court, neither the Committee nor myself has the authority to make a binding determination. Further, it is rare that I review records and advise as to their availability under the law. However, in this instance, the essence of the contents of the record in question was made known to me, for I spoke with both the author of the record and the recipient in an effort to offer guidance.

The record at issue is a letter addressed to Dr. Peter Paciolla, Superintendent of the Mount Sinai Union Free School District, by Cramer Harrington, Superintendent of the Harborfields Central School District. In brief, Mr. Harrington offered a written rendition of an incident that occurred during a baseball game between the Districts' teams. The incident involved an outburst directed at an umpire by "an unidentified parent from Mt. Sinai." Nowhere in the letter is there any identification of the parent or any student participating on either team. Mr. Harrington asked "that the parent in question be barred as a spectator from any future interscholastic contests between the two schools."

Based on a review of the letter, I believe that substantial portions must be disclosed. The remaining aspects could be withheld, but there would be no obligation to do so. In this regard, I offer the following comments.

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

While one of the grounds for denial is pertinent, due to its structure, I believe that it would require disclosure of much of the content of the letter. Specifically 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 the letter consists of "factual data" that must be disclosed under §87(2)(g)(i) of the Freedom of Information Law. From my perspective, much of the content of the letter consists of a factual rendition of events that occurred.

Some elements of the letter are, in my view, reflective of opinions. For instance, Mr. Cramer wrote that a certain call by an umpire "was a questionable one"; he also wrote that language was "shocking." Neither statement would be factual; either could be withheld on the ground that they are, technically, expressions of opinion. Further, the request that the parent be barred from attending similar activities would not be factual; it would more akin to a recommendation that either District could choose to withhold.

Notwithstanding the ability to withhold portions of the letter, 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. In this instance, because the letter identifies neither a parent nor any student, I do not believe that there would be any requirement to withhold any aspect of the letter.

In sum, substantial portions of the letter must, in my opinion, be disclosed under the Freedom of Information Law, and the District could, in its discretion, disclose the remainder.

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

cc: Cramer Harrington

STATE OF NEW YORK
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May 18, 1998

E-Mail

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Levine:

I have received your letter of April 26. You wrote that an attorney for what I would conjecture is Orange County was assigned to investigate a land purchase by the Chairman of the County Legislature. The attorney prepared a report, which was distributed to the Legislature.

As a member of the County Legislature, you indicated that you would like to "review the notes of the County attorney who did the individual interviews" and asked whether the notes must be disclosed.

From my perspective, it is likely that the notes may be withheld in great measure, if not in their entirety. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." From my perspective, §3101(c) and (d) of the Civil Practice Law and Rules (CPLR) may be relevant, for they authorize confidentiality regarding, respectively, the work product of an attorney and material prepared for or in anticipation of litigation. Insofar as those provisions apply, §87(2)(a) of the Freedom of Information Law would also be applicable. That provision authorizes an agency to withhold records that "are specifically exempted from disclosure by state or federal statute."

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

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

Also relevant is §4503 of the CPLR, the codification of the attorney-client privilege. In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

In addition to the provisions associated with the work product of an attorney or an attorney-client relationship, also pertinent is §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.

Insofar as the contents of the notes have been disclosed *via* the report distributed to the Legislature, I believe that the ability to deny access would effectively have been waived. To that extent, the records in my view would be accessible.

Lastly, the County Legislature 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; County Law, §153). In my view, in most instances, a member acting unilaterally, without the consent or approval of a majority of the total membership of the body, 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. Absent such a law or rule, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Chairman, County Legislature
County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 18, 1998

Mr. D. Jones
93-A-1836
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. Jones:

I have received your letter of April 27 concerning your interest in obtaining a voucher from the Office of the New York County District Attorney prepared by a police officer.

In this regard, although you referred repeatedly to the "Rosario issue", as explained to you in an opinion of April 16, your rights as a defendant under Rosario are different from those accorded by the Freedom of Information Law. Under Rosario, you may have the right to obtain records due to your status as a defendant. When seeking records under the Freedom of Information Law, your request is made as a member of the public. In that circumstance, you have the same rights, no more and no less, than other members of the public.

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. If I understand the matter correctly, and if the Office of the District Attorney maintains the record in question, it would likely be available. In short, it does not appear that any 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: Gary Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 20, 1998

Mr. Joaquin Winfield
97-A-5399
Wende Correctional Facility
3622 Wende Road
P.O. Box 1187
Alden, NY 14004-1187

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

Dear Mr. Winfield:

I have received your correspondence, which reached this office on May 1.

According to the materials, having requested certain records under the Freedom of Information Law from Suffolk County Court, you were informed by the County Clerk that the fee for copies "is $1.00 a page, minimum of $4.00 if certified." You have questioned the propriety of that response.

In this regard I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to agency records, and that §86(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 and court records. This is not to suggest that court records are not generally accessible, for other provisions of law may grant broad rights of access to those records (see e.g., Judiciary Law, §255).

Second, it appears that the fee in question was appropriate. Section 8019 of the Civil Practice Law and Rules, entitled "Copies of records", states in subdivision (f) in relevant part that:

> "The following fees, up to maximum of thirty dollars per record shall be payable to 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;
>
> 2. to certify a prepared copy of any record or paper on file, fifty cents per page with a minimum fee of four dollars;
>
> 3. to prepare and certify a copy of any record or paper on file, one dollar per page with a minimum fee of four dollars..."

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

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May 20, 1998

Mr. Eric Birdsall
93-A-1028
Woodbourne Correctional Facility
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. Birdsall:

I have received your letter of April 27. You wrote that you were convicted of manslaughter and reckless endangerment, and that the People presented sixteen witnesses. You asked whether you can obtain their "rap sheets", an evidence list, an "index to records in the DA's office", and "records of communication between the DA's supervisor, and the ADA in [your] case." You asked "what happens if the people do not answer..."

In this regard, I offer the following comments.

First, it is noted that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in part that an agency is not required to create a record to satisfy a request. Therefore, if, for example, there is no index to records related to your case, an office of a district attorney would not be obliged to prepare an index on your behalf.

Second, 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 of your interest 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 (is) 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:
>
> is. 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 (is) 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.

Section 87(2)(g) authorizes an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Communications between members of staff of the office of a district attorney would constitute intra-agency materials that fall within §87(2)(g).

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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-2892
FOIL-AO-1082

41 State Street, Albany, New York 12231
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May 20, 1998

Mr. Arthur M. Hirsch
[redacted]

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

Dear Mr. Hirsch:

I have received your letter of May 1, as well as the correspondence attached to it.

You wrote that you are "a vested member of the Transport Workers-Suburban Bus Authority (Long Island Bus) Employees' Pension Trust" ("the Trust") and that you and other members of the Trust "are or were employed by the Metropolitan Suburban Bus Authority, which is part of the Metropolitan Transit Authority", and that you "are considered 'Public Employees'." One of the attachments to your letter, a memorandum of March 16 addressed to retired members of the Trust, appears to confirm your contention, for it was stated that "because the MSBA was a division of the State of New York...pensions paid by the State to its former employees were totally State tax exempt."

Notwithstanding the foregoing, you have been informed by the manager of the Trust that you cannot attend meetings of the its Board of Trustees and that the "TWU MSBA Employees Pension Trust is not subject to Freedom of Information statutes." You have sought assistance in gaining access to records of the Trust and to meetings of its Board of Trustees.

From my perspective, if indeed all members of the Trust are present or former public employees, and if the only employers of those persons have been governmental entities, I believe that the Trust would be required to give effect to the Freedom of Information Law and that meetings of its Board of Trustees would fall within the coverage of the Open Meetings 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."

A public authority is a public corporation. Therefore, any public authority in New York State is an "agency", a governmental entity, that is subject to the Freedom of Information Law.

In my opinion, if the Trust would not exist but for its relationship with a public authority, and it if carries out its duties solely for or on behalf of present or former public employees, it, too, would constitute an "agency" required to comply with the Freedom of Information Law. I note that similar entities, such as the New York State Retirement System, the New York State Teachers' Retirement System and various New York City public employee trusts are subject to and have complied with the Freedom of Information Law since the enactment of that statute.

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

If the preceding assumptions and conclusions are accurate, the Board of Trustees of the Trust would be subject to the Open Meetings Law. That statute is applicable to public bodies, and §102(2) defines the phrase "public body" to include:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Again, assuming that the Trust carries out its duties solely for or on behalf of public employees, I believe that its Board of Trustees constitutes an entity that conducts public business and performs a governmental function for a public corporation, i.e., a public authority. If that is so, it is a public body that falls within the coverage of the Open Meetings Law.

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 §105(1) of the Open Meetings Law.

Enclosed for your review are copies of both the Freedom of Information Law and the Open Meetings Law, and an explanatory brochure that deals with those statutes.

In an effort to enhance compliance with and understanding of the issue, copies of the same materials and this response will be forwarded to the manager of the Trust.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Joan Engert, Manager

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2891
FOIL-AO-10823

41 State Street, Albany, New York 12231
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May 20, 1998

Kendall R. Pirro, Esq.
659 Putnam Road
Schenectady, NY 12306

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

Dear Mr. Pirro:

I have received your letter of April 28 in which you referred to the opinion of April 22 addressed to you. In brief, it was advised that the records and meetings of volunteer fire companies are subject, respectively, to the Freedom of Information Law and the Open Meetings Law.

You noted that the opinion did not address decisions cited in your letter "which hold, in effect, that the Open Meetings Law does not encompass bodies which have no authority to make governmental decisions or exercise the power of the sovereign, etc." You asked whether it is my view that the principles expressed in the Westchester-Rockland decision are distinguishable from those that you cited involving the Open Meetings Law and whether volunteer fire companies "exercise the power of the sovereign" and are involved in "the making of governmental decisions."

In this regard, I did not focus on or address the decisions that you cited, because they involved ad hoc bodies created to offer advice or recommendations concerning particular issues, and their existence ended when they completed their tasks. In contrast, the Court of Appeals in Westchester-Rockland characterized a volunteer fire company as "an organization on which a local government relies for performance of an essential public service." Similarly, in the S.W. Pitts Hose Company decision, the court emphasized that volunteer fire companies provide "an essential public service." Those courts concluded that volunteer fire companies are "agencies" that fall within the scope of the Freedom of Information Law because they are governmental in nature and carry out a governmental function for one or more municipalities. In short, in my view, volunteer fire companies are in no way analogous to the advisory bodies that were the subjects of the decisions that you cited.

Further, if, as the State's highest court held, a volunteer fire company is an agency that performs a governmental function, I believe that it may fairly be concluded for purposes of the Open meetings Law that it conducts public business, performs a governmental function and, therefore, is a public body required to comply with 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-1089Y

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May 20, 1998

Ms. Holly E. Mabb
Kingsbury Town Clerk
210 Main Street
Hudson Falls, NY 12839-1814

The staff of the Committee on 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. Mabb:

I have received your letter of April 30. As in the case of previous correspondence, your inquiry pertains to requests for records of the Town of Kingsbury by Mr. Antonio Cerro. You have asked how the Town should respond to Mr. Cerro.

By way of background, you indicated that :

> "I wrote to Mr. Cerro advising him that I had received the records from the various department heads and that the records were now available for him to come and *review*. I requested him to make an appointment as some of the records are used on a daily basis and I wanted to be sure he could access them. This request involves five years of records relating to the purchase of the Dix Drive In Property by the Town of Kingsbury. Mr. Cerro wants certified copies of everything in the files. Some of the items in the files are canceled checks, vouchers, ledgers, legal documents, just for an example. The manner in which these records are filed does not allow me to simply pull them out by the file name Dix Drive In Property. The are either numerically filed or alphabetically filed by a vendor name. I would have to sort through all the boxes and individually pull the documents out. 'The needle in the haystack method' as you refer to it..."
>
> "I feel I have done all I can do to determine what records Mr. Cerro wanted and to make them available to him for his *review*. I do not feel it is my duty to conduct a research project on his behalf."

In this regard, as I advised in an opinion addressed to you on March 17, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. The Court of Appeals, the State's highest court, has held that the extent to which a request reasonably describes records may be dependent on an agency's filing or record-keeping systems. To reiterate the guidance offered in the earlier opinion:

> "To the 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 of records individually in an effort to locate those falling within the scope of the request, the request would not in my opinion meet the standard of reasonably describing the records."

From my perspective, you are not required to conduct a "research project." Insofar as the request does not reasonably describe the records, it is suggested that you repeat your offer to permit Mr. Cerro to inspect the records. If, after reviewing the records, he has located those for which he wants copies, the Town would be obliged to prepare copies upon payment of the requisite fee [see Freedom of Information Law, §89(3)].

Lastly, when an applicant seeks a certification in accordance with §89(3), I do not believe that an agency must prepare a separate certification relating to each page that is copied. In my view, a single certification, in the nature of a brief affidavit in which you assert that the copies of records provided to the applicant are true copies of Town records, would be sufficient to comply with 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:tt

cc: Antonio Cerro

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 20, 1998

Ms. Jean A. Black
Sewanhaka Central High
School District
24 West Avenue
Suite 5
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 note, which reached this office on April 30.

Although you received the salary records that you requested form the Sewanhaka Central School District, you indicated that the District charged you $12.50. You asked whether an agency is " required to have a more concise list."

In this regard, as you are aware, §87(3)(b) of the Freedom of Information Law requires that each agency must maintain "a record setting forth the name, public office address, title and salary of every officer or employee of the agency." Nothing in the law specifies the manner in which the record envisioned by §87(3)(b) must be prepared.

Nevertheless, from my perspective, every law, including the Freedom of Information Law, should be implemented in a manner that gives reasonable effect to its intent. In my opinion, the Freedom of Information Law is intended to foster public access to records. In §84 of that statute, the legislative declaration, it is stated that:

> "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.

> "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.
>
> "The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.
>
> "The legislature therefore declares that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

In the context of your question, if an agency deliberately prepares a payroll record so as to include few names on a page in an effort to increase the fee for a copy of that record and dissuade the public from obtaining it, I believe that it would be acting unreasonably and in a manner inconsistent with the intent of the law. However, there is no requirement, in my view, that an agency include reference to as many employees as is physically possible on a printed page or that it alter its means of printing or publishing a payroll record in order to guarantee that the public will pay the lowest possible fee for copies.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. George Goldstein, Superintendent of Schools
Douglas Libby, Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1082b

41 State Street, Albany, New York 12231
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May 21, 1998

Ms. Patricia Williams
[redacted]

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

Dear Ms. Williams:

I have received your letter of May 5. You described a series of delays before obtaining certain records from the Town of Newburgh. Further, you complained that "[a]ny information that [you] request from the Town Accountant is copied to the Supervisor and Town Attorney" and expressed the belief that that practice "is highly unethical."

From my perspective, the practice of informing certain officials regarding requests made under the Freedom of Information Law is not contrary to law or unethical. There is nothing confidential about the request as you described it, and in my view, it would be accessible to the public if requested under the Freedom of Information Law. Frequently the recipient of a request for records will seek the advice or guidance of other municipal officials who may have expertise relating to the records sought. By means of example, when a town's records access officer, usually the town clerk, receives a request pertaining to a law enforcement investigation, the clerk may have no personal knowledge concerning the contents of the records sought or the effects of their disclosure. In that circumstance, in the access officer's role as coordinator of the town's response to a request, I believe that it would be appropriate and likely necessary to consult with law enforcement officials in an effort to determine rights of access to the records sought.

With respect to the delay in disclosure, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Supervisor
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1082?

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May 21, 1998

Mr. Edward R. Fitzpatrick
Times Union Reporter
TIMES-UNION
News Plaza Box 1500
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. Fitzpatrick:

I have received your letter of May 4 in which you sough an advisory opinion concerning "the Times-Union's request for photographs of Jermaine Henderson."

You indicated that the Times-Union requested "all photographs of Henderson taken on or about October 31, 1997, the night Henderson was allegedly assaulted by two Albany police officers." Although the City disclosed the mugshot of Henderson taken on the night of the event after the alleged assault, it denied the request for all other photos. In sustaining the initial denial of access, the Appeals Officer wrote that:

> "The Freedom of Information Law excepts from disclosure records that are compiled for law enforcement purposes, which, if disclosed, might deprive a person of a fair trial or impartial adjudication. The photographs you have requested are evidence in an ongoing investigation pertaining to a matter that has not yet been adjudicated and are not subject to review under the Freedom of Information Law."

In this regard, I offer the following comments.

First, as you are aware, the incident to which the photos relate has been widely publicized by the Times-Union and other area news media. Further, because the alleged assault involved police officers, and because Henderson is a star basketball player for a local college, a great deal has been written and aired about both the officers and Henderson.

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

From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access. The extent to which they were properly asserted is, in my opinion, dependent on the nature of the depiction in each photo.

Relevant are §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute " an unwarranted invasion of personal privacy", and §87(2)(e)(ii), which enables an agency to withhold records "compiled for law enforcement purposes" when disclosure would "deprive a person of a right to a fair trial or impartial adjudication." If, for example, a photo graphically depicts Henderson's injuries or includes intimate personal details, I would conjecture that a court would determine that such a record could be withheld under §87(2)(b). Similarly, disclosure of a photo of that nature might adversely affect the ability of the officers to have a fair trial. If that is so, it appears that §87(2)(e)(ii) could justifiably be asserted.

On the other hand, if a photo of Henderson is similar to the mugshot taken on the night of the event, or if it does not depict intimate personal details or reflect in a graphic manner the nature of injuries sustained, for example, neither of the grounds for withholding cited earlier would in my view justify a denial of access.

I note that the court of Appeals, the State's highest court, has stressed that the Freedom of Information Law should be construed expansively. Most recently, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, 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 Police Department contended that "complaint follow up reports" 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 that 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), 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 request, all of the photos taken on the night of the incident have been withheld. While I am not suggesting that each photo sought must be disclosed, based on the direction given by the Court of Appeals, the records must be reviewed individually by the City for the purpose of identifying those 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, an agency may deny access records under an exception "as long as the requisite particularized showing is made" (id., 277).

I note that a similar review was required in a case involving videotapes of events occurring at a correctional facility. In the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy [see §87(2)(b)] and endanger life and safety [§87(2)(f)] [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the City is required to review each photo falling within the scope of your request, individually, to attempt to ascertain whether any fall within the grounds for denial appearing in the statute. From my perspective, unless a photo depicts the subject in a manner that is intimate, as in the case of the strip frisk or a demonstration of extreme emotion, for example, it would be unlikely, in consideration of the release of the mugshot taken during the same evening, that disclosure would result in an unwarranted invasion of Mr. Henderson's privacy. Similarly, it would seem that the contention that disclosure "might deprive a person of a fair trial or impartial adjudication" could be sustained only if a photo provides a graphic depiction that could in some way be prejudicial (i.e.,

hypothetically, a depiction of a person bleeding profusely or writhing in pain due to a beating). If the photos do not include the kind of graphic detail described above, the City, in my opinion, could not likely meet the burden of defending secrecy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Harold Greenstein

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10828

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May 21, 1998

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

I have received your letter of April 28 in which you raised a series of questions regarding the Freedom of Information Law.

You asked initially whether records regarding inmates may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy pursuant to §87(2)(b). In this regard, there are various items pertaining to inmates that are public; there are others that may be withheld based upon considerations of privacy. For instance, pursuant to the regulations promulgated by the Department of Correctional Services (7 NYCRR §5.1 etc.), certain records regarding inmates are routinely made available based essentially upon an analysis that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy. Commitment information, the facility in which a criminal is housed, departmental actions regarding confinement and release are accessible to the public. On the other hand, medical information pertaining to an inmate or records that include intimate details could be withheld.

You referred to §87(2)(f) and asked whether that provision could be asserted with respect to witnesses who testified at a defendant's trial. As you are aware, the cited provision states that an agency may withhold records insofar as disclosure would "endanger the life or safety of any person." If records have been introduced in evidence during a public proceeding, it has been held that they are accessible, even though they might otherwise have been withheld under the Freedom of Information Law [see Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989)]. If, however, records pertaining to a witness have not been disclosed to a defendant or during a public proceeding, it is possible that they may be withheld under §87(2)(f).

Lastly, you referred to materials submitted concerning parole in the nature of recommendations offered by a prosecutor or others. In this regard, when such a letter is transmitted by an agency official, i.e., a police officer or a district attorney, those documents would fall within §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.

Letters sent by others, such as victims or their family members or other members of the public likely could be withheld in my opinion on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

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-10829

41 State Street, Albany, New York 12231
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May 22, 1998

Ms. June Maxam
Box 408
Chestertown, NY 12817

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

Dear Ms. Maxam:

I have received your letter of May 1. You have sought my views concerning delays that you have experienced in your efforts in obtaining records from the Division of State Police.

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

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

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

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of

the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Laurie M. Wagner, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10830

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May 27, 1998

Mr. Wayne Morgn
97-R-7260
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600morgan

The staff of the Committee on Open 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 April 16, which reached this office on May 4. As I understand the matter, you have sought assistance in obtaining records from the Division of Parole and the Bronx House of Detention.

In this regard, I offer the following comments.

First, you referred in your correspondence to 5 USC 552 and 552a. Those provision are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. The applicable statute in this instance is the New York Freedom of Information Law.

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 the agency's response to requests for records, and requests generally should be made to that person. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records of your interest.

I note that the Bronx House of Detention is part of the New York City Department of Correction. While I believe that the recipient of your requests should have responded in a manner consistent with the Freedom of Information Law or forwarded the requests to the records access officer, it is suggested that you resubmit the requests to Thomas Antenen, Records Access Officer, Department of Correction, 60 Hudson Street, 6th Floor, New York, NY 10013.

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

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

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

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

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

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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Thomas Antenen
SPO II Fallon
David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10831 PPPC-AO-236

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May 28, 1998

Mr. James M. Odato
Times-Union
Capitol Bureau
Box 7340
State Capitol
Albany, NY 12224

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

Dear Mr. Odato:

As you are aware, I have received your letter of May 6 in which you sought my views concerning a denial of a request directed to the New York State Higher Education Services Corporation ("the Corporation").

In a request made on February 6, you sought information from the Corporation "that lists the names of public employees who have defaulted on their student loans", as well as "the names of state employees whose names are garnished because they have defaulted on student loans." That request was denied, and on March 2, you asked that the matter be reconsidered. At that time, you requested a "list of state employees who fail to pay their loans because the state has the authority to garnish their paychecks." That request was denied by the Corporation's Appeals Officer, who cited both the Freedom of Information Law and the Personal Privacy Protection Law, stating that "the information...is personal and credit-related in nature, and as such meets the statutory standard which defines an 'unwarranted invasion of personal privacy' in section 89(2) of the Public Officers Law."

From my perspective, it is likely that the request was properly denied. While it is possible that a court might find that a list of all defaulters is accessible, it is doubtful in my view that a list of state employees who have defaulted would be determined to be public. In this regard, I offer the following comments.

In order to obtain background information concerning your request, I have spoken with representatives of the Corporation. One of the points offered is that the term "default" must be construed by the Corporation pursuant to federal laws and guidelines. As I understand their remarks, a default might include any failure to repay the appropriate portion of a loan on time, even if a payment is made immediately after a deadline. It is also my understanding that the list of "defaulters" may include people who appear to be in default but who may be exempt from repayment due to a certain status, such as a handicapping condition. and that federal law contains so-called "forgiveness" provisions that authorize individuals to repay loans despite apparent default. The data maintained by the Corporation does not differentiate among those categories of persons, nor does it distinguish between those in default now and those who repaid. As such, it is the contention of the Corporation that disclosure of the identity of defaulters generally would constitute "an unwarranted invasion of personal privacy."

In my view, if a person has entered into an agreement with a governmental entity but fails to uphold the agreement and is found to be in violation, a record indicating such violation typically must be disclosed. Although not fully analogous to the instant situation, the identities of those who have failed to comply with law, for example, are generally known to the public under the Freedom of Information Law. If a person has engaged in parking violations and owes money to a municipality, those persons' names are public; if an owner of real property has failed to pay his or her property taxes on time or at all, records reflective of such failure would be public. With the exception of those categorized as defaulters who in some way fall within an exception indicating that they are not truly in default, it is my view that the identities of those in default would be accessible.

As suggested in the responses to your requests, two statutes are pertinent to an analysis of the matter, the Freedom of Information Law and the Personal Privacy Protection 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.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of 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 pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

I point out that §89(2)(b) provides that "an unwarranted invasion of personal privacy" includes, but shall not be limited to situations that are described by means of five examples of unwarranted invasions of personal privacy. Two of the examples of unwarranted invasions of personal privacy listed in §89(2)(b) may be relevant to the situation. Specifically, those two exceptions state that an unwarranted invasion of personal privacy includes:

> "i. disclosure of employment, medical or credit histories or personal references of applicants for employment...
>
> 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..."

With respect to §89(2)(b)(i), the question in my view is whether the information sought could be equated with a "credit history." If a list identifying defaulters could be construed as a record reflective of credit histories, it would appear that the records sought could justifiably be withheld. On the other hand, a relationship between a person who obtains a loan from the Corporation involves a single event relating to credit. In my opinion, a relationship based upon one loan could not likely be viewed as "history" of a person's credit worthiness.

With regard to §89(2)(b)(iv), the information in my view is of a personal nature, disclosure might result in personal or economic hardship to the individuals in default or identified on the default list, but the information is relevant to the work of the Corporation. In construing §89(2)(b)(iv), it has been found that its language is conjunctive. As stated by the Court of Appeals in Gannett Co. Inc. v. County of Monroe, which construed the analogous provision of the original Freedom of Information Law, "the exception...is available only if there is both proof of such hardships and it is established that the records sought are not relevant or essential to the ordinary work of the agency or municipality. The latter branch of this conjunctive requirement cannot be met in this instance" [emphasis added by court, 45 NY 2d 954, 955 (1978)]. Similarly, in a decision that involved §89(2)(b)(iv), the court cited the Gannett decision and found that the application of that provision required that the "test" of finding that disclosure would result in personal or economic hardship and that the information was not relevant to the work of the agency could not be met. Therefore, it was held that the records were required to be made available [Flatbush Development Corp. v. Insurance Department, Sup. Ct., New York County, NYLJ, October 7, 1983].

If the records sought could not be characterized as containing credit histories, and if a court employed the test described in relation to §89(2)(b)(iv) of the Freedom of Information Law, it is likely in my view that a default list would be available, for the records would be relevant to the work of the Corporation, and disclosure would, for reasons discussed earlier, constitute a permissible rather than an unwarranted invasion of personal privacy.

It is possible, too, that a court might not look to the examples of unwarranted invasions of personal privacy listed in §89(2)(b) of the Freedom of Information Law. As indicated earlier, the cited provision states that an unwarranted invasion of personal privacy includes but "shall not be limited to" those examples. Consequently, while a court may seek guidance from the examples listed in §89(2)(b), I do not believe that it would be bound by those five specific references to unwarranted invasions of personal privacy.

Lastly, assuming that the Corporation can generate a list that identifies those in default who are also state employees, I believe that such a list could be withheld. As a state agency, the Corporation has a relationship with other state agencies that enable it to use their services and data in order to carry out their official duties. From my perspective, the ability to earmark certain defaulters as state employees is essentially fortuitous, incidental and based solely on the fact that state agencies have the opportunity in certain circumstances to share personal information.

In terms of disclosure, 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].

It has been advised in other situations that information about state employees indicating how their money may be spent, allocated or deducted is irrelevant to the performance of their official duties and, therefore, may be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy. If a state employee has money deducted from his or her paycheck for alimony payments, contributions to charity, or direct deposit into a savings or investment program,

those aspects of one's life are unrelated to the performance of that person's official duties. Similarly, the fact that a person may be in default on a student loan but happens to be a state employee is in my view also irrelevant to the performance of his or her official duties.

For the reasons expressed above, in my opinion, a list or record that identifies state employees who may be defaulters on loans could justifiably be withheld. If you would like to discuss the matter further, please feel free to contact me.

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: Julio Vidal
Pierre Alric
Jean Ghezzi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 28, 1998

Ms. Marguerite B. Lincoln
Records Access Officer
Oswego County Legislature
County Office Building
Oswego, NY 13126

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

Dear Ms. Lincoln:

I have received your letter of May 1 in which you referred to a conversation relating to access to Oswego County's application for employment. You enclosed a copy of the application and asked that I offer clarification and guidance concerning disclosure.

From my perspective, the extent to which the application must be disclosed will be dependent on a variety of facts and circumstances. In this regard, I offer the following comments.

First, it is noted that §89(7) of the Freedom of Information Law indicates that an agency is not required by that statute to disclose the name of an applicant for appointment to public employment. Therefore, if an application pertains to a person who has not been hired or employed by the County, his or her name need not be disclosed. If an applicant becomes an employee, that person's name would clearly be accessible. The same provision states that the home address of a present or former public employee need not be disclosed.

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 ensuing remarks will involve an assumption that an application pertains to a County employee.

Most relevant to the matter 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." 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 has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

In short, it is likely that some aspects of the application must be disclosed, while others could be withheld to protect personal privacy. If you would like to discuss the issue further, please feel free to contact me.

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

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May 28, 1998

Mr. Jack White
[redacted]

The staff of the Committee on Open 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 letters of May 26 and April 28 and apologize for sending you a response erroneously that should have been sent to a different person.

In your original letter, you referred to delays that you are experiencing in your attempts to obtain records from the Town of Beekman. You have asked whether "not having time" represents a "legitimate excuse" for delaying disclosure.

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

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

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

business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

Additionally, I note that it has been held that an agency's contention that a "shortage of manpower" was not a defense to a denial of access, for a refusal to disclose on that basis would "thwart the very purpose of the Freedom of Information Law" [see United Federation of Teachers v. NYC Health & Hospitals Corp, 428 NYS 2d 823 (1980)].

Lastly, I note that I will be speaking at the Beekman Town Hall on June 8 at 7:30 p.m. I will attempt to clarify open government laws and respond to any questions on the subject during the event.

I hope to see you there and that I have been of assistance.

Once again, please accept my apologies for the error.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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May 28, 1998

Mr. Ted Williams
95-R-8589
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13542-0370

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

Dear Mr. Williams:

As you are aware, I have received your recent letter. Please accept my apologies for sending a response on May 15 that you should have been sent to a different person.

You asked how you could obtain free trial transcripts under the Freedom of Information Law. In this regard, I offer the following comments.

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 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.

While I am not an expert on the subject, I believe that you could obtain court records free following a determination that you are a poor person entitled to a waiver of fees.

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

Once again, please accept my apologies for the error.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1083

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

May 28, 1998

Mr. Mitch Paulsen
New York Arts Council
P.O. Box 274
Floral Park, NY 11003

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

Dear Mr. Paulsen:

I have received your letter of May 6. You have requested an advisory opinion concerning the acknowledgement of the receipt of your request for records by the Office of Parks, Recreation and Historic Preservation indicating that a response would be rendered within "approximately 4-6 weeks."

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

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

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

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John F. Barr

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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May 29, 1998

Mr. Camillo Lovacco
86-A-2926
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. Lovacco:

I have received your letter of April 29, which reached this office on May 6. You have sought assistance relating to delays that you have encountered in your efforts in attempting to obtain records from the Office of the Kings County District Attorney.

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

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

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

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

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

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

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)].

For your information, I believe that the person designated to determine appeals by the District Attorney is Mr. Sholom Twersky.

I hope that I have been of assistance

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Yuriy Kogan
Sholom Twersky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-237
FOIL-AO-10837

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June 1, 1998

E-Mail

TO: Suzanne Suarez [redacted]

FROM: Robert J. Freeman, Executive Director

Dear Ms. Suarez:

I have received your communication of May 28 in which you sought information regarding the New York City Department of Parks and Recreation and its "Enforcement Patrol Agency."

Specifically, you have asked whether it is accurate that all agencies must annually file with the Attorney General "a complete and thorough description of the systems of their records", as well as a similar description of their "FOIL records." In this regard, there is no such requirement.

I note that there is a requirement in the Personal Privacy Protection Law that agencies file with the Committee on Open Government a notice of a system of records in which personal information may be retrieved by means of an identifier pertaining to an individual. However, that requirement is not annual; a notice would have been required when the Personal Privacy Protection Law went into effect and ensuing notices are filed if a new system of records is created. The Personal Privacy Protection Law also requires that agencies annually notify the Committee on Open Government of the number of requests made by individuals for records about themselves, and the number of denials of such requests. It is emphasized, however, that the Personal Privacy Protection Law applies only to state agencies; it does not apply to municipal agencies, such as those operating with New York City government.

I point out, too, that the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. An exception to that rule relates to the "subject matter list.". 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.

As a general matter, this office does not maintain records regarding the operation of state and municipal agencies. Nevertheless, every such agency is required to comply with and disclose records pursuant to 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.

To obtain additional information concerning the Freedom of Information Law, you can review the Committee's extensive website at: http://www.dos.state.ny.us/coog/coogwww.html.

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

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June 1, 1998

Stephen S. Teich, M.D.
[redacted]

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

Dear Dr. Teich:

I have received your letter of May 5 in which you raised a variety of issues and sought an advisory opinion involving the Freedom of Information Law.

You indicated that you have requested records from the Office of the Kings County District Attorney pertaining to your role as an expert witness for the defense, including any "investigative reports, active or inactive investigations bearing [your] name", as well as a "Master Index as maintained by that agency, as well as any and all Investigative Data Sheets which may bear [your] name." You have sought my views concerning the "relative merits of this application." You also asked for opinions concerning your right to obtain under the Freedom of Information Law transcripts of hearings in which you rendered an expert opinion and to records filed with the Indigent Defendants Panel of the Second Judicial Department.

In this regard, I offer the following comments.

First, from my perspective, a potential 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 District Attorney, to extent that 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 records are kept under the names of defendants, for example, and cannot by retrieved through the use of your name, it is likely that the request would not reasonably describe the records.

Second, the only reference to the phrase "master index", to the best of my knowledge, appears in a section of the regulations promulgated by the State Department of Correctional Services based upon §87(3)(c) of the Freedom of Information Law. That provision 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.

Third, I note that the Freedom of Information Law is applicable to agency records, and that the courts are excluded from its coverage [see definitions of "agency" and "judiciary", §86(3) and (1) respectively]. If the records maintained by a unit within the Second Judicial Department are considered to be court records, the Freedom of Information Law would not apply. If they are agency records, that statute would appear to govern 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.

With respect to 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.

Next, insofar as the records sought are maintained by the Office of the District Attorney and can be located in accordance with the preceding remarks, it appears that several grounds for denial may be pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." If a person is charged with a criminal offense, and the charge is later dismissed in favor of the accused, the records typically are sealed pursuant to §160.50 of the Criminal Procedure Law. Insofar as that may be so, the records would be exempt from disclosure.

Communications between or among members of the staff of the District Attorney or to officials of other agencies would fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

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

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

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

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).

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10839

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June 1, 1998

Ms. Erika Rosenberg
Democrat & 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 Ms. Rosenberg:

I have received your recent letter and the correspondence attached to it. You have questioned the propriety of a denial of your request for an audit concerning a high school in the Rochester City School District.

The correspondence consists of a letter addressed to you and a colleague by Louis N. Kash, the District's Chief Legal Counsel, offering a rationale for withholding the record at issue, which is characterized as an "internal audit." While there may be portions of the audit that may justifiably be withheld, based on Mr. Kash's remarks, I believe that other aspects of the documentation 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.

The only basis for denial of apparent relevance, and Mr. Kash made reference to it in his response to you, 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.

Mr. Kash wrote that "[a]mong the records that are not required to be disclosed are 'intra-agency materials which are not...external audits", and he concluded that "[g]iven the legislative history of this subsection, the language clearly references an exemption from disclosure internal audits." In contending that the document is "exempt from disclosure pursuant Public Officer's [sic] Law §87(2)(g)(iv)", he added that:

> "To the extent that this internal audit contains some 'statistical or factual tabulations or data' that does not covert [sic] it from an exempt to a disclosable document. In my view, the fact that the state Legislature chose to create a specific exemption for internal audits separate and distinct from the other subdivisions of §87(2)(g), and particularly from subdivision (i), argues strongly for an interpretation that the Legislature intended internal audits to be wholly exempt from disclosure even though they contain statistical or factual tabulations or data. Otherwise, there would be no need for a separate and distinct exemption for internal audits, as the statistical and factual information in such audits would be redactable and disclosable, while the opinions, recommendations, etc., would not, under already existing decisional law."

In short, I believe that his contention is erroneous. There is nothing in the language of the Freedom of Information Law that pertains specifically to internal audits or that exempts them form disclosure. The fact that external audits must be disclosed does not suggest other records, such as internal audits, are exempt, in their entirety, from disclosure. On the contrary, as stated earlier, all records are presumed to be available, and silence in the law concerning a certain kind of record does not confer confidentiality, but rather a presumption of access. In this instance, an internal audit constitutes "intra-agency" material that is accessible or deniable, in whole or in part, based on its contents.

A recent decision rendered by the Court of Appeals, the State's highest court, dealt with a similar contention relating to a different aspect of §87(2)(g). In Gould et al. v. New York City Police Department [89 NY2d 267 (1996)], the agency denied access on the basis of §87(2)(g)(iii), which grants access to "final agency policy or determinations", on the ground that the records sought were not final and did not relate to any event whose outcome had been finally determined. Just as Mr. Kash contended that because external audits are accessible, internal audits can be withheld in their

entirety, the New York City Police Department argued that because final determinations are public, records other than final may be withheld in their entirety. The Court of Appeals rejected that argument 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); emphasis added by Court].

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 brief, insofar as the record sought constitutes statistical or factual information, I believe that the District is obliged to disclose.

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 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 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. 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, Mr. Kash essentially confirmed that portions of the record sought consist of statistical or factual information. Based on the language of the law and especially its judicial interpretation, those portions, in my view, must be disclosed.

In an effort to enhance compliance with and understanding of the matter, and to attempt to avoid litigation, a copy of this opinion will be forwarded to Mr. Kash.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Louis N. Kash

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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June 2, 1998

Mr. Richard Becker
[redacted]

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

Dear Mr. Becker:

I have received your letter of May 1 addressed to Chairman Bookman, which reached this office on May 11. Please be advised that Mr. Bookman has retired.

Having requested records from the Nassau County Police Department, you wrote that your request was refused. You have asked "if the law applied to them..."

In this regard, as suggested in several previous correspondences on the subject, the Nassau County Police Department clearly is an "agency" that falls within the coverage of the Freedom of Information Law and must comply with that statute. However, I believe that it has also been advised that the Freedom of Information Law pertains to existing records. Stated differently, if an agency does not maintain records that fall within the scope of a request, very simply, it has no records to disclose, and the Freedom of Information Law would be inapplicable. Further, §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 information that you seek does not exist in the form of a record, the Department would not be obliged to prepare a new record on your behalf to satisfy 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: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084

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June 4, 1998

Mr. Robert E. O'Connor
[redacted]

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

Dear Mr. O'Connor:

I have received your letter of May 12, as well as the correspondence attached to it. You described a series of difficulties and delays in your attempts to gain access to certain records from the Hamburg Central School District. It was only when a District official "disclosed the magic term [you] should have been using" that you were able to obtain the records. You have asked that the Committee "investigate" the matter.

In this regard, the Committee on Open Government has neither the authority nor the resources to conduct what might be characterized as an investigation of an agency. However, the Committee is authorized to offer advice and opinions. While opinions rendered by the Committee are not binding, my hope is that they are educational and persuasive. With those goals, I offer the following comments.

As you inferred, based on two provisions of law, an applicant for records cannot be thwarted based on a failure to use a "magic term."

First, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) have the force and effect of law and govern the procedural aspects of the Freedom of Information Law. Pursuant to the regulations, each agency, such as a school district, must designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records. Part of that duty involves the obligation to ensure that agency personnel assist an applicant in identifying the record sought, if necessary.

Second, the Freedom of Information Law does not require, as the response to your request suggests, that an applicant must seek or describe a specific document or refer to a "magic term" when requesting records. 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, the State's highest court, 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)].

Based on the correspondence, it would appear that a brief conversation with a District official for the purpose of enabling you to describe the nature of the records sought, and concurrently enabling the District to identify the records, would have resulted in timely access and avoidance of your frustration and the need to engage in a lengthy series of communications.

In an effort to enhance compliance with and understanding of the 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: Peter Roswell, Superintendent
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084

41 State Street, Albany, New York 12231
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June 4, 1998

Mr. Alvin Waters
94-A-8127, B-1-17
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. Waters:

I have received your letter of May 11. As you requested, enclosed are two copies of each of "Your Right to Know" and "You Should Know", as well as the current version of the Freedom of Information Law. You also wrote that you would like to obtain a copy of the Department of Correctional Services Employee Manual including rules involving the employee dress code and rules of conduct.

It is unclear whether you are seeking the records developed by the Department of Correctional Services from this office, or whether you are seeking an advisory opinion concerning rights of access to those records. In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee does not maintain custody or control of records generally and does not have possession of the records in question. Pursuant to the regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may 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 record of an agency are available, except to the extent that records or portions thereof fall within one or more of the grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, three of the grounds for denial are relevant to an analysis of rights of access.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

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

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

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.

> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084

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June 4, 1998

Mr. John H. Wilson
90-C-1017
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. Wilson:

I have received your letter of May 11, as well as the correspondence attached to it. You have sought an advisory opinion concerning your requests directed to the Division of Parole.

Having reviewed the requests, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records and that §89(3) of the Law states in part that an agency is not required to create a record in response to a request. One aspect of your request, for example, involves records that provide an "exact definition of the meaning of an 'approved residence'"; another involves records that "specif[y] the exact criteria used to make the final determination as to what does and does not constitute an 'approved residence'." If there are no records that provide an "exact definition" or that include " the exact criteria" in the context of your request, the Division could not be required to prepare records on your behalf that include the information sought in order to satisfy your request. Similarly, later in your request, you sought "a complete list" of certain offices. If no such list exists, the Freedom of Information Law would not require that the Division create a list on your behalf.

Second, 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. Several of the grounds for denial appear to be pertinent to an analysis of rights of access.

Virtually all the records sought would in my view constitute "intra-agency materials" subject to §87(2)(g). That provision permits an agency to withhold records that :

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

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

Also potentially relevant is §87(2)(e), which authorizes an agency deny access to 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 officers or employees from carrying out their duties effectively.

Also of possible significance is §87(2)(f). That provision permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

Another provision of potential relevance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §168-l of the Correction Law concerning the Board of Examiners of Sex Offenders. Subdivision (5) of §168- l requires that the Board develop guidelines " to assess the risk of repeat offense by a sex offender and the threat posed to the public safety." Subdivision (6) requires that the Board apply those guidelines and that it "shall...prior to the discharge, parole or release of a sex offender make a recommendation which shall be confidential and shall not be available for public inspection..."

Lastly, 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:tt

cc: David Molik, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 1998

Mr. James Bacon, Esq.
10 Little Brittain road
Newburgh, NY 12550

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

Dear Mr. Bacon:

I have received your letter of May 12 in which you sought and advisory opinion relating to a request made under the Freedom of Information Law to the Town of Southeast.

You asked initially whether that statute requires disclosure of "an incomplete draft of a Final Environmental Impact Statement (FEIS) being reviewed by its consultants and Planning Board members prior to a Planning Board's final acceptance." You added that the Planning Board secretary "claims that she has no copy of the draft in the Planning Board office."

As I understand the matter, the document in question was prepared by or for Hoyts Cinema and, in your words, "is under review by the Town's consultants and certain Planning Board members." Nevertheless, you wrote that the Board "does not intend to release this document until formally accepted..."

If my interpretation of the facts is accurate, the document must be disclosed. In this regard I offer the following comments.

First, as you are aware, 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."

Assuming that the document at issue is in the possession of one or more Planning Board members or the Board consultants, I believe that it would constitute a Town record that falls within the converge of the Freedom of Information Law. Any of those persons presumably would have acquired the document due to and in the performance of their duties performed for the Town. The fact that the document might not have been "accepted" is of no moment; that it is kept or held for the Town brings it within the scope of the Freedom of Information Law.

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 record would not come into the possession of a Planning Board member or consultant except in that person's capacity as a government official or agent acting in the performance of duties for the Town. That being so, it is my opinion that a record used or acquired in the performance of those duties is subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be pertinent.

That the record may not have been accepted or considered final may be relevant in determining rights of access to inter-agency or intra-agency materials that fall within §87(2)(g). However, I believe that the cited provision is irrelevant in this instance, for the record was prepared for Hoyts Cinemas, a private entity that is not an "agency". Because it is not an agency, the exception concerning inter-agency and intra-agency materials is inapplicable.

Second, you asked whether a planning board must provide copies of a final FEIS "or whether the public can be denied copies and forced by a planning board to seek copying an FEIS [sic] at the local library." In short, assuming that a member of the public is willing to pay the requisite fees for copying, an agency, in my view, is required to prepare a copy of a record in its possession. I note that it has been held that an agency is required to comply with a request made under the Freedom of Information Law and to disclose records, even though the records may be available from another source [Muniz v. Roth, 620 NYS 2d 700 (1994)]

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:tt

cc: Town Board
Planning Board
Hon. Ruth Mezzei, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084S

41 State Street, Albany, New York 12231
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June 4, 1998

Ms. Barbara Jankiewicz
[redacted]

The staff of the Committee on 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. Jankiewicz:

I have received a copy of a letter of May 14 addressed to you by the Office of the Attorney General, as well as your letter of May 21 addressed to this office.

The matter relates to a request made under the Freedom of Information Law to Mr. James Coseo, Associate Commissioner of the Office of Temporary and Disability Assistance, for a record pertaining to you containing the name of a physician who signed a certain "DSS" form. As of the dates of your letters sent to the Attorney General and the Committee on Open Government, you had received no response. As such, you asked that this office, "investigate... and ... take appropriate action."

In this regard, the Committee on Open Government is authorized to advise with respect to matters involving public access to government records. While the Committee is not empowered to "investigate" or take action by compelling an agency to grant or deny access to records, I offer the following comments in an effort to assist you.

First, I am unaware of the nature of the form in which you are interested. However, it would appear to be a record of accessible to you.

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.

With respect to records maintained by a social services agency, §87(2)(a) of the Freedom of Information Laws pertains to records that "are specifically exempted from disclosure by state or federal statute." Several statutes within the Social Services Law prohibit public disclosure of records identifiable to either applicants for or recipients of public assistance (see e.g., Social Services Law, §§136 and 372). In my view, if the record in question is exempted from disclosure to the public, the Freedom of Information Law would not govern rights of access; rather, any rights of access would be conferred by the Social Services Law and applicable regulations.

With regard 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 care, adoption or child abuse or neglect or any records maintained for the purposes of the Child Care Review Services;
> >
> > (ii) those materials being maintained separate from public assistance files for purposes of criminal prosecution and referral to the district attorney's office; and
> >
> > (iii) the county attorney or welfare attorney's files.
>
> (2) Information may be released to a person, a public official, or another social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

Based on the foregoing, if you are the subject of a case file, it is likely that you would have rights of access under the regulations cited above.

If the provisions cited above do not apply, since the record in question pertains to you, it would likely be available to you under the Freedom of Information Law, for none of the grounds for denial would appear to be pertinent. Also of possible relevance is §18 of the Public Health Law, which generally provides rights of access to medical records to the subjects of those records.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: James Coseo, Associate Commissioner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084/6

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 4, 1998

Sergeant Thomas J. Metz
Records Access Officer
Onondaga County Sheriff's Department
407 South State Street
Syracuse, NY 13202

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

Dear Sergeant Metz:

I have received your letter of May 8, which reached this office on May 14.

You have sought an advisory opinion concerning a request for records by an inmate relating to three incidents in which he apparently was not involved. In your capacity as records access officer for the Onondaga County Sheriff's Department, you denied the request. Following an appeal, the denial was sustained with the exception of two items. Nevertheless, in your effort to comply with the determination of the appeal, you wrote that you "have become even more convinced that the entire investigation report" pertaining to one of the incidents, a case involving the death of one person and the severe beating of another, should be withheld.

In this regard, I offer the following comments.

First, the fact that the person requesting the records may have no relationship to the incidents is largely irrelevant to rights of access. 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 or the interest of the applicant would in my opinion be irrelevant.

Second, while I am unaware of which items were determined to be accessible, 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. 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 relatively recent decision involving police records, 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). 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.).

The foregoing is in no way intended to suggest 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 for the purpose of identifying those portions of the records that 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).

There is no question but that many of the records sought constitute intra-agency materials that fall within the scope of §87(2)(g). However, due to its structure, that provision frequently requires substantial 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 basis for denial is

applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

A second provision of potential significance is §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."

While I am not familiar with the contents of the records at issue, again, unless the Department could meet the standard of articulating a "particularized and specific justification" for withholding the entirety of particular records, the remainder would be available.

As suggested in your letter, provisions in the Freedom of Information Law concerning unwarranted invasions of personal privacy [§§87(2)(b) and 89(2)] would appear to be relevant, particularly with respect to references to or statements made by victims, witnesses and other civilians identified in the records.

Third, it appears that there may be additional considerations pertinent to determining rights of access.

For instance, the applicant sought "lists" of records available for inspection and a "list" identifying officers to who responded to and investigated an incident. In this regard, I point out that the Freedom of Information Law pertains to existing records and that §89(3) of the Law states in part that an agency need not create a record or records in response to a request. Therefore, if the lists requested do not exist, the Department would not be required to prepare a new record, a list, on behalf of the applicant.

Also relevant is §87(2)(a) of the Freedom of Information Law, which relates to records that "are specifically exempted from disclosure by state or federal statute." One aspect of the request involved autopsy and related reports that fall within the scope of §677 of the County Law. 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.

One of the incidents involved a rape and the arrest of eight and ten year olds. It is likely in my view that all records relating to the incident would be exempted from disclosure by statute. Section 50-b of the Civil Rights Law prohibits the disclosure of records that would identify the victim of a sex offense. Section 784 of the Family Court Act prohibits the disclosure of records relating to the arrests of juveniles.

Lastly, I am unaware of the extent to which there may have been public judicial proceedings concerning the incidents that are the subject of the request. I note, however, that it has been held that records introduced into evidence in such proceedings "lose their cloak of confidentiality" and are available either from the court in which the proceeding was conducted or an agency in possession of the records [see Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989)].

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

Robert J. Freeman
Executive Director

RJF:jm
cc: Christina Pezzulo

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO 10847

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June 4, 1998

E-Mail

TO: Dekmm [redacted]

FROM: Robert J. Freeman

The staff of the Committee on 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. Menzies:

I have received your communications of May 12 and 13.

In the first, you wrote that the Mayor of the Village of Fleischmanns videotaped a meeting of the Village Board of Trustees. You asked whether taping the meeting was "legal" and whether a copy of the tape must be made available to the public. In the second, you wrote that it is your understanding that the Mayor has contended that the tape is his property and he is not required to provide a copy.

In this regard, I offer the following comments.

First, so long as recording equipment is used in a manner that is not disruptive to a meeting, any person may audiotape or videotape an open meeting of a public body.

I point out that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. However, there is a recent judicial decision pertaining to the use of video equipment, and there are several concerning the use of audio tape recorders at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

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

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

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

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

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this

> authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

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).

Second, assuming that the Mayor recorded the meeting in order to have an accurate rendition of statements made at the meeting for the purpose of enhancing the performance of his duties, I believe that the recording would constitute a "record" that falls within the coverage of the Freedom

of Information Law. 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, again, if the meeting was taped by the Mayor in furtherance of his duties, the recording, in my view, would be a Village record subject to the Freedom of Information Law.

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 any person could have attended the meeting and could have seen and heard the content of the tape, there would be no basis for a denial of access, and it was held some twenty years ago that a tape record of an open meeting is a "record" available under the Freedom of Information Law (Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1978).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mayor, Village of Fleischmanns
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 4, 1998

Mr. Daniel Mortimer
04881-052
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. Mortimer;

I have received your letter of May 13, as well as the correspondence attached to it.

You requested certain records form the City of Syracuse Police Department in March. However, as of the date of your letter to the office, you had not received a response either to your request or the appeal that followed. You have asked whether, in my view, the request and appeal were "facially sufficient." In addition, you sought the names, addresses and telephone numbers of the Department's records access and appeals officers and asked whether you should submit a second by means of certified mail, with a return receipt requested, or whether you may commence an Article 78 Proceeding.

In this regard, I am unaware of the identities of the records access and appeals officers. However, from my perspective, both your request and appeal were adequate. In my view, the recipients of your correspondence were required to have responded in a manner consistent with the Freedom of Information Law or forwarded your communications to the appropriate persons.

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

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

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)]. [see also Barrett v. Morgenthau, 144 AD 2d 1040, 74 NY 2d 907 (1990)].

In my opinion, it is always appropriate to avoid costly and time consuming litigation, and it is recommended that you send a second request in the manner that you described. Nevertheless, under the circumstances, it would appear that you could initiate a proceeding under Article 78 of the Civil Practice Law and Rules.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: James T. Foody, Chief of Police
Records Access Officer
Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1084

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June 10, 1998

Mr. Bernard J. Morosco, CEO
Village of Frankfort
1603 Girard 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 May 17 in which you raised questions relating to the Freedom of Information Law.

In your capacity as Code Enforcement Officer for the Village of Frankfort, you wrote that you discovered that a non-profit agency performed "weatherization work without building permits as required under local and state law." When you sought "a list of addresses and type of work performed" within your enforcement area, you were informed that disclosure "would be violating privacy of individuals (pertaining to them as low-income)." Having spoken with an attorney for the Division of Housing and Community Renewal, it was reiterated that the information could be withheld in order to protect personal privacy.

Since building permits are required, and since "[l]ow income families have the same entitlement to safe installation of equipment as do higher income families", you have questioned the propriety of the rejection of your request. In this regard, I offer the following comments.

By way of background, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant under the circumstances is §87(2)(b), which 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 that statute enable government to prevent disclosures

concerning the personal or intimate details of individuals' lives. As such, with respect to grant, loan or other programs in which income level is a factor in determining participation, often the question involves the extent to which disclosure would constitute an unwarranted invasion of personal privacy.

From my perspective, a disclosure that permits the public determine the general income level of a participant in such a program based upon income eligibility would likely constitute an unwarranted invasion of personal privacy, for such a disclosure would indicate that a particular individual has an income or economic means below a certain level. In some circumstances, individuals might be embarrassed by such a disclosure. Further, the New York State Tax Law contains provisions that require the confidentiality of records reflective of the particulars of a person's income or payment of taxes (see e.g., section 697, Tax Law). As such, it would appear that the Legislature felt that disclosure of records concerning income would constitute an improper or "unwarranted" invasion of personal privacy, and, therefore, that the information sought could be withheld from the public under the Freedom of Information Law.

Also pertinent is the Personal Privacy Protection Law. That statute pertains to records maintained by state agencies that identify individuals. In brief, under §96(1) of that statute, a state agency cannot disclose personally identifiable information, except pursuant to an exception appearing in that provision. Nevertheless, if you are seeking information not as a member of the public under the Freedom of Information Law, but rather as a government official acting in the performance of your official duties, it appears that the Division of Housing and Community Renewal could choose to disclose the information to you under §96(1)(d) of the Personal Privacy Protection Law. That provision permits a state agency to disclose personal information:

> "to officers or employees of another governmental unit if each category of information sought to be disclosed is necessary for the receiving governmental unit to operate a program specifically authorized by statute and if the use for which the information is requested is not relevant to the purpose for which it was collected..."

While it is likely that the Utica Community Action Agency is required to disclose its records in accordance with the Freedom of Information Law, that entity is not a state agency. Therefore, the Personal Privacy Protection Law would not serve as a barrier to its disclosure of records to you. Although you may not have the right under the Freedom of Information Law to obtain the information in question from that agency due to the ability of the agency to protect personal privacy, frequently, in the spirit of cooperation, entities will share information when it is clear that it is being sought in the performance of one's official governmental duties.

Lastly, you asked whether the Division of Housing and Community Renewal may refuse to mail photocopies of records and insist that you travel to Albany to view and copy records. In this regard, nothing in the Freedom of Information Law or the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) specifically deals with requests made and responses given by mail. However, due to the size of the state, the inability of some people to physically travel to locations where records are kept, the reality that many people work and cannot travel to those locations, and in view of the intent of the Law, I believe that is implicit that agencies must respond

to requests by mail. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Utica Community Action Agency
David Diamond

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10850

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June 12, 1998

Mr. James Leman
[redacted]

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

Dear Mr. Leman:

I have received your letter of May 19 in which you sought my views concerning a request directed to Rockland County relating to County employees who are "non-citizens."

As you are aware, it is my view that portions of employment applications indicating whether employees or prospective employees are citizens 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. Pertinent is §87(2)(b), which authorizes agencies to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." While the standard concerning privacy is flexible and may be subject to conflicting interpretations, the courts have provided substantial direction regarding the privacy of public officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to public officers and employees, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that

records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977 regarding membership in a union; also Seelig v. Sielaff, 201 AD2d 298 (1994) regarding social security numbers].

From my perspective, one's citizenship, like race, gender, social security number or date of birth, is largely irrelevant to the performance of one's governmental duties. Moreover, as we discussed, §71.1 of the regulations promulgated by the Department of Civil Service restricts the disclosure of information relating to one's citizenship and states that "Before a candidate's application for examination is exhibited to the appointing officer or his representative, all reference therein to the candidate's national origin or to the basis of his citizenship shall be concealed." In short, I believe that a court would determine that disclosure would result in an unwarranted invasion of personal privacy.

In addition, at the end of your letter, you indicated that you would like answers to questions, such as the number of "non-citizen" County employees and whether the County checked the documentation needed to hire aliens. In this regard, 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 new records in response to a request. Consequently, if there is no figure or tabulation indicating the number of aliens employed by the County, the County would not be required to review its records to prepare a compilation or total on your behalf. Similarly, agency staff is not required by the Freedom of Information Law to provide information in response to questions. While they may do so, again, that statute pertains to existing records.

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

FOIL-AO-1085

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 12, 1998

Mr. Frank Caserta
87-A-4412
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. Caserta:

I have received your letter of May 13 in which you raised a question concerning the Freedom of Information Law.

According to your letter, you are serving three years in the Special Housing Unit at your facility. You and another inmate submitted "identical appeals" relating to placement in that unit. Although the decision concerning your placement was affirmed, the other inmate's was reversed. You indicated that the individual who determines appeals "usually sends a letter with his determination...explaining why a disciplinary hearing is reversed." When you requested a copy of the letter pertaining to the other inmate, you were informed that it could be withheld under the Freedom of Information Law. You have sought guidance concerning the propriety of that response.

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 unfamiliar with the contents of the record in question, it appears that two of the grounds for denial may be relevant to an analysis of rights of access.

Pursuant to §87(2)(b), an agency has the authority to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Therefore, insofar as the letter includes information of a personal or intimate nature, the Department could withhold its contents.

The other provision of possible significance, §87(2)(f), enables an agency to withhold records when disclosure "would endanger the life or safety of any person." If, for example, there are security concerns or references to an inmates associations, the cited provision may serve as a basis for a denial 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-1852

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 12, 1998

Mr. Antonio Cerro
[redacted]

Dear Mr. Cerro:

I have received your letter of May 18 concerning your request for records of the Town of Kingsbury.

I assume that you have received a copy of an opinion regarding the subject of your concern dated May 20 addressed to Ms. Holly Mabb, the Town Clerk. In short, if your request does not meet the standard of "reasonably describing" the records sought, Town officials in my opinion would not be required to review them, page by page, to retrieve those in which you are interested. As stated in the opinion of May 20: "if the records are not maintained in a manner that permits their retrieval, except by reviewing perhaps hundreds of records individually in an effort to locate those falling within the scope of the request, the request would not...meet the standard of reasonably describing the records." That kind of effort would exceed the requirements of the Freedom of Information Law.

The alternative, as suggested by the Town, involves its offer to enable you to inspect the records in an effort to locate those of interest to you.

I hope that this and the earlier correspondence that you have received from this office serve to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Holly Mabb, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10853

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 12, 1998

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 May 20. In brief, you complained that SUNY officials had not responded to your request under the Freedom of Information Law in a timely manner. You also referred to a conversation in which I suggested that you might appeal to "someone in Albany."

It appears that you may have misunderstood my remark. You indicated in your letter that you appealed to Martin Reid in SUNY's central offices; he is the person in Albany designated by SUNY to determine appeals.

With respect to the delays in response, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Karen L. Summerlin
Martin T. Reid
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10854

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 15, 1998

Mr. King Davis
78-C-0428
Elmira Correctional Facility
P.O. Box 500
Elmira, NY 14902-0500

Dear Mr. Davis:

I have received your letter of May 18, which is addressed to Ms. Susan Petito of the New York City Police Department and to me. Because your appeal submitted on March 16 under §89(4)(a) of the Freedom of Information Law had not been answered as of the date of your letter, you asked that Ms. Petito and I "investigate and expedite this matter..."

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 resources to conduct investigations or the authority to compel an agency to grant or deny access to records. Nevertheless, in an effort to enhance compliance with law, a copy of this response will be sent to Ms. Petito.

As you are aware, an agency must determine an appeal within ten business days of its receipt of an appeal. 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 of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I note that it has been held that if a proper appeal is made and the agency fails to determine the appeal within ten business days, the applicant may consider the appeal to have been denied. In that circumstance, the applicant would have exhausted his or her administrative remedies and could seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

The foregoing is not intended to suggest that you should initiate litigation, but rather that you may do so. Because I am sending a copy of this response to Ms. Petito, it is recommended that you wait for a time before considering litigation.

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-2901
FOIL-AO-10855

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 15, 1998

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:

As you are aware, I have received your fax of May 19. Due to the possibility that a library board of trustees may be subject to the Open Meetings Law but not the Freedom of Information Law, you have asked whether minutes of meetings and a record of the votes of the members must be prepared and made available.

From my perspective, in view of the remedial nature of the Freedom of Information and Open Meetings Laws, and the clear intent of §260-a of the Education to require accountability on the part of library boards of trustees, all such boards must prepare and disclose their minutes in a manner consistent with the both the Open Meetings and Freedom of Information Laws. Further, based on a judicial decision, I believe that they must include an indication of the manner in which board members cast their votes.

As you may recall, §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."

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.

Section 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."

While some library boards of trustees may not be subject to the Freedom of Information Law because they serve as the governing bodies of not-for-profit corporations separate from government, it would be anomalous in my view to be subject to the Open Meetings Law but exempt from critical requirements of that statute, specifically, those pertaining to minutes of their meetings. For that reason, because of the obvious intent of §260-a of the Education Law, and because of the general nature of the libraries subject to that statute and the Open Meetings Law, I believe that the entities falling within the scope of those provisions must prepare and generally disclose minutes of meetings as described above.

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)].

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-10856

41 State Street, Albany, New York 12231
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June 15, 1998

Mr. Carlos Samper
93-A-2614
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. Samper:

I have received your undated letter, which reached this office on May 20. You have sought assistance in obtaining "the policy proceedings of the Department of Correctional Services" concerning transfers and the "I.P.C. Unit."

This office does not maintain any information on the subjects of your interest, and I am unaware of the extent to which the agency in question has developed policies on those subjects. Nevertheless, based on the assumption that policies have been developed, I offer the following comments.

First, if the records in question are maintained by the Department of Correctional Services at its Albany offices, a request should be directed to Mr. Mark Shepard, Records Access Officer. 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 of your interest.

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

Specifically, §87(2)(g) states that an agency may withhold records that:

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

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

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

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

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

Under the circumstances, most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

> "The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of

> Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93

> Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

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

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

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

I hope that 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-1085?

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 15, 1998

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 May 14 and the materials attached to it.

According to the correspondence, you requested records from the New York City Police Department in September of 1994. In February of 1995, those portions of your request involving complaint follow up reports and police officers' memo book entries were denied in their entirety. As I understand the matter, you requested essentially the same records in 1997, but the request was denied on the ground that it was duplicative of the first request.

In my opinion, in view of the grounds for the denial of your initial request, and the rejection of those grounds by the State's highest court in the decision rendered in Gould v. New York City Police Department [89 NY2d 267 (1996)], even though the request may duplicate that made years ago, the Department should accept the request and determine rights of access in accordance with the direction provided by Gould.

The foregoing is not intended to suggest that the records in question must be disclosed in their entirety. While the Court rejected the Department's blanket denial of access, it specified that several grounds for denial may be applicable, depending on the contents of the records and the effects of disclosure.

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-10858

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 16, 1998

Mr. Joseph J. Cerbone
Town of Mount Kisco
40 Green Street
Mount Kisco, NY 10549

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

Dear Mr. Cerbone:

I have received your letter of May 19 and the materials related to it. You asked whether in my view certain officials "were in violation" of §240.65 of the Penal Law.

In this regard, I am neither a judge nor prosecutor who has expertise in matters involving the Penal Law. Consequently, I could not advise that officials acted in violation of the Penal law.

Further, from my perspective, §240.65 of the Penal Law and its companion, §89(8) of the Freedom of Information Law, have a narrow application. The former 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, or when an agency cannot locate a record that must be maintained.

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-10859

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 16, 1998

Mr. Donald A. Chase
[redacted]

The staff of the Committee on Open 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 May 19, as well as the materials attached to it. You have sought my views relating to requests for records involving structural changes in a transmission line in the Town of Fleming.

Having reviewed the materials and discussed the matter with the Town Clerk, 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, while the Town clearly is an "agency" required to comply with the Freedom of Information Law, private companies, such as those identified in the correspondence, are not subject to the requirements of that statute.

Second, the Town Clerk indicated that no money was paid by the Town in relation to the project and that, therefore, there are few records dealing with the issue. I was further informed that he cost of the changes was borne by residents and that they paid the appropriate costs directly.

Certain aspects of your requests involve materials submitted by private firms to the Town. In short, the Town Clerk indicated that any such records have been made available to you and that there are no other records pertaining to the matter that are maintained by the Town.

Lastly, it is noted that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create or prepare records 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: Hon. Alan P. Kozlowski
Hon. Charleen V. Dygert

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10860

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 16, 1998

Mr. Howard Protter
Jacobowitz and Gubits, LLP
P.O. Box 367
Walden, NY 12586-0367

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

Dear Mr. Protter:

I have received your letter of May 19, as well as the materials attached to it.

According to the documentation, you made a request under the Freedom of Information Law to the Town of Highlands for permission to make a copy of a videotape of a Town Board meeting. While the Town indicated that you could view the videotape, you were denied the ability to make a copy. That determination was apparently based upon an action taken by the Town Board in January which states in part that:

> "A copy or copies of the taped meeting will not be provided to anyone by the Town Clerk or any town employee. There is no policy for filing, preserving, or insuring the authenticity of these tapes. Anyone interested in a tape of a meeting being televised may record the meeting from their own VCR or, for those non cable subscribers, by asking a favor of someone who does subscribe.
>
> "Supervisor Lent made a motion, seconded by Council Member Ripa, that a copy or copies of a taped meeting will not be provided to anyone by the Town Clerk or any town employee."

From my perspective, the action taken by the Town Board upon which the determination is based is inconsistent with law. In this regard, I offer the following comments.

First, while the Town might consider the videotape to be unofficial and does not vouch for its content, I believe that it nonetheless constitutes a record that falls with in the scope of the Freedom

of Information Law. 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, irrespective of its characterization or function, the videotape in my view clearly constitutes a "record" subject to rights of access conferred by the Freedom of Information Law.

Second, it has been held that an 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 an assertion of confidentiality would serve to remove from public rights of access records that would otherwise be 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. I note that §87(2) specifies that accessible records must be made available for inspection and copying. Further, §89(3) indicates that an agency must make a copy of a record available upon payment of the requisite fee.

Next, since any person could have attended the meeting and could have seen and heard the content of the tape, there would be no basis for a denial of access, and it was held some twenty years ago that a tape recording of an open meeting is a "record" available under the Freedom of Information Law (Zaleski v. Hicksville Union Free School District, Board of Education of Hicksville

Union Free School, Sup. Ct., Nassau Cty., NYLJ, Dec. 27, 1997). Although the decision cited above pertained to an audiotape recording of an open meeting, the principles expressed in the decision would in my opinion clearly be equally applicable to a videotape of an open meeting.

In sum, I believe that the videotape at issue must be made available by the Town for inspection and copying, and that its prohibition regarding reproduction of the record is inconsistent with law.

Lastly, I note that the action taken by the Town states that "There is no policy for filing, preserving, or insuring the authenticity of these tapes." While the matter is separate from the Freedom of Information Law, I point out that provisions of the Arts and Cultural Affairs Law, §57.25, deal with the retention and disposal of records by entities of local government. Further, I believe that recordings of open meetings must be maintained for a minimum of four months.

In an effort to enhance compliance with and understanding of law, copies of this response 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
Hon. Sandra Tonneson, Town Clerk
Myron I. Mandel, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1080

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 16, 1998

E-Mail

TO: ccinfo <ccinfo@stny.lrun.com>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Margeson:

I have received your recent communication in which you asked whether "lists of unclaimed court and trust funds from the Surrogate Court [are] available through FOIL."

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."

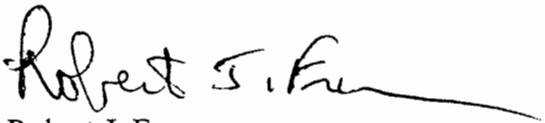
Based on the foregoing, the Freedom of Information Law does not pertain to the courts or court records. This is not to suggest that court records are confidential; on the contrary, court records in many instances must be made available by the court or court clerk. In the case of a Surrogate's Court,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

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-10862

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 17, 1998

Mr. William J. Clark
[redacted]

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

Dear Mr. Clark:

I have received your letters of May 19, May 26 and June 13, all of which deal with your efforts in obtaining a 1989 performance evaluation from the Town of New Hartford. Based on a review of the correspondence, 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. In this instance, the Town has indicated on several occasions that the record sought does not exist and was never prepared. If that is so, there is no record to be made available or to be withheld.

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 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: Town Supervisor
Hon. Gail Wolanin Young, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10863

41 State Street, Albany, New York 12231
(518) 474-2518
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June 17, 1998

Ms. Patty Villanova
[redacted]

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

Dear Ms. Villanova:

I have received your letter of May 21 and the correspondence relating to it.

You indicated that you have been trying without success to obtain the financial records of the Putnam Valley Volunteer Fire Department and the Volunteer Ambulance Corps from the Town of Putnam Valley, and you added that you might "have no other option but to sue the Town". The Town Clerk has informed you that the two entities whose records are the subject of your request are "not for profit, private corporations, independent of the Town of Putnam Valley" and that the Town does not have and never has had possession of the records.

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

First, since the Town does not maintain the records in which you are interested, I do not believe that it has any obligation to acquire or disclose the records at issue to you. In short, although the Town may have a relationship with the two entities, as the Town Clerk suggested, those entities are separate from the Town, and the Town simply has no records falling within the scope of your request to disclose.

Second, although the organizations that maintain the records of your interest were created as not-for-profit corporations, one, the volunteer fire company, is, based upon judicial decisions, clearly required to comply with the Freedom of Information Law; the other, the volunteer ambulance company, may or may not be the subject to that statute depending upon its nature.

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.

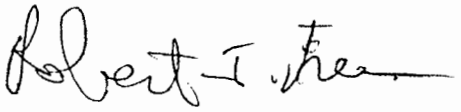
In the only case of which I am aware on the subject, the Appellate Division, Second Department, held that a volunteer ambulance corporation performing its duties for an ambulance district is subject to the Freedom of Information Law. In so holding, the decision stated that:

> "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)].

It is emphasized that the decision cited above pertained to an ambulance company performing its duties for an ambulance district, which is itself a public corporation. I am unaware of the specific nature of the ambulance company whose records you are requesting. If it is analogous to the entity that was the subject of the Ryan decision, I believe that it would be subject to the Freedom of Information Law. However, if it is different, the Freedom of Information Law might not apply. If additional information can be provided concerning the volunteer ambulance company, perhaps I could offer a more precise response.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carole P. Hughes, Town Clerk
Putnam Valley Ambulance Corp.
Putnam Valley Volunteer Fire Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1086

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June 17, 1998

Mr. Edwin Garcia
92-A-9233 E6-18
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. Garcia:

I have received your letter of May 15 in which you requested an advisory opinion. You referred to a decision rendered by the Court of Appeals which you characterized as "self-explanatory." You have sought my views concerning whether the decision "would allow disclosure of statements given by non-testifying individuals, who were not witnesses to a particular offense. ex. interviews of a coworker for background information on purposes in the investigation of a criminal defendant."

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. Further, while the decision that you cited [Gould v. NYC Police Department, 89 NY 2d 267 (1996)] rejected a blanket denial of access to certain records, the Court specified that other grounds for denial might apply. The following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

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. 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 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-10865

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June 17, 1998

Mr. Jack Chase
96-B-0041
Shawangunk Correctional Facility
Box 700
Wallkill, NY 12589

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

Dear Mr. Chase:

I have received your letter of May 20, as well as the materials attached to it. In short, you requested a variety of records pertaining to your case from the Office of the Washington County District Attorney on April 27. As I understand the matter, you have not yet received a response. You have sought my views regarding rights of access to the record sought and asked whether "the appeal process [can] be handled through [this] agency."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. This office is not empowered to determine appeals or compel an agency to grant or deny access to records. Nevertheless, it is emphasized that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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).

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

Next, I note that you requested a "subject matter list for Indictment Number I-20-95, pursuant to section 87(3)(c)" of the Freedom of Information Law. In this regard, while §87(3)(c) requires that an agency maintain a reasonably detailed list by subject matter of all of its records, there is no requirement that an agency prepare a similar list with respect to a specific indictment or case. In short, the District Attorney would not be required to maintain such a record.

Lastly, since you request "any DD-5 and/or UF 61 forms", I note that those terms are used to refer to particular forms employed by the New York City Police Department. I do not believe that those terms or forms are used elsewhere in the state.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robert Winn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10866

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 18, 1998

Mr. Wallace S. Nolen
94-A-6723
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

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

Dear Mr. Nolen:

I have received your letter of May 14 in which you sought guidance concerning the calculation of the fees that may be assessed for the reproduction of electronic records by county boards of elections.

In this regard, that issue was considered at length in Schulz v. New York State Board of Elections (Supreme Court, Albany County, September 7, 1995), a copy of which is attached. The court determined the issue by viewing both the Freedom of Information Law and sections of the Election Law, stating that:

> "The language of the Freedom of Information Law (Public Officers Law, sec. 87(1)(b)(iii), which limits charges for requested public records to 'the actual cost of reproducing' [emphasis added], is elucidating. 'Actual cost' would reasonably seem to mean more finite, direct and less inclusive than '[indirect] cost', which is a concept as infinite and expandable as the mind of man. 'Reproducing' a record certainly does not include 'producing' a record in the first place - i.e., compiling the information from which the record is produced. The purpose and intention of the Freedom of Information Law is to further the concept of open government. For this reason charges for public records must be kept to a minimum. In a sense the information compiled by counties under election Law 5-602 and 5-604 is a part of that concept and charges for that information must be kept to a minimum so as to maximize access thereto."

Further, using the standard of "actual cost of reproduction", it was stated that:

> "Where the record is a computerized record the charge shall be limited to the cost of a diskette or other computerized tape and a reasonable amount for the salary of the employee downloading said diskette or tape during the time such diskette or tape is being downloaded."

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-10867

41 State Street, Albany, New York 12231
(518) 474-2518
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June 18, 1998

Mr. J. Williams
96-A-6812
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. Williams:

I have received your letter of May 8, which reached this office on May 27. You have sought assistance in obtaining a trial transcript from your trial attorney.

In this regard, the statute within the Committee's advisory jurisdiction, the Freedom of Information Law, is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

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

Based on the foregoing, the Freedom of Information Law does not apply to records maintained by a private attorney or firm.

If your efforts continue to fail, it is suggested that you seek the aid of Prisoners' Legal Services.

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-1088

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 18, 1998

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 May 21. As I understand the matter, you have questioned the status of the Buffalo and Erie County Regional Development Corporation under the Freedom of Information Law.

The President of the Corporation indicated that because it is a not-for-profit corporation, it is not an agency subject to the Freedom of Information Law. Based on the judicial interpretation of the Freedom of Information Law, the corporate status of an entity is not necessarily determinative of its coverage under that statute. In this regard, I offer the following comments.

As the President of the Corporation wrote, 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).

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals found that a not-for-profit local development 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 corporation and one or more municipalities is similar to that of the BEDC and the City of Buffalo, believe that it would constitute an "agency" required to comply with the Freedom of Information Law. On the other hand, if the Corporation is essentially independent of government, it would likely fall beyond the scope of that statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Ronald W. Coan, President

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1869

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 18, 1998

Mr. Eric Birdsall
93-A-1028
Woodbourne Correctional Facility
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. Birdsall:

I have received your letter of May 25 in which you raised a variety of issues concerning the Freedom of Information Law.

First, you asked whether your appeal to the Ulster County Attorney was appropriate. In this regard, the regulations promulgated by the Committee on Open Government, 21 NYCRR §1401.7(e), provide that an appeal must identify:

"(1) the date and location of requests for records;

(2) the records that were denied; and

(3) the name and return address of the appellant."

Second, you wrote that a district attorney's office has contended that it does not make or keep an evidence list or an index to all records under an indictment number. I know of no obligation to maintain those records. I note, too, that the Freedom of Information Law pertains to existing records and that §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if there is no evidence list or no index to records pertaining to an indictment, an office of a district attorney would not be required to prepare such records on your behalf.

Lastly, you asked whether you can seek records under the Freedom of Information Law from the Bell Atlantic Telephone Company. Since the Freedom of Information Law pertains to agency records, i.e., those maintained by entities of state and local government [see Freedom of Information Law, §86(3)], Bell Atlantic, a private company, would not be subject to 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-1870

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 18, 1998

Ms. Judy Braiman
Empire State Consumer Association
50 Landsdowne Lane
Rochester, NY 14618

The staff of the Committee on 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. Braiman:

I have received your letter of May 27, as well as a variety of related correspondence. You have sought an opinion concerning your request to Monroe County "for their schedule of application for the 1998 herbicide spray program."

Last year, on September 3, you were informed that "only existing reports are available." Similarly, on April 10 of this year, you were informed that: "[a] schedule of application for the 1998 herbicide spray program does not exist." It is your view that the record in question must exist, for a portion of the bid package involving the spray program states in part that the County's Associate Engineer-Highways: "shall be given a daily report at the end of each work day. This report shall show, for each road sprayed: the miles traveled, lineal feet of guide rail treated, and the amount of material used."

From my perspective, the difficulty involves the use of the term "schedule." As you may be aware, 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. Therefore, if no "schedule" exists, the County would not be obliged to prepare such a record on your behalf.

Rather than requesting a schedule, it is suggested that you request the documentation in the manner in which it is referenced in the bid materials, i.e., as "daily records", specifically, the daily records given to the Associate Engineer-Highways after each workday showing "each road sprayed: the miles traveled, lineal feet of guide rail treated, and the amount of material used." Assuming that the terms of the agreement have been met, the daily records must be maintained by the County. Further, it appears that they would consist solely of factual information that 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: John Riley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1087

41 State Street, Albany, New York 12231
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June 18, 1998

Mr. Tim Sheehan
J.J. Sheehan Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902-0604

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

Dear Mr. Sheehan:

I have received your letter of May 20, which reached this office on May 29.

You have questioned the propriety of a response by Richard B. Decker, Chairman of the Chenango County Board of Supervisors, concerning your request for reports relating to accidents occurring at a particular location. You were informed that "there is no data or underlying system by which accident reports for a particular road can be identified amongst a large volume of such reports." On that basis, the County denied your request.

In this regard, although accident reports are generally available under both the Freedom of Information Law and §66-a of the Public Officers Law, 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 County, to the 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.

Based upon the statement made in the correspondence, it does not appear that the County maintains the records by location. That being so, it is likely that the request would not have reasonably described the records and that the County's response was consistent with law.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard B. Decker
Richard W. Breslin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10872

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 18, 1998

Mr. Earl M. Wilbur
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 May 25. You complained that three agencies have failed to respond to your requests for records made under the Freedom of Information Law, and you asked that this office "intervene" on your behalf.

In this regard, the Committee on Open Government is authorized to advise with respect to the Freedom of Information Law; it is not empowered to intervene in the legal sense. Nevertheless, in an effort to enhance compliance with and understanding of law, copies of this response will be forwarded to the agencies involved.

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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Cortland County Department of Social Services
Records Access Officer, Homer Police Department
Records Access Officer, Homer School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10873

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 19, 1998

Mr. Donald G. Symer
[redacted]

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

Dear Mr. Symer:

I have received your letter of May 26. You referred to a telephone conversation some time ago pertaining to a request that you made to obtain payroll information from a school district and to an article in which the Town Clerk of the Town of Lancaster expressed the view that a municipality "is under no obligation to create a record." You suggested that his statement may be "at variance" with the advice given to you when we spoke.

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

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

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

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

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

In analyzing rights of access, of primary relevance 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 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.

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. Robert Thill

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1087

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 22, 1998

Mr. Robert H. Feller
Feller & Ferrentino
488 Broadway - Suite 512
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, unless otherwise indicated.

Dear Mr. Feller:

I have received your letter of May 29, and the correspondence attached to it. In addition, as you are aware, Robin M. Levine, Deputy General Counsel to the New York City Department of Environmental Protection transmitted a letter to me concerning your request for records of that agency.

You have sought an opinion concerning the propriety of a denial of access to records relating to the proposed allocation of funds for the "SPDES Upgrade Program" in which contracts are being negotiated with owners of waste water treatment plants in the New York City Watershed.

The Department denied the request initially on the ground that the records fell within the scope of §87(2)(g) of the Freedom of Information Law. Following your appeal, which was sustained, in addition to the original basis for denial, the Department also contended that disclosure would impair present or imminent contract awards pursuant to §87(2)(c).

Having spoken recently with Ms. Levine, I was informed that most of the contracts to which your request relates have been made final. To that extent, the matter has become moot, for the Department has indicated that it would make the records available when the contracts become final. Notwithstanding the foregoing, for the purpose of providing clarification and guidance, 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 cited as the basis for the initial denial, §87(2)(g), deals with "inter-agency and intra-agency materials." In this regard, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

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

Based on the foregoing, the exception pertains to communications between or among state or local government officials at two or more agencies ("inter-agency materials"), or communications between or among officials at one agency ("intra-agency materials"). Insofar as the records sought consist of communications between the Department and persons or firms outside of government, because such persons are firms and are not "agencies", they would not constitute inter-agency or intra-agency materials, and the exception cited by the Department, in my view, would not apply.

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.

One of the contentions offered by a New York City agency in a recent decision rendered by the Court of Appeals 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 record is "non-final" or relates to a transaction that is not 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) id., 276-277).]

In my opinion, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they consist of statistical or factual information, they must be disclosed, unless a different ground for denial applies.

With respect to the application of §87(2)(c), based on Ms. Levine's rendition of the facts, it appears that the cited provision would have been applicable at the time of the responses to you. In most instances, when both parties to negotiations maintain copies of the same records, §87(2)(c)

would not serve as a basis for denial. In those cases, there is no issue relating to the disclosure of the negotiation strategy or records reflecting similar information to the other party; there is no inequality of knowledge between the parties [see Community Board 7 of Borough of Manhattan v. Schaeffer, 570 NYS 2d 769, aff'd 83 AD 2d 422; reversed on other grounds, 84 NY 2d 148 (1994)]. Nevertheless, Ms. Levine indicated that a number of owners of waste water treatment plants have essentially been in competition for a limited and specific amount of money which will be allocated to them pursuant to contract. Because of the limit of that amount, premature disclosure to a plant in competition with the others could in my view impair the contracting process. If that is so, §87(2)(c) would validly have served as a basis for the denial to the extent that disclosure would result in the impairment of present or imminent contract awards.

Lastly, since you complained that Ms. Levine offered a second basis for denial in response to your appeal, you wrote that "it is wholly inequitable for the custodial agency to cite new reasons for a denial in an appeal as the requester has had no opportunity to address the issue." There is nothing in the Freedom of Information Law that prohibits the person designated to determine appeals to cite different provisions of law as a basis for either sustaining a denial of access to record or granting access. In short, I believe that the appeal process is *de novo* and that the appeals officer is not bound by the response offered by an agency's records access officer.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Robin M. Levine

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10875

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 23, 1998

Mr. Matteo Ruggiero
30148-048, 2-B
FCI Schuykill
Minersville, PA 17954

Dear Mr. Ruggiero:

I have received your letter of June 16, which reached this office on June 22. You have requested "all information in [our] files" pertaining to you and questioned the status of the Waterfront Commission of New York and New Jersey Harbors under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice and guidance concerning the Freedom of Information Law. The Committee does not maintain records generally and performs no criminal law enforcement function. In short, this office does not maintain records pertaining to you.

To seek records under the New York Freedom of Information Law, a request should be directed to the "records access officer" at the agency or agencies that you believe maintain the records of your interest. 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 "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify the records.

The New York Freedom of Information Law applies to agencies of state and local government within its borders, 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."

Lastly, insofar as records are maintained by an agency required to comply with 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.

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

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-10876

41 State Street, Albany, New York 12231
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June 23, 1998

Mr. Art Simmons
[redacted]

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

Dear Mr. Simmons:

I have received your letter of May 28, as well as the materials attached to it. You have questioned delays in disclosure of records requested from the Village of Northville.

In this regard, 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, 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)].

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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. James K. Groff, Mayor
Hon. Sylvia J. Brooks, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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June 23, 1998

Mr. Wayne Gardine
96-A-5097
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. Gardine:

I have received your letter of May 25. You have sought guidance in relation to a denial of your request for records of the New York City Police Department on the ground that the Department "does not keep the records in the manner [you] seek them, i.e., by indictment."

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).

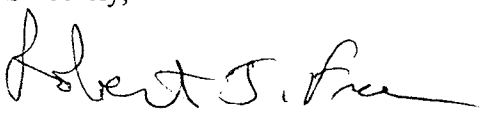
In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system. In Konigsberg, it appears that the agency was able to locate the records on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

While I am unfamiliar with the recordkeeping systems of the Department, 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.

Lastly, it is emphasized that the regulations promulgated by the Committee on Open Government specify that an agency's records access officer "is responsible for assuring that agency personnel...Assist the requester in identifying requested records, if necessary" [21 NYCRR §1401.2(b)(2)]. As such, I believe that your letter of April 22 to Lt. Suarez was appropriate and that he or others should provide information adequate to enable you to "reasonably describe" the records.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Glen Suarez
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1087

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 23, 1998

Ms. Teri Weaver
Syracuse Newspapers
601 Lakeport Road
Chittenango, NY 13037

The staff of the Committee on 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. Weaver:

I have received your letter of June 2 in which you sought an opinion concerning "youthful offender status as it relates to police arrest information." You wrote that the Oneida Police Department "recently began withholding arrest information for people ages 16, 17, 18 and 19..."

In this regard, I offer the following comments.

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

Second, the initial ground for denial, §87(2)(a), pertains to records that "are specifically exempted from disclosure by state or federal statute." While records concerning youthful offenders might at some point fall within a statutory exemption from disclosure, that point is reached, in my view, only when or after a court determines that a person is a youthful offender.

Most relevant to the issue in my view is the provision cited by the Police Department, §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, it is clear in my opinion that only a court has the authority to seal an accusatory instrument that identifies "an apparently eligible youth". Further, subdivision (3) of §720.15 narrows the applicability of subdivisions (1) and (2) and the capacity to seal records or conduct private proceedings by distinguishing between apparently eligible youths charged with felonies from others. As such, I do not believe that records pertaining to eligible youths become "exempted from disclosure" by statute unless or until a court orders that they be sealed.

It is possible that records pertaining to an apparently eligible youth charged with a felony may at some point be adjudicated a youthful offender, in which case the records pertaining to that person may be sealed under §720.35 of the Criminal Procedural Law. However, until that occurs, I believe that the records and proceedings concerning such an individual would be open to the public to the same extent as similar records or proceedings concerning adults.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. David Meeker

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10879

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June 23, 1998

Mr. Carlos Fernandez
94-A-2439
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

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

Dear Mr. Fernandez:

I have received your undated letter, which reached this office on June 1. You have sought assistance in obtaining medical records pertaining to yourself from your facility.

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 facility 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 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-10880

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 23, 1998

Ms. Charlene Heidorn
[redacted]

The staff of the Committee on 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. Heidorn:

I have received your letter of June 3 in which you sought assistance in obtaining a record from the Chautauqua County Department of Health.

You described a series of events concerning the flooding of your home. In an effort to deal with the problem, you spoke with or contacted a variety of government officials. In relation to the foregoing, you sought under the Freedom of Information Law the name of the employee "at the Sewer District who turned [your] name into the Health Department." The Chautauqua County Department of Health responded by explaining its "policy not to disclose the names of complainants." The Director of Environmental Health Services added that the report concerning the sewer connection "was made by the South and Center Chautauqua Lake Sewer District."

If my understanding of the matter is accurate, that an official or employee of the Sewer District contacted the Department of Health pertaining to your situation, it is my opinion that a record identifying that person must be disclosed. In this regard, I offer the following comments.

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

Notwithstanding the foregoing, if my assumption is accurate, that the report regarding your property was made by an employee of the Sewer District, that person presumably was acting in the performance of his or her official duties. From my perspective, since a person in that circumstance would not be acting as a member of the public, the exception regarding the protection of personal privacy would not apply. There would be nothing "personal" about the information; on the contrary, again, it would relate to a government employee carrying out governmental duties. In a situation in which an effort was made to "keep the names of...investigative employees undisclosed" under the privacy provisions, it was held that records identifying those employees must be disclosed, for the names were "relevant to the work of the agency requesting or maintaining" them and are "relevant to the ordinary work of such agency" (see Lewis v. Giuliani, Supreme Court, New York County, NYLJ, May 1, 1997).

If the Sewer District maintains a record identifying the employee who contacted the Department of Health, it, too, I believe that it, too, would be obliged to disclose a record identifying that employee upon receipt of a request made under the Freedom of Information Law.

I note that the denial by the Director of Environmental Health Services made no reference to your right to appeal the denial. 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).

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 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 and the South and Center Chautauqua Lake Sewer District.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Steven M. Johnson
John Poshka

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1088

41 State Street, Albany, New York 12231
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June 24, 1998

Mr. Albert Gimein
[redacted]

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

Dear Mr. Gimein:

I have received your letter of June 1 and a variety of related correspondence. You have sought assistance in obtaining a memorandum from the New York City Department of Personnel that was withheld in 1993 on the ground that "it is not final in nature." The agency cited §87(2)(g)(iii) of the Freedom of Information Law as the basis for the denial of access.

In this regard, I offer the following comments.

First, based on a review of the materials, I note that a request for records should ordinarily be directed to the "records access officer" at the agency that you believe maintains the records. The records access officer has the duty of coordinating an 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.

As you may be aware, §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.

One of the contentions offered by the New York City Police Department in a decision rendered by the Court of Appeals, 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 record 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) id., 276-277).]

In my view, insofar as the records at issue consist of recommendations, advice or opinions, for example, they may be withheld; insofar as they 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
Executive Director

RJF:jm

cc: Records Access Officer, Department of Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1088

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

June 24, 1998

Mr. George F. Supan
[redacted]

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

Dear Mr. Supan:

I have received your letter of June 2. You have sought assistance in obtaining data from the Wappingers Central School District in a usable electronic form.

In this regard, 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."

In view of 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.

If my understanding of the matter is accurate, it appears that the "Access database" consists of software that enables the District to manipulate data. From my perspective, software would itself constitute a record that falls within the framework of the Freedom of Information Law, for it would be analogous to a written manual describing a series of procedures to be followed to carry out a certain function. As such, I believe that it would constitute a record falling within the coverage of the Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Wayne F. Gersen
Joseph DiDonato

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1883

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June 24, 1998

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

I have received your letter of May 28. You have sought guidance in relation to a court's failure to respond to your request for records pursuant to §255 of the Judiciary Law.

In this regard, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §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.

It is suggested that you persist in your efforts. If they fail, it might be worthwhile to confer with your attorney or a representative of Prisoners' Legal Services.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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June 24, 1998

Mr. David Wood
84-A-4819, 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. Wood:

I have received your letter of May 29. You have sought assistance in obtaining records from the Department of Correctional Services.

According to your letter, soon after the TWA Flight 800 disaster, you sought to share your ideas concerning its cause, and you contacted the Commissioner of the Department. You were later visited by two agents from the Department's Office of Inspector General. Most recently, you requested records from one of the investigators who interviewed you that would indicate the results of the investigation relative to the ideas that you offered. 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. While I believe that the investigator 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 records access officer, Mr. Mark Shepard.

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

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

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

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

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

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

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

Third, the extent to which you might have the right to obtain the records of an investigation is, in my view, questionable. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 decision by the Court of Appeals concerning records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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 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: Senior Investigator Torreggiani
Mark Shepard, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1085

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June 24, 1998

Mr. Leif Lopez
95-R-8690
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. Lopez:

I have received your letter of May 26. You have asked whether you "are entitled to a certain correctional official's records of performance negligence and any complaints against him regarding his conduct and propensity to make errors while conducting urinalysis evaluations."

From my perspective, it is likely those records could 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.

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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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FOIL-AO-10886

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June 25, 1998

Hon. Shirley Murray
Town Clerk
Town of Wilton
22 Traver Road
Gansevoort, NY 12831-9127

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

Dear Ms. Murray:

I have received your communication of June 4, as well as related materials.

You have sought my views concerning a request for "decisions by the Board of Assessment Review on tax grievances or protests in 1998" and "complaints regarding tentative assessments filed by property taxpayers in the Town of Wilton in May of 1998." It is your assumption that the person seeking the records "wants to use this information for commercial purposes." Since it appears that the person making the request, an attorney, intends to use the records for the purpose of soliciting clients, it appears that your assumption is accurate. Ordinarily in that kind of circumstance, §89(2)(b)(iii) of the Freedom of Information Law could be asserted. That provision, as you are aware, authorizes an agency to withhold the list of names and addresses if the list would be used for commercial or fund-raising purposes. Further, in a somewhat similar circumstance in which a law firm sought accident reports for the purpose of soliciting clients, i.e., accident victims, the Court of Appeals found that the identifying details could be withheld [see Scott, Sardano & Pomeranz v. Records Access Officer of Syracuse, 65 NY 2d 294, 491 NYS 2d 289 (1985)].

Nevertheless, in a recent judicial decision, Hudson v. Jurczynski (Supreme Court, Schenectady County, February 2, 1998), it was determined that the records in question must be disclosed. The Court indicated that the records sought were available under other provisions of law, citing §516(2) of the Real Property Tax Law, §51 of the General Municipal Law and §208(4) of the County Law. When records are available under a provision of law other than the Freedom of Information Law, those records remain available notwithstanding the grounds for denial in the Freedom of Information Law [see Freedom of Information Law, §89(6)]. You wrote, however, that you "can find nothing in the Real Property [Tax] Law requiring disclosure of these records."

Therefore, you asked whether you should deny access to the records requested in their entirety or provide access to the records after deleting the names and addresses of property owners. In this regard, I offer the following comments.

First, the Hudson decision deals with exactly the same records that have been requested from the Town. Consequently, there is precedent from a neighboring county indicating that those same records must be disclosed. Should you withhold the records and face a challenge to a denial in court, the extent to which the Supreme Court in Saratoga County would agree with or rely upon the Hudson case as precedent is conjectural. In short, denying access to any portion of the records would represent something of a risk on the part of the Town.

On the other hand, I agree with your contention that §516 of the Real Property Tax Law does not refer to the kinds of records at issue. That provision pertains only to the assessment roll; it makes no reference to the records requested by Mr. Hudson.

The other statutes cited by the Court were enacted prior to the Freedom of Information Law and appear to provide broad rights of access, for they refer to all records maintained by certain municipalities being available. Here I point out that the Court of Appeals has dealt with the argument that §51 of the General Municipal Law should be treated literally to grant access to all records of a municipality and has rejected that contention. In Xerox Corp. v. Town of Webster [65 NY 2d 131 (1985)], the Court determined that the exceptions appearing in the Freedom of Information Law should be construed as having been "engrafted" on §51 of the General Municipal Law (id., 132). Therefore, if, for example, records would apparently be available under the General Municipal Law or the County Law sections cited by the Court, but an exception in the Freedom of Information Law would otherwise authorize an agency to deny access, the agency, according to the State's highest Court, would have the ability to do so.

In sum, for the reasons expressed above, the basis for the Court's determination in Hudson is, in my view, questionable. Whether the Town would want to encourage judicial review of the matter in Saratoga County involves a determination to be made by Town officials.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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June 25, 1998

Mr. Robert Davis
81-C-0288
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. Davis:

I have received your letter of May 31 in which you sought guidance in your attempt to obtain your "trial court indictment papers, and the original police report in [your] case." You also asked "which public office in the arresting county is in possession of such documents."

In this regard, I offer the following comments.

First, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) 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. Insofar as your inquiry pertains to court records, it is suggested that you direct a request to the clerk of the court in which the trial was conducted.

Second, the police report would be in the possession of the law enforcement agency that made the arrest, and your request for that record should be directed to the "records access officer" at that agency. The records access officer has the duty of coordinating an agency's response to requests.

Third, with respect to rights of access to police reports and similar records, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. 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 decision by the Court of Appeals concerning records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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 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
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June 26, 1998

Ms. Carolyn Schurr
Newsday
235 Pinelawn Road
Melville, NY 11747

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

Dear Ms. Schurr

I have received your correspondence of June 8 in which you questioned the propriety of a denial of your appeal to the New York City Department of Investigation.

According to the materials, Newsday sought records reflective of "the results of any investigation DOI or its inspectors general did regarding Sylvia Maraia, a deputy commissioner in the Department of Housing Preservation and Development, and/or HPD's sale of city property to the Congress of Italian-American Organizations." The initial denial of access cited §87(2)(b) of the Freedom of Information Law concerning an unwarranted invasion of personal privacy and §87(2)(e), which authorizes an agency to withhold records compiled for law enforcement purposes under certain circumstances. That denial was affirmed following your appeal, citing §87(2)(e) and reiterating that disclosure "would interfere with law enforcement investigations, deprive a person of a right to a fair trial or impartial adjudication, or reveal confidential information relating to a criminal investigation."

While it is possible that some elements of the records sought might justifiably be withheld, the expressed basis for the affirmance of the denial is, in my opinion, inadequate. Further, based on judicial decisions, it is likely that a blanket denial of access to the records sought is inconsistent with law. In this regard, I offer the following comments.

First, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records and requires that an agency's determination of an appeal must either grant access to the records or "fully explain in writing... the reasons for further denial." In this instance, the determination following your appeal merely repeated a rationale expressed in the initial denial of access and essentially reiterated the statutory language of §87(2)(e). From my perspective, the response to the appeal could not be characterized as having "fully explained" the reasons for further

denial. I note that the Department of Investigation was criticized in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) for a denials of access also based merely on a reiteration of the statutory language of an exception, stating that "DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases'". In this instance, the "law enforcement purposes" exception appears to have been used in much the same manner.

Second, in a related vein, the denial appears to be inconsistent with the language and intent of the Freedom of the Freedom of Information Law and its judicial construction. In short, it appear to evince a refusal to follow or recognize the clear direction provided by not only in Lewis, but also by the Court of Appeals court, in Gould v. New York City Police Department, [87 NY 2d 267 (1996)].

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 Police Department contended that complaint follow up reports 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), 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 request,the Department has engaged in a blanket denial of access 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).

In sum, I believe that the basis for the denial of your appeal was incomplete and inadequate, and that the blanket denial of the request was inconsistent with law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Alain M. Bourgeois

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2406
FOIL-AO-10889

41 State Street, Albany, New York 12231
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June 26, 1998

Mr. Gregory F. Yakaboski, Esq.
Southold Town Attorney
Town Hall, 53095 Main Road
P.O. Box 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 Mr. Yakaboski:

As you are aware, I have received your letter of June 5. You have questioned the obligation of a public body to disclose minutes of meetings sought pursuant to the Freedom of Information Law prior to being "settled" or approved.

In this regard, §106 of the Open Meetings Law pertains to minutes of meetings and states that:

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

In view of the foregoing, it is clear in my opinion that minutes of open meetings must be prepared and made available "within two weeks of the date of such meeting."

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

Lastly, viewing the issue from a different vantage point, the Freedom of Information Law makes no distinction between drafts as opposed to "final" documents. The Law pertains to all agency records, and §86(4) defines the term "record" to mean:

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

Due to the breadth of the language quoted above, once a document exists, it constitutes a "record" subject to rights of access, even if the record is characterized as "draft" or is unapproved. Further, as a general matter, minutes consist of a factual rendition of what transpired at an open meeting. On that basis, I believe that they are accessible [see Freedom of Information Law, section 87(2)(g)(i)]. Further, minutes often reflect final agency determinations, which are available under section 87(2)(g)(iii), irrespective of whether minutes are "approved". Additionally, in the case of an open meeting, during which the public may be present and, in fact, may tape record the meeting [see Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985)], there would appear to be no valid basis for withholding minutes, whether or not they have been approved.

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

OMC-AO-2905
FOIL-AO-10890

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June 26, 1998

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 June 2. You have questioned whether a board of assessment review is subject to the Open Meetings Law, and if so, whether you can tape record or photograph the proceedings.

In this regard, it is clear in my opinion that a board of assessment review is a "public body" required to comply with the Open Meetings Law [see Open Meetings Law, §102(2)]. While meetings of public bodies generally must be conducted in public unless there is a basis for entry into executive session, following public proceedings conducted by boards of assessment review, I believe that their deliberations could be characterized as "quasi-judicial proceedings" that would be exempt from the Open Meetings Law pursuant to §108(1) of that statute and, therefore, could be conducted in private. It is emphasized, however, that even though 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)].

Consequently, although an assessment board of review may deliberate in private, based upon the decision cited above, the act of voting or taking action must in my view occur during a meeting.

Moreover, both the Freedom of Information Law and the Open Meetings Law impose record-keeping requirements upon public bodies. With respect to minutes of open meetings, §106(1) of the Open Meetings Law states that:

> "Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon."

Further, since its enactment, the Freedom of Information Law has contained a related requirement in §87(3). The provision states in part that:

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

In my opinion, because an assessment board of review is a "public body" and an "agency"for purposes of the Freedom of Information Law [see §86(3)], 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.

With respect to the use of audio or photographic equipment at open meetings, it has been held that audio and video tape recorders may be used at such meetings, so long as their use is not disruptive or obtrusive [Mitchell v. Board of Education of the Garden City Union Free School District, 113 AD 2d 924 (1985) and Peloquin v. Arsenault, 616 NYS 2d 716 (1994)]. I am unaware of any judicial decisions involving the use of still cameras. The principle, however, would in my opinion be the same. If a camera needs special lighting or if a photographer must be close to the subject, that kind of activivity might be disruptive and could likely be prohibited. On the other hand, if use of a camera requires no special equipment or lighting and can be used at a distance, such use would be not be disruptive and a public body could not likely prohibit that kind of activity.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Assessment Review

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1089

41 State Street, Albany, New York 12231
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June 26, 1998

Mr. Dennis J. Duffy
[redacted]

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

Dear Mr. Duffy:

I have received your letter of June 4, as well as the materials attached to it. You have sought an advisory opinion concerning your right to obtain a copy of a memorandum prepared by the principal of a school attended by one of your children that apparently was transmitted to teachers and perhaps others. As I understand the matter, students other than your child may be named or identified in the memorandum.

From my perspective, it is likely that portions of the document in question should be disclosed to you. In this regard, I offer the following comments.

First, if the Freedom of Information Law governed rights of access to the record in question, it is probable that significant portions of the memorandum could be withheld. That statute authorizes an agency to withhold internal communications, so-called "intra-agency materials", insofar as they consist of opinions, advice, recommendations and the like [see Freedom of Information Law, §87(2)(g)]. In addition, §87(2)(b) authorizes an agency to withheld records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Nevertheless, in my opinion, a different statute governs rights of access in the circumstances as I understand them.

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.

It is emphasized that FERPA would preclude disclosure of portions of the record that are personally identifiable to other students without the consent of the parents of the students. 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, except to the extent that the record pertains to your child, references to students' names, parents' names, or other aspects of the record that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Leesa Terdiman, Principal
John Beyrer, EdD

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10892

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June 26, 1998

Mr. James Leman
The Rockland Reporter
Box 58
Tappan, NY 10983

The staff of the Committee 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. Leman:

I have received your letter of June 5 in which you sought an advisory opinion concerning the propriety of a denial of access to certain records maintained by the Town of Orangetown.

According to your letter, having requested the Planning Board file relating to "The Rossi Subdivision, 97-32", you inspected its contents, which included three memoranda from attorney for the Town that were addressed to Town officials. Despite having read the memoranda, your request for copies of the those records was denied on the grounds that they constitute intra-agency materials and are subject to the attorney-client privilege. You contended that "once the records were entered as part of the record of the planning board and a subsequent final determination has been made, those records no longer hold the confidentiality status that they held prior to the planning boards [sic] decision."

If the records in question had been purposely disclosed, I would agree that the authority for denying access would have been waived. Nevertheless, having spoken with Town officials, it appears that the records were mistakenly disclosed. While the memoranda might have been included in the file pertaining to the Rossi Subdivision, their placement in the file does not necessarily signify that the entire contents of the file must be disclosed. Frequently files on a particular subject or transaction include a variety of records, some of which may clearly be withheld in whole or in part. Moreover, I was informed that the file was retrieved for you by a summer employee, a student, and that after your review of the file and your subsequent request for copies, the student was informed that the memoranda in question should not have been made available for your inspection.

I note that it has been held that if a disclosure was inadvertent and was not made "intelligently and voluntarily", an agency does not waive its right to deny access to a copy of a record previously inspected [McGraw-Edison v. Williams, 509 NYS 2d 285, 287, 1986)]. In the case cited above, among the records inspected was a document that the agency believed was exempted from disclosure and which should have been withheld, and it was held that an inadvertent disclosure of an exempt records did not create a right to copy the record. Therefore, if the records may justifiably be withheld, but they were inadvertently made available for inspection, I believe that the Town could properly deny ensuing requests for the records or a request that the records be copied.

Further, it appears that the records sought could properly have been 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. Both of the grounds for denial cited by the Town are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been intelligently and purposely waived, and that records consist of legal advice or opinion provided by counsel to the client, such records would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law. The fact that a determination has been made concerning the Rossi Subdivision does not, in my view, alter the nature of the document or the ability of the Town to deny access to the records in question. While I have not read the decision, I note that the United States Supreme Court held yesterday that the attorney-client privilege remains effective even after the death of a party to a privileged communication. While death is not an issue in this instance, I believe that the essential holding would be equally applicable here.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

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

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Dennis D. Michaels, Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10893

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June 29, 1998

Mr. Jorge Castro
96-R-3225
Mid-State Correctional Facility
P.O. Box 25000
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. Castro:

I have received your letter of June 4 in which you complained with respect to a delay in disclosure of records that you requested from your facility and asked that "an investigation be made into this matter."

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 resources to conduct investigations, and it is not empowered to compel an agency to grant or deny access to records. Nevertheless, in an effort to provide 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 at the Department of Correctional Services 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: Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1089 4

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June 29, 1998

Dr. John A. Ferrette, D.D.S., F.A.G.D
30 East 40th Street, suite 302
New York, NY 10016

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

Dear Dr. Ferrette:

As you are aware, I have received your letter of June 5, as well as the materials attached to it.

In brief, following an accident at the Triborough Bridge toll plaza that occurred nearly a year ago, you submitted a notice of claim and attempted to obtain various records from the MTA/TBTA, including a videotape of the scene of the accident. In February, you were informed by the New York City Transit Authority that it was "not currently in possession of videotapes" of the location of the accident when the accident occurred. In April, you were informed that the Authority was "now arranging for the copying of the videotape relevant to this incident" and that there would be a charge of $40 for the reproduction of the tape. Most recently, however, an attorney for the Authority wrote that she had "been advised by the TBTA that they will provide you with a copy of the videotape if you serve them with a subpoena."

You have sought assistance in the matter, and 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" broadly to include:

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

Based on the foregoing, if a videotape of the incident continues to exist, it would in my opinion clearly constitute a "record" of the TBTA that falls within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, since the incident in which you were involved occurred in plain sight and includes nothing of an intimate nature, I believe that it would be accessible, for none of the grounds for denial would be applicable or pertinent.

Third, 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. Unless there is a basis for withholding records in accordance with the grounds for denial appearing in §87(2), the intended use of the records is in my view irrelevant. Consequently, there should be no need or requirement to obtain the record in question via a subpoena; on the contrary, according to the Court of Appeals, your status as a litigant has no effect on your rights as a member of the public when seeking records under the Freedom of Information Law.

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 appropriate 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 an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to the person at the Authority with whom you have been communicating.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Denise M. Fraser, Assistant General Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1089S

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June 29, 1998

Mr. Bob Breglio
[redacted]

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

Dear Mr. Breglio:

I have received your letter of June 7 and the correspondence attached to it. You have sought assistance in your efforts in obtaining from the Town of Broome "copies of checks written on four budget lines or resolutions transferring money from those lines" in 1996.

Three of the four areas involve state aid recorded in the General Fund or the Highway Fund; the other involves federal aid recorded as revenue in the highway fund. The Town Clerk indicated that "there are multiple files in which this information is contained", and she denied the request "based on the cumbersomeness of the task." She offered to enable you "view these records and determine at that time if there are specific copies that would be of help to you."

There appears to be no dispute concerning the right to view or copy the records; the issue appears to involve the effort in locating records. In this regard, I offer the following comments.

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

From my perspective, the records in question are accessible, for none of the grounds for denial would apply. It appears that the records are related to information 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, 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."

Second, §89(3) of the Freedom of Information Law requires 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 its records. If the Town maintains the records sought 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. For example, if a review of an abstract enables the Town Clerk to locate the checks, the request would likely "reasonably describe" the records, and the clerk would be required to retrieve the records and make copies. On the other hand, if 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, the request might not meet that standard. In that event, you could, as the clerk suggested, review a series of records in an effort to locate those of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Doreen Burgett, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10896

41 State Street, Albany, New York 12231
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June 29, 1998

Ms. Annu Mangat
Reporter
P.O. Box 410
Red Hook, NY 12571-0410

The staff of the Committee on 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. Mangat:

I have received your letter of June 11, as well as the materials related to it.

The correspondence indicates that you requested "the disciplinary records of six police officers who were disciplined by the Town Board" of the Town of Hyde Park in March "for filing erroneous attendance records." According to Town officials, one police officer was suspended without pay for sixty days, and five others were reprimanded. In response to your request, it was unanimously resolved by the Town Board that "the material requested is material of a personnel nature contained within the personnel files of the individuals, and said release would be in violation of the Freedom of Information Act as an unwarranted invasion of personal privacy."

You have sought an advisory opinion concerning the propriety of the Town's response. In this regard, based on judicial decisions referenced in the following analysis, I believe that the records should have been disclosed.

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 are pertinent in consideration of rights of access to the records in question.

The provision to which the Town Board alluded, §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].

A second ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

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

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

In terms of the judicial interpretation of the Freedom of Information Law, 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.

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.

Pertinent in view of the number of officers involved, six, 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).

In sum, it has clearly been established by the courts that disclosure of determinations indicating that public employees have been found to have engaged in misconduct would not constitute an unwarranted invasion of personal privacy. Nevertheless, another ground for denial is critical to an analysis of the matter.

Section 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 Daily Freeman, the purpose of the request appears to involve an effort to inform the public concerning an issue of public interest and which bears on the accountability of government and its employees. Moreover, the records at issue do not deal with unsubstantiated allegations or complaints, for the officers have been found to have engaged in misconduct.

I note that recent decision rendered by the Appellate Division, Third Department, reversed a lower court decision in which it was held that the names of police officers who had been reprimanded and which were sought by newspapers were shielded by §50-a of the Civil Rights Law (Daily Gazette et al. v. City of Schenectady, ___ADd___, NYLJ, June 10, 1998). In rejecting the lower court's conclusion that police officers and others whose records are the subject of §50-a "are afforded an almost impenetrable cloak of secrecy", the Appellate Division reviewed the holdings of the Court of Appeals cited earlier and found that:

> "Clearly, the purpose of the information request in Prisoners' Legal Servs. was potentially adversarial or litigious in nature. However, the Court of Appeals was careful to contrast the scenario with one where, as here in Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, (supra), the media is merely seeking the information to report as news and not with even a remote view toward any litigation. In making a key distinction between the request in Capital Newspapers and the FOIL request before it in Prisoners' Legal Services, the Court of Appeals, referring to its holding in Capital Newspapers, states:
>
> > * * * we by no means suggested that the application of (§50-a) was limited to an ongoing litigation. Rather, we simply recognized that the legislative intent in enacting the [correction officer] amendment to section

> 50-a was to prevent release of sensitive personnel records that could be used in litigation for the purpose of harassing or embarrassing correction officers * * * records having remote or no such potential use, like those sought in Capital Newspapers, fall outside the scope of the statute (Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. Of Correctional Servs., supra, at 33 [citation omited]).

"The use or potential use in litigation remains a critical factor in assessing Civil Rights Law § 50-a protection as evidenced in other cases ordering disclosure. For example, in a pre-Prisoners' Legal Servs. decision, this court permitted access to a disciplinary determination action against a police investigator, citing Capital Newspapers and stating that the protection afforded under Civil Rights Law § 50-a 'is only intended to prevent access to police personnel records * * * for purposes of harassment of the police on cross-examination or otherwise in the context of a civil or criminal action' (Matter of Scaccia v. New York State Div. of State Police, 138 AD2d 50, 54). Similarly, a post-Prisoners' Legal Servs. decision in Supreme Court, Oneida County, ordered disclosure of the final determination of a firefighter's suspension hearing to a local newspaper, citing Capital Newspapers and specifically rejecting the notion that Civil Rights Law § 50-a (1) prohibited its release concluding:

> * * *the court finds that in this non-litigation context, [petitioner newspaper] is entitled to disclosure of the final determination in this fireman's suspension hearing, without disclosing all the supporting allegations, complaints or witness names (Matter of Rome Sentinel Co. v. City of Rome, 145 Misc 2d 183, 186)" (emphasis added by court).

At the end of the decision, the Court held that:

> "...Prisoners' Legal Servs. did not broaden the scope of the Civil Rights Law § 50-a exemption to include FOIL requests made in a context unrelated to litigation. Accordingly, respondents have failed to demonstrate that the information requested by petitioners comes squarely within the Civil Rights Law § 50-a FOIL exemption because they have not established, in any convincing way, that the information sought would be used in existing or potential litigation. The names of the police officers involved and the respective discipline imposed must be released to petitioners."

Based upon the recent holding quoted above, as well as the other judicial decisions cited previously, I believe that the records sought are accessible under the Freedom of Information Law.

As you requested, a copy of this opinion will be forwarded to Supervisor Spence.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Thomas Spence, Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1089

41 State Street, Albany, New York 12231
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June 29, 1998

Mr. Melvin Wesson
Civil#82/5773/4015/83/43392/86
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929

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

Dear Mr. Wesson:

I have received your letter of May 29 addressed to Secretary of State Treadwell in care of me. As I understand the matter, you have questioned the propriety of a response to request for records that you had directed to the Office of the Mayor of New York City.

In this regard, although I have not seen your request, it is emphasized that a request for records should be made to records access officer at the agency or agencies that you believe would maintain possession of the records in which you are interested. As a general matter, unless there are unusual circumstances, I do not believe that the Office of the Mayor would maintain records pertaining to individual civil or criminal cases. If the Office of the Mayor does not maintain the records that you requested, I believe that its response would have been appropriate.

Second, it is also noted that §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, a request for records must contain sufficient detail to enable agency staff to locate and identify the records.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Laurence A. Levy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10898

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June 30, 1998

Ms. Rosalie Russello
Town of Brookhaven
3233 Route 112
Medford, NY 11763

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

Dear Ms. Russello:

I have received your letter of June 8 in which you sought guidance concerning what you characterized as "a misuse of the Freedom of Information Act and harassment on the part of an employee of the Town of Brookhaven."

In short, although hundreds of documents have been made available to the individual, she nonetheless seeks updated or current versions of the same records on an ongoing basis. You have sought advice "as to when using the Freedom of Information Act constitutes harassment and when the Town of Brookhaven may stop supplying information that is requested simply to frustrate the purposes of Town government."

In this regard, there is nothing in the Freedom of Information Law or any judicial interpretation of which I am aware that focuses on the use of that statute for the purpose of harassment. Further, in a technical sense, there is nothing that prohibits an individual from continually seeking current versions of the same records. Nevertheless, the law does offer flexibility in terms of agencies' responses to requests.

First, an agency is not required to respond instantly to a request. The Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Second, if particular records have been made available in past and those same records are requested again, an agency, according to judicial decisions, is not required to supply the same records repeatedly [see Moore v. Santucci, 543 NYS 2d 103, 151 AD 2d 677 (1989); Walsh v. Wasser, 639 NYS2d 506, 225 AD2d 911 (1996)]. This not to suggest that new versions of records previously disclosed may be rejected; only if the exact records that had been made available in the past are requested a second time may an agency decline to honor the request.

Lastly, an agency may require payment of the requisite fees in advance of preparing copies of records (see Sambucci v.McGuire, Sup. Ct., New York Cty., Nov. 4, 1982).

I regret that I cannot be of greater assistance. If you would like to discuss the matter further, 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

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June 30, 1998

Mr. Richard Becker
[redacted]

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

Dear Mr. Becker:

I have received your letter of June 4 addressed to Committee member Smith. Please be advised that Mr. Smith has retired.

Having reviewed my response to you of June 2, there is little that I can add to it and to the same kinds of inquiries that have been repeated over the course of many years. 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:tt

STATE OF NEW YORK
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June 30, 1998

Mr. Christopher Lue-Shing
92-A-9582
C.C.F. Annex - P.O. Box 2002
Dannemora, NY 12929-2002

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

Dear Mr. Lue-Shing

I have received your letter of June 11. You have sought an advisory opinion "on how to go about in [sic] obtain formal or informal reports or records from the New York State Board of Parole relating to annual statistical data governing parole release decisions divided into specific classifications."

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 it is suggested that any request for records of the Division of Parole be directed to its records access officer.

Second, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of the Law indicates that an agency is not required to create or prepare a record in response to a request. Therefore, if the Division of Parole has not prepared statistics by means of the classifications or breakdowns of your interest and cannot generate that data by means of its existing computer programs, it would not be required to prepare new records containing the information sought in response to your request [see Guerrier v. Hernandez-Cuebas, 165 AD2d 218 (1991)].

If the statistics in which you are interested do exist or can be generated by the Division's computer programs, I believe that they would be available, for §87(2)(g)(i) of the Freedom of Information Law requires that "intra-agency materials" consisting of "statistical or factual tabulations or data" generally must be disclosed.

Lastly, I am unfamiliar with the record keeping requirements that may be imposed on the Division of Parole or the extent to which that agency maintains statistical data pertaining to parole release.

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

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June 30, 1998

E-Mail

TO: Michael Lisuzzo<michael.saratoga@internetmci.com

From: Robert J. Freeman, Executive Director

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

Dear Mr. Lisuzzo:

I have received your letter of June 15, as well as materials related to it.

According to your letter, following reports of thefts of ritalin from various schools in your area, you sent a request to the Shenendehowa School District in which you sought "the names of employees who were authorized to dispense, store, and order Ritalin", as well as a "quantification of the amount and frequency of Ritalin dispensed on an average day and week over the past year." The District responded by indicating "that they don't know and don't keep a record of these specific employees" and that "they have no records of the dispensing of Ritalin." You added that the District indicated that the only information on the subject is found in student records.

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

First, as a general matter, the Freedom of Information Law pertains to existing records, and §89(3) of the Law states in part that an agency is not required to create a record in response to a request. Therefore, if, for example, there are no records that include a "quantification" or statistics pertaining to ritalin use, the District would not be obliged to prepare new records containing the information sought on your behalf.

Second, however, the Freedom of Information Law pertains to all agency records and 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."

Third, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. It is emphasized that the introductory language of §87(2) refers to the authority to withhold "records or portions thereof" that fall within one or more of the grounds for denial that follow. The phrase quoted in the preceding sentence is based on a recognition that a single record might include both available and deniable information. It also imposes an obligation on an agency to review records sought in their entirety to determine which portions, if any, may justifiably be withheld and to disclose the remainder.

From my perspective, if the District maintains any records that identify employees authorized to dispense, store or order ritalin or any other drug, those records, insofar as they include those items, must be disclosed, perhaps after the deletion of other aspects of the records.

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 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 "FERPA." In brief, FERPA applies to all educational agencies or institutions that participate in grant programs administered by the United States Department of Education. As such, FERPA includes within its scope virtually all public educational institutions and many private educational institutions. The focal 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 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 in order to comply with federal law.

In a case dealing with a request that may be somewhat analogous to yours, an applicant sought records of test scores that were prepared by class in alphabetical order. 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 that decision, the district was required to disclose the grades in a manner in which students' identities were protected. Stated differently, the grades were required to be disclosed, but any identifying details pertaining to students were required to have been withheld. In the context of your request, if records are maintained by the District dealing with ritalin use by students, based upon FERPA, Kryston and the language of the Freedom of Information Law, I believe that they would be available, following the deletion of any information that would be personally identifiable to a student.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Laraine Longhurst

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10902

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July 1, 1998

Mr. Joaquin Winfield
97-A-5399/A-6-11
Wende Correctional Facility
P.O. Box 1127
Alden, NY 14004-1127

The staff of the Committee on Open 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 May 20, which reached this office on June 15. Having reviewed the materials attached to your letter, I offer the following comments.

First, throughout your requests, you referred to 5 USC 552 and 552a. Those statutes are, respectively, the federal Freedom of Information and Privacy Acts. They apply only to records maintained by federal agencies. Similarly, I note that the New York Freedom of Information Law is applicable to agency records, and that §86(3) of that statute defines the term "agency" to include:

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

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

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

Based on the foregoing, police departments or offices of district attorneys, for example, would constitute agencies required to comply with the Freedom of Information Law. The courts and court records, however, would be outside the coverage of the Freedom of Information Law.

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

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested, or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Since you referred to a "pre-sentence investigation", I direct your attention to §390.50 of the Criminal Procedure Law, which, in my opinion represents the exclusive procedure concerning access to pre-sentence reports and memoranda. That provision states that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article and any medical, psychiatric or social agency report or other information gathered for the court by a probation department, or submitted directly to the court, in connection with the question of sentence is confidential and may not be made available to any person or public or private agency except where specifically required or permitted by statute or upon specific authorization of the court. For purposes of this section, any report, memorandum or other information forwarded to a probation department within this state from a probation agency outside this state is governed by the same rules of confidentiality. Any person, public or private agency receiving such material must retain it under the same conditions of confidentiality as apply to the probation department that made it available."

In addition, subdivision (2) of §390.50 states in part that: "The pre-sentence report shall be made available by the court for examination and copying in connection with any appeal in the case..."

In view of the foregoing, I believe that a pre-sentence report may be made available only upon the order of a court, and only under the circumstances described in §390.50 of the Criminal Procedure Law. Further, Matter of Thomas, 131 AD 2d 488 (1987), in my view confirms that a pre-sentence report may be made available only by a court or pursuant to an order of the court.

Of potential significance with respect to other agency records 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
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July 1, 1998

Ms. Julie Kessler
[redacted]

The staff of the Committee on 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. Kessler:

I have received your letter of June 15 in which you sought an advisory opinion.

As I understand the matter, you requested notes taken at a meeting by an assistant superintendent of the Northport-East Northport Union Free School District relating to your daughter's "social and curriculum development and needs." She responded by indicating that the notes are "personal" and "are not available for others to view." You have asked whether the notes fall within the coverage of the Freedom of Information Law. In addition, you questioned the authority of the School District or the administrator to destroy the notes.

In this regard, I offer the following comments.

First, based on the language of the Freedom of Information Law and its judicial interpretation, the notes would, in my opinion, clearly fall within its scope. 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, an administrator or teacher 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.

Second, the Freedom of Information Law does not deal with the destruction of 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..."

In view of 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 note that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. It is my understanding that you have contacted that agency and that it will offer guidance regarding the destruction of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Dr. Abruzzo, Assistant Superintendent
Warren Broderick

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 6, 1998

Mr. Lasyah M. Palmer
97-A-5841
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Palmer:

I have received your letter of June 15 in which you described your unsuccessful efforts in obtaining your parole files.

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)].

If you are interested in initiating a proceeding under Article 78 of the Civil Practice Law and Rules, such a proceeding must be commenced within four months of an agency's final determination, and I believe that the person making the determination should be named in the proceeding.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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July 6, 1998

Mr. Gregory P. Klibansky
[redacted]

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

Dear Mr. Klibansky:

Your letter of June 17 addressed to Governor Pataki has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

In brief, you described a series of difficulties and delays in your attempts to gain access to records from the Office of the Suffolk County District Attorney. As I understand the matter, you requested any files maintained by that agency pertaining to you, and you expressed particular interest in a claim made by an individual in a judicial proceeding that you "surreptitiously faxed him some type of material." That individual also contended that the incident was investigated by a detective, and you requested the name of the detective and records relating to the contention and its investigation. Despite repeated attempts made by phone and in writing to the Office of the District Attorney, it appears that you had received no substantive response as of the date of your letter to the Governor.

From my perspective, several issues are pertinent to an analysis of the matter. In this regard, I offer the following comments.

First, in an initial response to your request, it was stated that you did not "reasonably describe" the records sought as required by the Freedom of Information Law [see §89(3)]. To meet that standard, an applicant is required to supply sufficient detail (i.e., names, dates, indictment, index or docket numbers) to enable agency staff to locate and identify the records. I point out that it has been held by the Court of Appeals, the State's highest court, 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 record keeping systems of the Office of the District Attorney, 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. If you were not a party to the proceeding in which the issue of the fax arose, it is questionable in my view whether a request for records pertaining to you, without additional detail, would meet the requirement of reasonably describing the records.

Second, assuming that the records of your interest can be located, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Several of the grounds for denial might be relevant in determining rights of access.

You did not indicate the outcome of the case. If the charges against the accused were dismissed in his favor, the records would be sealed pursuant to §160.50 of the Criminal Procedure and, therefore, would be exempted from disclosure by statute in accordance with §87(2)(a) of the Freedom of Information Law.

If there was a conviction, much of the information sought would likely be accessible. Insofar as the records were introduced or disclosed in a public judicial proceeding, they would be available, even if one or more of the grounds would otherwise apply [see Moore v. Santucci, 151 AD2d 677 (1989)]. If they were not introduced during the proceeding and are not part of the public court

record, the extent to which the records could be withheld would be dependent on their contents. For example, if the records identify persons other than yourself, such as witnesses or those interviewed as part of an investigation, of potential relevance is §87(2)(b), which permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Also of possible relevance is §87(2)(e), which authorizes an agency to withhold records that:

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

The extent to which the records of your interest could justifiably be withheld under the provisions cited above would be largely dependent on the effects of disclosure.

Since you sought the name of a detective, I point out 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].

It is also noted that in a recent decision, it was held that the names of investigative employees of the New York City Department of Investigation must be disclosed. It was held in Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997) that:

> "any effort by DOI to keep the names of its investigative employees undisclosed under POL §89(2)(b)(iv) or (v) may not succeed because information concerning the identities of persons doing the agency's work is 'relevant to the work of the agency requesting or maintaining it' and is 'relevant to the ordinary work of such agency.' In addition, because the purpose of the exemption is to prevent the *'unwarranted* invasion of personal privacy' (emphasis added), DOI may not engage in mantra-like invocation of the personal privacy exemption in an effort to 'have carte blanche to withhold any information it pleases' (Kheel v. Ravitch, 93 AD2d 422, 426; *affd* 62 NY2d 1), especially with respect to information about its employees."

Next, in view of the delays that you have encountered, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Lastly, 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. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joanne V. Smith, Assistant District Attorney

STATE OF NEW YORK
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July 6, 1998

Ms. Gary Griffiths
Alcove Preservation Assoc.
P.O. Box 81
Alcove, NY 12007

The staff of the Committee on 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. Griffiths:

I have received your letter of June 16 in which you complained that Albany County had not responded to your appeal made pursuant to the Freedom of Information Law in a timely manner.

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

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

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.

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. In addition, each agency shall immediately forward to the Committee on Open Government a copy of such appeal when received by the agency 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 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)].

Similarly, when an appeal is submitted and the agency appeals officer fails to respond within the statutory period of ten business days, it has been found that such failure may be deemed a denial of the appeal, that the appellant has exhausted his or her administrative remedies, and that he or she

may seek judicial review of the denial under Article 78 of the Civil Practice Law and Rules [see Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY2d 774 (1982)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Thomas Clingan, County Clerk
Paul Collins, Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1090 7

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 7, 1998

Mr. Donald G. Olson
Clerk of the Legislature
Greene County Legislature
P.O. Box 467
Catskill, NY 12414

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

Dear Mr. Olson:

I have received your letter of June 19 and the materials related to it. You have sought an advisory opinion pertaining to a request for records concerning two cases. According to the District Attorney, the records sought have been sealed or involve proceedings before a grand jury.

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 initial ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute". One such statute is §160.50 of the Criminal Procedure Law (CPL). Specifically, subdivision (1) of §160.50 states in relevant part that:

> "Upon the termination of a criminal action or proceeding against a person in favor of such person...the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding has been sealed. Upon receipt of notification of such termination and sealing...

> (c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency..."

Assuming that a court in which a proceeding was heard has not directed otherwise, when charges are dismissed in favor of an accused, records of or relating to the charges would be sealed in conjunction with the provisions quoted above. If that is so in relation to the cases cited, the records would be exempted from disclosure in conjunction with §87(2)(a) of the Freedom of Information Law.

The same provision would be applicable concerning records relating to grand jury proceedings, for §190.25(4) of the Criminal Procedure Law, which deals with grand jury, 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, testimony and the like 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-10908

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 8, 1998

Mr. James Bryan Bacon
Attorney & Counsellor At Law
10 Little Britain Road
Newburgh, NY 12550

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

Dear Mr. Bacon:

I have received your letter of June 19. You have sought an advisory opinion "as to whether under the Freedom of Information Law the public is entitled to a copy of a subdivision plan submitted by a developer to a County Department of Health for its review of proposed septic locations." You added that the plan was recently revised, and that you were told by the records access officer for the Westchester County Department of Health, in your words, that "because these plans were not formally accepted...they were considered private property and [your] FOIA request was denied."

From my perspective, once the document came into the possession of the County, it became a County record that fell within the coverage of the Freedom of Information Law. Further, there appears to be no basis for withholding the revised plan, irrespective of whether it was "formally accepted." In this regard, I offer the following comments.

As you are aware, 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."

Because the document at issue is in the possession of a County agency, I believe that it would constitute a "record" that falls within the scope of the Freedom of Information Law. The fact that the document might not have been "accepted" is of no moment; that it is kept or held by the County brings it within the scope of the Freedom of Information Law.

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)].

The record would not come into the possession of a County officer or employee except in that person's capacity as a government official. That being so, it is my opinion that a record used or acquired in the performance of one's official duties is subject to rights conferred by the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, none of the grounds for denial would be pertinent.

That the record may not have been accepted or considered final may be relevant in determining rights of access to inter-agency or intra-agency materials that fall within §87(2)(g). However, I believe that the cited provision is irrelevant in this instance, for the record was submitted by a developer, a private entity that is not an "agency". Because it is not an agency, the exception concerning inter-agency and intra-agency materials is inapplicable.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Valerie Goldstein, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AC-10909

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(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 7, 1998

Mr. Stanley Arnold Wtulich
[redacted]

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

Dear Mr. Wtulich:

I have received your letter of June 15. You complained that the Chairperson of the Town of Greenville Planning Board has "refused to show [you] the document of the subdivision of a nearby wetland."

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 for records, and a request should ordinarily be directed to that person. In the great majority of towns, the records access officer is the town clerk. I note, too, that the town clerk, under §30 of the Town Law, is the legal custodian of all town records. It is suggested that you contact the Town Clerk to describe the matter, to learn of the identity of the records access officer, and if necessary, to submit a request to the records access officer.

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. As I understand the nature of the record sought, none of the grounds for denial would be applicable. If that is so, the record must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Judith Swaine, Chairperson
Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1090

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 8, 1998

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 June 18 and the materials attached to it. In brief, you have complained concerning delays in response to your requests for records of the Town of Brookhaven.

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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Stanley Allen
Rosalie Russello

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1091

41 State Street, Albany, New York 12231
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July 8, 1998

Ms. Janet M. 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 Ms. Roberts:

I have received your letter of June 22 and related materials. You have sought an advisory opinion concerning a denial of access to a record by the Department of Motor Vehicles.

According to the correspondence, you requested from the Department a certain "scofflaw report" sent to the Department by the Albany City Court. The Department denied access, citing §89(2)(b)(iii) of the Freedom of Information Law. In your appeal, you contended that scofflaw reports identify those "who have been found guilty in traffic court, which is open to the public and often times their violations published in the newspaper." You also expressed the view that you have a right to the report "for whatever reason" and that the public has the right "to ensure accountability by the government."

If I understand the matter accurately, the record in question must be disclosed. In this regard, I offer the following comments.

First, as a general matter, the purpose for which a request is made and the intended use of records are irrelevant in determining rights of access to records. In short, it has been determined that if a record is accessible under the Freedom of Information Law, it must be made equally available to any person, irrespective of one's status or interest [Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976); M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)]. There is an exception to that principle, and it will be considered later.

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. In my view, one of the grounds for denial is relevant to an analysis of rights of access. Specifically, §87(2)(b) states that an agency may withhold records to the extent that disclosure would result in "an

unwarranted invasion of personal privacy". In addition, §89(2)(b) includes a series of examples of unwarranted invasions of privacy.

In my opinion, when a government agency has determined that an individual has engaged in a violation of law, a record identifying that person must be disclosed[Johnson Newspaper Corp. v. Stainkamp, 94 AD 2d 825, 61 NY 2d 958 (1984)]. Similarly, the imposition of a penalty indicates that a final agency determination has been made, and a record so indicating would be available [see Freedom of Information Law, §87(2)(g)(iii)]. In short, I believe that records identifying those found to have violated the law or against whom penalties have been imposed must be disclosed, for disclosure in those instances would result in a permissible rather than an unwarranted invasion of personal privacy.

The provision cited by the Department as the basis for a denial of access represents the exception to the rule that the interest of an applicant for records has no bearing on rights of access. Section 89(2)(b)(iii) states that an unwarranted invasion of personal privacy includes the disclosure of a list of names and addresses if the list would be used for "commercial or fund-raising purposes". Consequently, if the names and addresses of scofflaws would be used for a commercial or fund-raising purpose, I believe that the Department could justifiably deny access. However, if that is not your intent, the names and addresses must in my opinion be disclosed.

Lastly, although the courts and court records are not subject to the Freedom of Information Law, most court records are available under other provisions of law (see e.g., Judiciary Law, §255). If the record sent to the Department of Motor Vehicles is also maintained by a court, I believe that you could also acquire a copy from the court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Alexandra K. Sussman
George Christian

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1091 2

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 10, 1998

Mr. Santiago Ramirez
82-A-2130
Fishkill Correctional Facility
Box 307
Beacon, NY 12508-0307

Dear Mr. Ramirez:

I have received your letter of July 6. In brief, you complained that you requested certain records from your facility but that you received no response. As such, you appealed to this office and asked that we provide the records to you.

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, compel an agency to grant or deny access, or to acquire records on behalf of an individual.

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

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

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

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

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

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

It appears that your request involves a "memo" transmitted between staff at your facility. While I am not familiar with its contents, that record likely falls within §87(2)(g) of the Freedom of Information Law. That provision permits an agency to withhold records that:

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: William T. Corrigan, Senior Correction Counselor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1091B

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 10, 1998

Mr. Thomas Hill
91-B-1169
South Port 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. Hill:

I have received your letter of June 16. You have sought an opinion concerning your right to obtain the policies, rules and regulations of an organization known as "Crimestoppers" under the Freedom of Information Law.

In this regard, the Freedom of Information Law applies to records of 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, the Freedom of Information Law pertains to records maintained by entities of state and local government. Assuming that Crimestoppers is not a government agency, it would not be subject to the Freedom of Information Law or required by that statute to disclose the records in question.

I hope that 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

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41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 10, 1998

Mr. Chris Osborn
C & C Tobacco Outlet of Ithaca
109 North Meadow 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. Osborn:

I have received your undated letter, as well as the materials attached to it.

It is my understanding that you are a tobacconist and that the Tompkins Cortland Cayuga Tobacco Control Coalition engaged in a "sting operation" that resulted in a finding of a violation occurring at your place of business. You have sought the identities of those who appeared at your store, for it is your view that you should be able to "face [your| accuser." The Tompkins County Attorney has denied your request on the grounds that "the records were compiled for law enforcement purposes and if disclosed would interfere with law enforcement investigations" and that disclosure would result in "an unwarranted invasion of privacy."

From my perspective, it is unlikely that you have the right under the Freedom of Information Law to obtain the information sought. In this regard, I offer the following comments.

First, as I interpret the situation, the Tompkins Cortland Cayuga Tobacco Coalition is a citizens group that is not part of the government but is participating with the County in efforts to enforce provisions of the Public Health Law. If that is so, I do not believe that the County would be obliged to disclose records in the circumstance described that identify the members of the Coalition. Further, the Coalition would not be subject to the Freedom of Information Law, for it is not an "agency" [see Freedom of Information Law, §86(3)].

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

One of the exceptions referenced by the County Attorney, §87(2)(b), authorizes an agency

to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In my opinion, the identities of those involved in the sting operation are largely irrelevant to the enforcement of the law by the County; what is relevant is whether a violation of law occurred. The violation is not being prosecuted by the Coalition, but rather by the County as a governmental entity. In short, I believe that the names of those who appeared in your store are incidental to the matter, and that, consequently, the names could be withheld based upon considerations of privacy.

The other provision referenced by the County Attorney, §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."

Although I believe that §87(2)(b) pertaining to the protection of privacy would serve as a valid basis for denying your request, based upon the language of §87(2)(e), it is unlikely in my opinion that that provision would serve as a justifiable basis for withholding.

Lastly, the Public Health Law, §1399-ee, refers to hearings regarding violations. If records identifying the members of the Coalition in whom you are interested are introduced as evidence at such a hearing, I believe that those records would become part of the record and would be available to you.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Henry W. Theisen, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1091S

41 State Street, Albany, New York 12231
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July 10, 1998

Mr. Isaiah Brown
97-A-7589
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

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

Dear Mr Brown:

I have received your letter of June 15 in which you sought guidance concerning two requests made under the Freedom of Informaiton Law.

One involves a delay in responding to a request, and you asked whether a request may be deemed constructively denied "where no estimated date of decision is contained" in the acknowledgement of receipt of the request.

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, if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, if an agency acknowledges the receipt of a request but fails to include an approximate date of its grant or denial of the request, the request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may

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

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

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

The second area of inquiry involved a request to the Department of Correctional Services for "the record which contains the security file" pertaining to you. In response, you were told that the request was denied because "there is no record known as a security file." You have asked whether the request "reasonably described" the record 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)].

In the context of your request, I am unaware of the means by which the Department maintains records. If the nature of the records sought can be ascertained by your description of them, and if Department staff can locate and identify the records based on that description, the request, in my view, would meet the requirement of reasonably decribing the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Gary J. Galperin
Anthony J. Annucci
Rodney Moody

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1096

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 13, 1998

Mr. Bennett V. Young
Westchester County Jail
P.O. Box 10
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 Mr. Young:

I have received your letter of June 27 and the correspondence attached to it. You have sought assistance in obtaining your medical and dental records, as well as "the policies for medical and dental provision promulgated by a private health care (EMSA)" company. Having written to that company, you were informed that it is not subject to freedom of information or privacy laws.

In this regard, I offer the following comments.

First, 5 USC 552 and 552a are, respectively, the federal Freedom of Information and Privacy Acts, which apply only to records maintained by federal agencies. Similarly, the New York Freedom of Information Law applies only to records of units of state and local government in New York. As such, none of those statutes would apply to a private company.

Second, however, if the Department of Correctional Services maintains a copy of the policies in question, I believe that you could seek and obtain them from the Department under the Freedom of Information Law. Pursuant to the Department's regulations, if the records are maintained at your facility, a request may be directed to the superintendent or his designee. When records are maintained at the Department's central offices in Albany, a request may be made to the records access officer, Mr. Mark Shepard.

Lastly, with regard to medical records pertaining to you maintained at your facility, 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 assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

FOIL-AO-10917

From: Robert Freeman
To: SMTP("twilliam@crain.com")
Date: 7/13/98 2:36pm
Subject: FOIA request of Comptroller -Reply

Following the receipt of your message, I called Jeffrey Gordon to discuss your request. He was quite apologetic indicated that he would call you. He also specified that the requested records will be sent to you tomorrow.

For future reference, this office is authorized to provide advice and written opinions. While the opinions are not binding and the Committee cannot compel an agency to grant or deny access to records, I like to think that the opinions are educational and persuasive.

Should a person denied access seek judicial review of the denial, a court has discretionary authority to award attorney fees if three conditions are present: first, the applicant must "substantially prevail"; second, the court must find that the agency had no reasonable basis for withholding the records; and third, the records must be of clearly significant interest to the general public.

If I can be of assistance, please feel free to contact me.

CC: internet:jgordon@osc.state. ny.us

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1098

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 13, 1998

Mr. Andrew Stergiou
96-R-8896
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

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

Dear Mr. Stergiou:

I have received your letter of June 15. As I understand the matter, you sought all "non-exempt" records pertaining to your case from the Office of the New York County District Attorney, and following an appeal, Mr. Gary J. Galperin on October 23, 1997 determined to grant access to the records. Nevertheless, as of the date of your letter to this office, you had not yet received the records.

You have sought a "determination" from the Committee on Open Government and asked that the Office of the District Attorney be "compelled" to disclose the records.

In this regard, the Committee is authorized to provide advice concerning the Freedom of Information Law. It is not empowered to render determinations that are binding or to compel an agency to grant or deny access to records. Nevertheless, it appears that the Office of the District Attorney has failed to comply with law.

When a person appeals an agency's initial denial of access to records, §89(4)(a) of the Freedom of Information Law states that head of the agency or that person's designee "shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought." Although you indicated that your appeal was granted, if the Office of the District Attorney has not provided access to the records sought, I believe that it has acted in a manner inconsistent with the Freedom of Information Law.

Since the records have not been disclosed following your appeal, you may, in my opinion, consider the appeal to have been constructively denied, and you may seek to compel disclosure by initiating 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:tt

cc: Gary J. Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1091 9

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. Constantinee Jackson
93-B-0074
Groveland Correctional Facility
P.O. Box 104, Rte. 36, Sonyea Rd.
Sonyea, NY 14556

Dear Mr. Jackson:

I have received your letter of July 19 in which you requested from this office the criminal history record of person who apparently was a witness at your trial.

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 available because this office does not possess them. Nevertheless, I offer the following comments.

First, a request should be directed to the "records access officer" at the agency that maintains the records sought. The records access officer has the duty of coordinating the agency's response to requests. If records are maintained by a court, the Freedom of Information Law would not apply. However, other statutes, such as that cited in your letter, §255 of the Judiciary Law, frequently provide rights of access to court records. If you believe that the records of your interest are maintained by a court, a request should be directed to the clerk of the court.

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." 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, since you asked that fees be waived due to your status as a poor person, I point out the Freedom of Information Law does not include any provision pertaining to the waiver of fees. Further, it has been held that an agency may charge its established fees, even if the applicant is 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-10920

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. Hector M. Rodriguez
98-A-1419
Drawer B
Stormville, NY 12582

Dear Mr. Rodriguez:

I have received your letter July 8 in which you requested a copy of your trial minutes 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 maintain custody or control of records generally. In short, I cannot make the records requested available, for this office does not possess them.

I note, too, that the Freedom of Information Law is applicable to agency records, and that §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. It is suggested that request for court records be directed to the clerk of the appropriate court, citing an applicable provision of law as the basis for the 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1092

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. Stewart S. Lilker
c/o Donart
302 Guy Lombardo Avenue
Freeport, NY 11520

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

Dear Mr. Lilker:

I have received your letter of June 23 and the materials attached to it. You have raised a variety of questions concerning your attempts to gain access to records from the Village of Freeport. Based on a review of the correspondence, 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, one of the issues appears to involve 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.

While I am unaware of the means by which the Village its maintains records, insofar as the records sought are retrievable on the basis of the terms of a request, I believe that the requirement that the records be reasonably described would be met. On the other hand, however, it is possible that the Village maintains records falling within the scope of a given 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.

Third, you asked whether the Building Department can remove records from a file or seal records. In a related vein, you questioned whether "the Village lose their obligation to respond to the FOIL request because the Court ruled against them." In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant under the circumstances is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §160.50 of the Criminal Procedure Law (CPL). In brief, under that statute, if charges against a person are dismissed in his or her favor, the records pertaining to the matter are ordered sealed. Having contacted the Office of Court Administration to obtain guidance on the matter, I was informed that violations, including building code violations, are filed as accusatory instruments and that the proceedings are treated as criminal cases. As such, a building code violation resulting in a proceeding is treated as a criminal proceeding. If that is so, when charges are dismissed against a

person accused of a code violation, it appears that §160.50 of the CPL would be applicable as a basis for sealing records.

Next, with respect to records concerning litigation, in brief, in my opinion, insofar as the records have been communicated between the Village and its adversary or have been filed with a court, any claim of privilege or its equivalent would be effectively waived. Once records in the nature of attorney work product or material prepared for litigation are transmitted to an adversary, i.e., from the Village to its adversary and *vice versa*, I believe that the capacity to claim exemptions from disclosure under §3101(c) or (d) of the Civil Practice Law and Rules or, therefore, §87(2)(a) of the Freedom of Information Law, ends.

Lastly, with regard to records relating to payments by the Village to its attorneys, enclosed is a copy of an opinion that dealt with the issue in detail. A copy of that opinion, as well as 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

Enc.

cc: Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 10922

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. William Keegan
92-A-0276
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. Keegan:

I have received your letter of June 22 in which you sought assistance in obtaining records from the Office of the Bronx County District Attorney.

For purposes of clarification, you referred in several aspects of your letter to "motions" to obtain records. It is assumed that there is no litigation and that no motions served upon an adversary or filed with a court have been prepared; it is my understanding that your use of the term "motions" merely refers to papers submitted for the purpose of making a request or an appeal under the Freedom of Information Law. The ensuing comments will be based on that assumption.

You referred to a letter sent by an assistant district attorney attached to your correspondence. Nevertheless, no letter was attached. You wrote that the assistant district attorney indicated that he determined that there are 113 documents that are available but that he did not enclose a "master index sheet" describing those records. You have asked whether you should send him the money that he requested "prior to seeing exactly what he is sending." In this regard, there is no requirement in the Freedom of Information Law that an agency prepare a "master index sheet" or other record specifically indicating the nature of the records to be made available. Consequently, if you want copies of the records, it is suggested that you pay the appropriate fee.

Next, you wrote that you were informed by an agency that it would be "approximately 60 days" prior to making certain records available. As indicated in previous correspondence, an agency must respond in some manner to a request within five business days of its receipt of a request. While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which

an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Assistant District Attorney Shimpkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10923

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. Eric M. Davis
97-A-3523
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. Davis:

I have received your letter of June 24 in which you complained with respect to responses to requests by the Office of the Queens County District Attorney. You wrote that some of the records made available are illegible or cut off so that a document is incomplete and that responses to your requests repeatedly extend the time for determining to grant or deny access to records.

In this regard, I offer the following comments.

First, insofar as copies of records made available to you are illegible or incomplete, it is suggested that you contact the person who responded and so indicate or that you return the records and seek legible or complete copies.

Second, with respect to continual delays in responses to requests, I note that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

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

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

Further, in a decision involving a situation in which requests were made, but the agency engaged in continual delays and failed to grant or deny access to the records sought, when the applicant initiated a judicial proceeding, the court rejected the agency's contention that petitioner had failed to exhaust her administrative remedies. In a discussion of the matter, the decision states that:

> "The respondent contents that petitioner failed to appeal the denial of access to records within 30 days to the agency head as provided in Public Officers Law [section] 89(4)(a) and, therefore, may not bring this proceeding.
>
> "The petitioner alleges that Public Officers Law [section] 89(4)(a) is not applicable as petitioner's FOIL requests has never been decided by respondent as respondent's only correspondence in response to petitioner's application indicates only that the matter is under investigation.
>
> "While the papers, for both sides, in this proceeding fail to discuss the issue of constructive denial, it has been found that the failure of an agency to respond to a FOIL request, as provided for in Public Officers Law [section] 89(3), can be construed as a denial of said request. In the case of Mtr. Robertson v. Chairman, 122 Misc 2d 829, the court held the failure of the Division of Parole to respond within five days to a letter from petitioner requesting access to certain information contained in his parole records is properly construed as a denial of his request...

> "It, therefore, appears that respondent's failure in this particular proceeding to neither grant nor deny the petitioner's request may be construed as a denial of access that may be appealed to the agency head" (Bernstein v. City of New York, Supreme Court, New York County, NYLJ, November 7, 1990).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Brian Lee, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1092/

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Ms. Janice Stamm
Senior Assistant Town Attorney
Town of Babylon
200 East Sunrise Highway
Lindenhurst, NY 11757

The staff of the Committee on 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. Stamm:

I have received a copy of your letter of June 19 addressed to Mr. Jay M. Herman. As I understand the matter, Mr. Herman requested a copy of the Town's assessment roll, and you asked that he "provide...information regarding the use by [his] firm of the requested information."

For reasons to be discussed, I believe that an assessment roll must be disclosed, notwithstanding its intended use.

In general, the reasons for which a request is made and an applicant's potential use of records are irrelevant, and it has been held that 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.

As you are likely aware, §89(2)(b)(iii) of the Freedom of Information Law permits an agency to withhold a "list 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; aff'd, ___AD2d___, NYLJ, July 8, 1998).

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.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10925

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 14, 1998

Mr. H. Detrick
[redacted]

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

Dear Mr. Detrick:

I have received your letter of June 23 in which you sought assistance in obtaining military discharge records from the Westchester County Clerk. You wrote that you were informed by that agency that you "would have to produce a signed permission slip from the parties whom the records concern" in order to obtain copies.

In this regard, by way of background, §250 of the Military Law, which has remained unchanged for some forty years, states that any certificate of honorable discharge issued after April 6, 1917 "may be recorded in any one county, in the office of the county clerk, and when so recorded shall constitute notice to all public officials of the facts set forth therein." As such, although there is no requirement that they do so, veterans may file certificates of honorable discharge with county clerks. The more recent filings, perhaps those within the last twenty years, include social security numbers.

A veteran who chooses to file a certificate of honorable discharge with a county clerk has the ability direct that it be sealed pursuant to §79-g of the Civil Rights Law. That provision states that:

> "a. Notwithstanding the provisions of any general, special or local law to the contrary, any person filing a certificate of honorable discharge in the office of a county clerk shall have the right to direct the county clerk to keep such certificate sealed.
>
> b. Thereafter, such certificate shall be made available to the veteran, a duly authorized agent or representative of such veteran or the representative of the estate of a deceased veteran but shall not be available for public inspection."

Although the Freedom of Information Law is based on a presumption of access, the first ground for denial would authorize county clerks to shield from the public certificates or honorable discharge that have been sealed based on the direction to do so by a veteran. Section 87(2)(a) pertains to records that are "specifically exempted from disclosure by state or federal statute." Section 79-g of the Civil Rights Law is such a statute, and if direction to seal is given by a veteran, a county clerk would be prohibited from disclosing, notwithstanding the provisions of the Freedom of Information Law.

When there is no direction by a veteran to seal a certificate of honorable discharge, that record, like all others, would be subject to rights conferred by the Freedom of Information Law. As I understand the content of such a record, the only item that could be withheld would be the social security number. It has been held that local government agencies may withhold social security numbers on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)], but that they not required to do so [Seelig v. Sielaff, 201 A.D. 2d 298 (1994)]. As a general matter, even though a local government agency, i.e., a county, may withhold records or portions thereof in appropriate circumstances, it is not obliged to do so, because the Freedom of Information Law is permissive. Therefore, while I believe that a local government agency may delete social security numbers from records that are otherwise available, the Freedom of Information Law would not prohibit a county clerk from disclosing certificates of honorable discharge in their entirety, unless those records are sealed under §79-g of the Civil Rights Law.

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 relates to the protection of personal privacy. As indicated earlier, §87(2)(b) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure would constitute an unwarranted invasion of personal privacy. 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 suggested above, 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. 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)]. If it is determined that certificates of honorable discharge are requested for commercial purposes, it appears that county clerks could justifiably deny the request.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Westchester County Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10926

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 15, 1998

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 June 24 and the materials attached to it. As I understand the matter, you requested records from Cattaraugus County indicating its approval of two septic systems on a particular parcel of real property. The County denied the request, citing §87(2)(b)and (g) of the Freedom of Information Law.

If the preceding interpretation of the matter is accurate, I believe that the records should have been disclosed. In this regard, I offer the following comments.

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

Second, in my view, none of the grounds for denial could appropriately be asserted to withhold the records sought. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, there is nothing personal or intimate about an approval to build or install a septic system. Septic systems and similar projects are generally installed or built in plain sight; anyone can see or inspect the activity. Further, permits and similar approvals issued in relation to the use or improvement of real property have historically been accessible to the public, for the issuance of such authorization essentially enables the public to know that an owner of real property is engaging in a project or activity in a manner consistent with law.

The other provision cited in the denial, §87(2)(g), pertains to the ability to withhold "inter-agency or intra-agency materials." However, subparagraph (iii) of that provision specifies that such materials must be disclosed insofar as they consist of "final agency determinations." In my opinion, an approval by the County would represent a final agency determination that must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald E. Furman, Records Appeals Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1092?

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July 15, 1998

Mr. Roger Powell
83-A-3782
Clinton Correctional Facility
P.O. Box 2002 (Annex)
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. Powell:

I have received your letter of June 24, as well as the correspondence attached to it. Having considered your remarks, I offer the following comments.

First, it appears to be your contention that when an agency indicates that it does not maintain the records sought, it is obligated to inform the applicant where the records are kept. While an agency may do so, there is no requirement in the Freedom of Information Law that an agency must inform an applicant of the location of records outside of that agency.

Second, you complained with respect to delays in response to your request and appeal. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

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

constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

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

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

Third, in view of the references to certain decisions and sections of the Criminal Procedure Law (CPL) in your letter, I point out that 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, 89 NY 2d 267 (1996).]

In short, I believe that the Freedom of Information Law imposes a duty to disclose records, as well as the capacity to withhold them, irrespective of the status or interest of the person requesting them. To be distinguished are other provisions of law that may require disclosure based upon one's status, e.g., as a defendant, and the nature of the records or their materiality to a proceeding.

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

Based on the foregoing, neither a police department nor an office of a district attorney can claim that records prepared by police personnel 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:tt

cc: Lawrence J. Schwarz
Noreen Healey

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10928

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July 15, 1998

Ms. Catherine G. Scavo
Labor Relations Specialist
NYSUL United Teachers
187 Wolf Road, Suite 100
P.O. Box 5189
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 Ms. Scavo:

I have received your letter of June 30. You have sought an opinion "as to whether an attorney's retainer agreement with a school district is a public document and thereby foilable."

From my perspective, it is clear that a retainer agreement, a contract between an attorney or a law firm and an agency, such as a school district, is accessible under the Freedom of Information Law. In this regard, I offer the following comments.

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

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of payments made or expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable in most instances.

With specific respect to payments to attorneys, I point out that while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. Moreover, in an expansive decision involving billing records of attorneys, it was determined the "fee arrangements" as well as other

details within the records must generally be disclosed, for the exceptions to rights of access must be narrowly construed. Orange County Publications, Inc. v. County of Orange [637 NYS 2d 596 (1995)] involved a request for "the amount of money paid in 1994 to a particular law firm for legal services rendered in representing the County in a 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" (id., 599). 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'" (id.). 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:

> "Thus, respondent's position can be sustained only if such descriptions rise to the level of protected communications.
>
> "In this regard, the Court recognizes that not all communications between attorney and client are privileged. Matter of Priest v. Hennessy, supra, 51 N.Y.2d 68, 69, 409 N.E.2d 983, 431, N.Y.S.2d 511. In particular, 'fee arrangements between attorney and client do not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

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, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible. Further, a retainer agreement, which does not involve the rendition of legal advice or a description of legal strategy, would, according to the decision, clearly be available.

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

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July 15, 1998

Mr. Walter Kowsh Jr., VP
Cedar Grove Civic Homeowners
Association, Inc.
54-08 136th Street
Flushing, NY 11367

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

Dear Mr. Kowsh:

I have received your letter of June 30 and the materials relating to it. You have complained with respect to a response to a request made under the Freedom of Information Law to the New York City Planning Commission.

In a request dated June 9 addressed to the Commission's records access officer, you referred to §2800(a) of the New York City Charter, which states in relevant part that:

> "The city planning commission, after each council redistricting pursuant to chapter two-A, and after each community redistricting pursuant to section twenty-seven hundred two, shall determine the proportion of the community district's population represented by each council member. Copies of such determinations shall be filed with the appropriate borough president, community board, and council member."

Your request involves "the most currently available, and its immediate predecessor, analysis of Community Board representation by Council Member for the Borough of Queens."

In acknowledging the receipt of your request, the records access officer indicated that "a response to your request will require [her] to search for, collect and review the requested records from offices that are separate from [hers] and to consult with two or more divisions of this agency and with other agencies that have substantial interest in the subject matter of your request." You questioned "who are the 'other agencies that have a substantial interest in the subject matter'" of your request.

As I interpret the provisions of the City Charter quoted above, the City Planning Commission is required to prepare records that contain the analyses that you requested. If it can be assumed that the Commission has carried out its official duties and has prepared the records sought, and that it maintains copies of the records that it prepared, it would appear that the matter of your request should be easily and promptly resolved.

I am unaware of which agencies merit contact by the records access officer. In an effort to appropriately assess rights of access, there are often situations in which an agency's records access officer properly consults with persons within his or her agency or from other agencies in order to obtain information concerning the contents of certain records and the effects of their disclosure in accordance with the grounds for denial of access appearing in §87(2) of the Freedom of Information Law. However, if in this instance the Commission maintains the records sought, there would appear to be no need to collect records or engage in consultation. In short the kinds of records that you requested would, in my view, be clearly available. Section 87(2)(g)(iii) of the Freedom of Information Law specifies that those portions of "inter-agency or intra-agency materials" consisting of "statistical or factual tabulations or data" must be disclosed. Based on the terms of the City Charter, records reflective of a "proportion of the community district's population represented by each council member" would constitute statistical or factual information accessible to the public.

With respect to the delay in granting access, 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, 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)].

In my view, 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).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

cc: Wendy Niles, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10930

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 15, 1998

Mr. Ethan Jacobs
[redacted]

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

Dear Mr. Jacobs:

I have received your letter of June 29, as well as the materials attached to it. You have sought assistance in relation to a longstanding request for records of the New York City Police Department.

As I understand the matter, you are interested in obtaining ticket serial numbers assigned to particular police officers. In addition, you wrote that you would like to obtain "a record of tickets already issued, and to whom they were issued - but prior to any determination regarding their guilt or non-guilt." The matter has involved a series of correspondence between yourself and officials of the Police Department covering a period of approximately a year. As of the date of your letter to this office, no determination had been rendered concerning rights of access to the records. Based upon a review of the correspondence, I offer the following comments.

First, a primary issue in my view relates to the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records. Part of the problem appears to have involved the use of the language and perhaps semantics. As I interpret the materials, Department personnel were not familiar with the phrase you used in seeking the records, "control records." Although it appears in certain state regulations, that phrase might not be used commonly within the New York City Police Department. Rather than naming or attempting to name a particular record, it has been suggested that records sought be described by means of their nature, content or functions. By so doing, problems frequently can be avoided by mischaracterizing certain records or by characterizing them in a way that is unfamiliar to an agency's staff.

As you are aware, the State's highest court has held that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 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, to the 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 thousands of records individually in an effort to locate those falling within the scope of a request, to that extent, a request would not in my opinion meet the standard of reasonably describing the records.

It would seem that the regulations promulgated by the Department of Motor Vehicles, 15 NYCRR §122.3(c), requires the Department to maintain the records sought in a manner that would enable staff to retrieve them by serial number or *via* the other identifiers that you suggested in your request. The cited provision, which is entitled "Recordkeeping", states that:

> "Each police agency shall maintain a control record of all tickets assigned to police officers under its jurisdiction and a record of the disposition of all summonses and complaints, appearance tickets and notices of violations issued."

Again, unless the Department cannot locate and identify the records sought due to the nature of its filing systems, I believe that the request would meet the standard of "reasonably describing" the records.

Second, with respect to the delay in granting access, 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, 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, since you expressed interest in obtaining "a record of tickets already issued, and to whom they were issued - but prior to any determination regarding their guilt or non-guilt", it is likely that some of those records may be withheld. In my view, 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 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). In short, identifying details pertaining to person whose charges were dismissed likely would not be accessible.

In a related vein, you expressed interest in obtaining "a list of tickets issued by specific officers." As you may be 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. Therefore, if no "list" exists, the Department would not be obliged to create a list on your behalf.

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-1093

41 State Street, Albany, New York 12231
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July 16, 1998

Mr. Vernon M. Allen
[redacted]

The staff of the Committee on Open 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 correspondence of June 28 and July 12. You have sought assistance in your efforts in obtaining records from the Village of Clayton.

By way of background, on April 11, you transmitted a request to the Village Clerk-Treasurer (hereafter "the Clerk") for "records or portions thereof pertaining to the total amount of money received by the village to date from The Cape Vincent Correctional Facility for handling their sewage and specifically how this money was used by the village." The Clerk acknowledged the receipt of your request on April 14 and indicated that due the need to perform a variety of other tasks, she would "not be able to either furnish the information you requested, nor a denial of such request until at least mid-May 1998." Soon after receipt of her letter, you wrote that you did "not anticipate a denial inasmuch as [the Clerk] stated in [her] letter to [you] of March 12 that information such as [you are] requesting is a matter of public record." Because you had received no further response, you wrote to the Clerk on June 1 to ask when you might expect to receive the information. Hearing nothing since sending that letter, you appealed on July 10 to the Board of Trustees.

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 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)].

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. I would conjecture that the Village can locate and identify records of payment by the correctional facility and that you could review those records for the purpose of preparing a total figure indicating payments or revenues. However, if the Village has no single record indicating a total, it would not be required to tabulate figures found in a number of records to create a new record on your behalf reflecting a total. In a similar vein, if the moneys received from the facility are earmarked in some manner or are deposited in a special fund, it may be relatively easy to ascertain how the money was used by the Village. However, if the moneys were deposited into a general fund, for example, there may be no way of knowing exactly how the money was spent. It is suggested that you discuss that issue with the Clerk.

Lastly, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Insofar as the records sought exist and can be located by the Village, I believe that the Law requires disclosure. In short, none of the grounds for denial could in my opinion be asserted to withhold books of account, ledgers or similar records reflective of revenues and expenditures or disbursements by an agency.

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-10932

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July 16, 1998

Mr. Ethan Jacobs
[redacted]

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

Dear Mr. Jacobs:

I have received your letter of July 1 in which you raised questions involving the relationship between provisions of the Vehicle and Traffic Law and the Freedom of Information Law concerning fees that may be charged for copies of records.

Specifically, you raised the following two questions:

> "1) If the statute authorizes a commissioner to issue any regulation, and the commissioner decides a record be kept, is that record considered kept according to the provisions of the statute or according to provisions of the regulation?
>
> 2) If the record is kept according to the provisions of the regulation and not according to the provisions of the statute, would the higher fees prescribed by statute for records kept pursuant to the provisions of the statutes be applicable?"

With respect to the first question, it is emphasized that the Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. From my perspective, the issue in the first question lies beyond the scope of the jurisdiction or expertise of the Committee.

With respect to the second, in general, it is my view that the provisions regarding fees in §202 of the Vehicle and Traffic Law are applicable only to those records kept by the Department pursuant to the provisions of the Vehicle and Traffic Law; records kept by the Department, but not due to the requirements of the Vehicle and Traffic Law, would in my view be subject to the provisions regarding fees in the Freedom of Information Law.

You have focused on traffic tickets in terms of the fees that may be charged by the Department for copies. Since it is unclear in my opinion whether those records are maintained by the Department pursuant to the provisions of the Vehicle and Traffic Law, it is suggested that you raise that issue with staff at the Department. I direct your attention to §201(1)(i) which refers to:

> "accident reports required by law to be filed with the commissioner, conviction certificates, police reports, complaints, satisfied judgment records, closed suspension and revocation orders, hearing records, significant correspondence relating to any of the same..."

I note that §208 is entitled "Affirmation of complaints" and that it refers to traffic summonses. Since §201(1)(i) refers to police reports, complaints and records "relating to any of the same", it is possible that traffic tickets may be kept pursuant to the Vehicle and Traffic Law. Nevertheless, again, it is suggested that you seek clarification from 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- 10933

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July 16, 1998

Mr. Lloyd Sokolow
Attorney & Counselor at Law
1356 Union Street
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.

Dear Mr. Sokolow:

I have received your letter of June 25 in which you requested an advisory opinion concerning rights of access to "an application for a specific individual who had applied for and has been granted a credential as an Alcoholism Counselor, by the New York State Office of Alcohol and Substance Abuse Services." You added that this office "has issued an opinion that applications for licensure as a Psychologist made to the Education Department are accessible as public records."

In this regard, I offer the following comments.

Having reviewed our files, I could not find and do not recall having issued an opinion indicating that an application for licensure is public. I do not believe that it would ever have been advised by this office that such an application must be disclosed in its entirety. I do believe, however, that portions of license applications must be disclosed if a license, a permit or similar authorization has been granted.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 an agency's ability to withhold "records or portions thereof" that fall within the grounds for denial that follow. The phrase quoted in the preceding sentence indicates that a single record might include both accessible and deniable information and that an agency is required to review records sought in their entirety to determine which portions, if any, may justifiably be withheld.

From my perspective, the only ground for denial pertinent to an analysis of rights of access is §87(2)(b), which authorizes 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.

In consideration of the thrust and intent of the Freedom of Information Law, it is clear in my view that intimate details of individuals' lives may be withheld, as well as items that are largely irrelevant to the duties to be performed as a licensee or, in the context of your inquiry, a "credentialed alcoholism counselor." For instance, a social security number, a home address, medical history, names of employers and similar details could in my opinion be deleted.

However, if an individual must have certain types of experience, educational accomplishments or certifications as a condition precedent to being licensed or credentialed, those aspects of an application that has been granted would, in my opinion, be accessible. Disclosure of those elements of the record would serve as the means by which the public can ascertain whether an individual is qualified or has met the necessary criteria to be licensed or credentialed by a governmental entity.

It is also noted that the Appellate Division has found that "an individual's educational background, i.e., the level of education attained and the particular institutions attended, does not constitute an employment, medical or credit history within the meaning of the Public Officers Law § 89(2)(b)(i). Nor are we persuaded that a reasonable person of ordinary sensibilities would find it offensive and objectionable to have such information disclosed..." [Ruberti, Girvin & Ferlazzo v. Division of State Police, 218 AD2d 494, 641 NYS2d 411, 415 (1996)]. As such, I believe that those portions of an application reflective of one's educational background must be disclosed.

I hope that the foregoing serves to clarify your understanding of the views of the Committee on the issue and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Chady
Mark Boss

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10934

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 16, 1998

Mr. Gene D. Mentzer
[redacted]

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

Dear Mr. Mentzer:

I have received your letter of June 30 and the materials attached to it. You sought my views concerning your efforts in obtaining records from the Wappingers Central School District in relation to a brochure distributed at an exhibit at a local mall.

Having reviewed the materials, it appears that you misunderstand the Freedom of Information Law. I note that the title of that statute may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, the District does not maintain records containing the information sought, District staff would not be required to prepare records on your behalf in an effort to satisfy your request. Further, it appears that the Superintendent's response to you of May 15 was appropriate and essentially ended the matter as it pertains to your requests under the Freedom of Information Law.

A second issue, which is related to the first in terms of the District's obligations, pertains to your request that the Superintendent review data that you had previously obtained and that he inform you of its correctness or make necessary corrections. In short, that is not a request for records, and the Freedom of Information Law would not be applicable or relevant. From my perspective, while the Superintendent could choose to accommodate you, there would be no legal obligation to do so.

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: Wayne Gersen, Superintendent of Schools
Michael K. Lambert School District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10935

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July 16, 1998

Mr. Clarence R. Darrah
[redacted]

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

Dear Mr. Darrah:

As you are aware, your letter of June 25 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 advise with respect to the Freedom of Information Law.

You wrote that you have sought records under the Freedom of Information Law from the Supervisor of the Town of Plattsburgh but that your request has been "ignored." The records sought involve the salaries of persons employed by the Clinton County Fair. In conjunction with your request, you have been asked why you want the information and who is the subject of your request.

In this regard, I offer the following comments.

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

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

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges

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

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

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 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 and the intent of the applicant are in my opinion irrelevant.

Third, it is unclear why you believe that the information in question would be maintained by a town. I am unaware of any requirement that the information be submitted to or maintained by a town. As I understand the law on the subject, a county fair typically is conducted by an agricultural or horticultural corporation created pursuant to §1409 of the Not-for-Profit Corporation Law. As a not-for-profit corporation, such an entity would not be subject to the Freedom of Information Law. Neverthless, §1409(d) states that:

> "Any county agricultural corporation receiving after May tenth, nineteen hundred and twenty, money from any county shall, through its secretary, make annually to the board of supervisors a detailed statement with vouchers showing the disbursement during the year of all moneys so received."

Further, §1409(i) states that:

> "On or before December fifteenth in each year, the directors of every agricultural or horticultural corporation shall make a verified report to the commissioner of agriculture and markets of the transactions of the corporation for the preceding twelve months giving full details of the receipts and expenditures thereof, with a list of premiums awarded and to whom and for what awarded."

Based upon the preceding, records regarding the financial affairs of an agricultural and horticultural corporation that runs a county fair would be available from a county board of supervisors and the Department of Agriculture and Markets.

As you requested, enclosed is an explanatory brochure concerning the Freedom of Information and Open Meetings Laws.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10936

41 State Street, Albany, New York 12231
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July 16, 1998

Mr. Anthony Vitiello
895-98-00109
NIC 6 North
Rikers Island
1500 Hazen Street
E. Elmhurst, NY 11370

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

Dear Mr. Vitiello:

I have received your letter of June 25 in which you asked whether "a court such as Queens County Supreme Court [can] be FOILed pertaining to a certain issue."

In this regard, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to include:

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

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

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

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the

designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that the foregoing serves to clarify your understanding of the matter and 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-1937

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

Mr. Dwayne Williams
97-r-8956
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

Dear Mr. Williams:

As you are aware, your letter of June 30 sent to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice and opinions concerning the Freedom of Information Law.

You have complained that the Office of the Bronx County District Attorney has failed to respond to your request for records in a timely fashion. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: E.F. Bernhardt, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10938

41 State Street, Albany, New York 12231
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July 17, 1998

Mr. Rickey Moore
87-A-3573
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. Moore:

I have received your undated letter, which reached this office on July 2.

As I understand the matter, you requested medical records under the Freedom of Information Law from the Office of the Queens County District Attorney relating to police officers. That agency denied access, citing certain provisions of the Public Health Law. You have contended that you should have access to the records because they "are relevant to the instant case."

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].

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. Frequently the ability to gain access to records as a defendant under the CPL will be greater than as a member of public under the Freedom of Information Law.

Second, under the circumstances, I believe that the Office of the District Attorney clearly had the right to deny access to the records under the Freedom of Information Law. Although that statute is based on a presumption of access, two of the grounds for denial would be pertinent. Section 87(2)(a) relates to records that "are specifically exempted from disclosure by state or federal statute." The provisions of the Public Health Law cited in response to your request are statutes that essentially prohibit public disclosure. Further, §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." Section 89(2)(b) includes a series of examples of unwarranted invasions of privacy, the first two of which pertain to medical information. Therefore, those provisions of the Freedom of Information Law would, in my opinion, justify a denial of access pursuant to that statute.

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

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Andrew L. Zwerling
Brian S.B. Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10939

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

Mr. Robert M. O'Brien
General Counsel
Bridges and Tunnels
10 Columbus Circle
New York, NY 10019-1203

Dear Mr. O'Brien:

I have received your thoughtful letter of July 10 in which you referred to an opinion addressed to Dr. John A. Ferrette on June 29. In brief, it was advised that a videotape of a motor vehicle accident in which he was involved occurring at a toll plaza should be available under the Freedom of Information Law.

As we discussed, the opinion that I prepared was based on series of correspondence indicating Dr. Ferrette's efforts and frustration encountered in his attempts to obtain the tape. Nowhere in the materials was there any indication that disclosure might in some way jeopardize the security of the toll plazas or their employees. Because that issue was not raised by the agencies with which Dr. Ferrette communication and because the incident occurred in plain sight, I did not address it. Nevertheless, you wrote that:

> "These plazas are highly populated by customers and employees and contain a large amount of cash toll payments. Active security measures including armed officers and security cameras are constantly employed. In the past, toll plazas have been the target of extremely dangerous armed robberies. Our Security Department has advised that release of security videotapes to the public under FOIL would constitute a danger to the life and safety of persons at the plazas by revealing the nature of the security systems and the location of the cameras."

You added that you explained your views to Dr. Ferrette and that you would assist him in utilizing a procedure other than the Freedom of Information Law to obtain the tape.

From my perspective, the only provision that would justify a denial of access under the Freedom of Information Law would be §87(2)(f), which authorizes an agency to withhold records

when disclosure "would endanger the life or safety of any person." While your reliance on that provision may be fully appropriate, I note that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals more than decade ago:

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

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

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

The foregoing is not intended to reflect disagreement with your position, but rather to emphasize that the courts have construed the Freedom of Information Law expansively in terms of public rights of access.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10940

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July 17, 1998

Mr. Virgil L. LaChance
95-B-0769
Eastern NY 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. LaChance:

I have received your letter of June 25. You indicated that you sent an appeal under the Freedom of Information Law on May 25 to the Saratoga County District Attorney but that you had not received a determination as of the date of your letter to this office. You have asked what action may be taken.

In this regard, as you may be aware, §89(4)(a) of the Freedom of Information Law pertains to the right to appeal a denial of access to records 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."

It has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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: James A. Murphy, III, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1094

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July 17, 1998

Mr. Louis J. Christopher, Jr.
Briar Patch Consulting
2604 River Road
Melrose, NY 12121

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

Dear Mr. Christopher:

I have received your letters of May 8 and July 12. As explained by my assistant, the earlier letter, for reasons unknown, did not reach this office until you faxed a copy yesterday. Please accept my apologies for the delay.

You have sought assistance in obtaining copies of records relating to the purchase of residence hall furniture by the State University at Albany in 1996. The latest correspondence that you included from the University includes the following statement by Stephen J. Beditz, Assistant Vice President and Records Access Officer:

> "I am informed that the purchase you describe may have been transacted between the University Auxiliary Services Corporation and a suppler. The Auxiliary Services Corporation is a private, not for profit entity and not a State Agency. Accordingly, their records do not fall within the purview of the Public Officers Law and in point of fact I have no access to them."

From my perspective, Mr. Beditz' response is troubling, for it indicates either a failure to know of or give effect to a decision rendered by the Court of Appeals, the State's highest court, that involved a key principle most pertinent to the matter. In this regard, I offer the following comments.

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

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

Based on the language quoted above, if documents are maintained for an agency, even though they may not be in the physical possession of the agency, they nonetheless constitute agency "records" that fall within the scope of the Freedom of Information Law.

Most relevant is the decision to which allusion was made earlier. In that case, records were maintained at a facility of the Auxiliary Services Corporation that carried out certain functions pursuant to a contractual agreement with the SUNY College at Farmingdale. The Court of Appeals found that the records of the Auxiliary Services Corporation were maintained for SUNY and 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 or held for an agency, it constitutes an agency record, even if it is not in the physical possession of the agency.

Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), an agency's records access officer has the duty of coordinating an agency's response to requests. Under the circumstances, because the materials sought are SUNY/Albany records, I believe that Mr. Beditz, in his capacity as Records Access Officer, is required to ensure that the Auxiliary Services Corporation discloses the records to you in a manner consistent with the Freedom of Information Law or to acquire the records so that they may be disclosed as required by law.

Lastly, 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).

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. Based on the degree of detail that you provided, it appears that the request would have adequately described the records and met the standard imposed by law.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Stephen J. Beditz, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1094

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

Mr. Alvaro A. Sanchez
870-A-7358
Drawer B
Stormville, NY 12582

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

Dear Mr. Sanchez:

I have received your letter of June 29 and the correspondence attached to it. You contended that the Office of the Queens County District Attorney has not transmitted to this office copies of all denials of requests based on a certain premise.

In this regard, for the purpose of clarification, I point out that there is no requirement that the Office of the District Attorney or any agency forward copies of all denials of requests to this office. The only notification requirement pertains to appeals. Under §89(4)(a) of the Freedom of Information Law, an agency is required to transmit to the Committee on Open Government copies of appeals following denials of access and the ensuing determinations. Copies of initial denials of access to records need not be sent to this office, and I would conjecture that many requests that are initially denied are not appealed. Again, in those circumstances, an agency would not be obliged to inform the Committee of its action.

You also raised questions concerning the retention and disposal of records. That issue involves the implementation of certain provisions of the Arts and Cultural Affairs Law (see Articles 57 and 57-A). To obtain information on the subject, it is suggested that you write to the State Archives and Records Administration, State Education Department, Cultural Education Center, Albany, NY 12230.

Lastly, in terms of the obligation or ability of the Office of the District Attorney to produce the records of your interest, 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 record keeping systems of the District Attorney, to extent that the records sought can be located with reasonable effort, I believe that a request would meet 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, a request would not in my opinion meet the standard of reasonably describing the 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:tt

cc: Brian S.B. Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10943

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July 17, 1998

Mr. Samuel J. Villafrank, Executor
Dunkirk Aviation
165 Academy Street
Westfield, NY 14787

The staff of the Committee 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. Villafrank:

As you are aware, I have received your letter of July 7 as well as related materials. You have questioned your right to obtain records from the Village of Westfield and delays in response to your request.

By way of background, in your capacity as executor of the estate of Samuel L. Villafrank, you requested a variety of records relating to the "Villafrank Subdivision Phase II." The records sought, in brief, consist of communications between the late Mr. Villafrank and Village officials and minutes of meetings of the Board of Trustees and the Planning Board.

In this regard, first, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. From my perspective, the records that you requested, insofar as they exist, must be disclosed, for none of the grounds for denial would be applicable or pertinent.

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

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

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

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

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

Lastly, 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: Vincent Luce, Clerk
Board of Trustees

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1094

41 State Street, Albany, New York 12231
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July 17, 1998

Ms. Karen Leff, R.N.
Hope Ridge Farms
Rd. #4 26 Beck Road
Pork, NY 12601

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

Dear Ms. Leff:

I have received your letter of June 24 and the correspondence attached to it. You have sought assistance in obtaining records from the Dutchess County SPCA, which has failed to respond to your requests.

In this regard, I do not believe that the SPCA is subject to or required to comply with the 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 stat legislature."

Based on the foregoing, the Freedom of Information Law generally applies to entities of state and local government in New York; it does not ordinarily include private entities, such as not-for-profit corporations within its coverage. Because the SPCA is a not-for-profit corporation separate from government, I do not believe that it would fall within the requirements of the Freedom of Information Law.

Nevertheless, if the SPCA carries out certain functions for an agency, such as a county, town or village, pursuant to a contract, records maintained in conjunction with those functions may be subject to the Freedom of Information Law. As indicated earlier, that statute pertains to agency records. Section 86(4) defines the term "record" expansively to include:

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

Under the language quoted above, if records are kept "for" an agency, they would constitute "agency records", even if they are not in the physical custody of the agency. In that circumstance, I do not believe that the private entity would be responsible for answering a request. However, it is noted that each agency is required by regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests for records.

If, for example, an agency contracts with the SPCA to carry out certain functions on its behalf, and if the SPCA maintains records for the agency, it is suggested that a request be made to the agency's records access officer. That person would have the responsibility to direct the SPCA to disclose agency records held by the SPCA to the extent required by law or, in the alternative, to acquire the agency records sought for the purpose of disclosing them in a manner consistent with law.

Since one aspect of your request involved complaints regarding your farm, I point out that even when the Freedom of Information Law clearly applies, an agency may in my opinion protect the privacy of those who make complaints. As a general matter, that law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

With respect to complaints, it has generally been advised that the substance of a complaint made by a member of the public 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 a member of the public who made the complaint is

often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Al Lawrence, Executive Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1094S

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

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

I have received your letter of June 30 in which you sought "advice regarding a Subject Matter List."

In this regard, as a general matter, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. Similarly, if records that once existed have legally been disposed of or destroyed, the Freedom of Information Law would not apply.

An exception that rule relates to the subject of your inquiry. 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.

Because a subject matter list is a factual account of the kinds of records maintained by an agency, it must be disclosed. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. None of the grounds for denial of access would be pertinent or applicable in relation to the subject matter list.

Lastly, if an agency fails to maintain a subject matter list, a person seeking such a list could seek to compel the agency to do so by initiating a proceeding in the nature of *mandamus* 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1094/6

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

Ms. Leila Laufer
[redacted]

The staff of the Committee on 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. Laufer:

I have received your letter of July 3 and the materials attached to it. You have sought assistance in relation to your request to the Office of Professional Medical Conduct for "all the records of the investigation" of a certain physician following your complaint.

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

Second, despite rights granted by the Freedom of Information Law, I believe that the records in which you are interested may generally be kept confidential. 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." One such statute, §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 or investigation must remain confidential, unless specific direction is given to the contrary.

In addition, the Court of Appeals, the State's highest court, 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 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

FOIL-AO-10917

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 17, 1998

Mr. Kevin J. Smyth
93-B-1546
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. Smyth:

I have received your letter of July 2 in which you complained concerning a delay in response to a request for medical 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 designated by the Department of Correctional Services to determine appeals is Counsel to the Department, Anthony J. Annucci.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 specific respect to medical records, the Freedom of Information Law, in my view, likely permits that some of those records may be withheld in whole or in part, depending upon their contents. For instance, medical records prepared by 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, as you may be aware, §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. Further, subdivision (2)(a) of §18 states that the subject of a request for medical records should be given an opportunity to inspect the records within ten days of the receipt of a request.

To obtain additional information concerning access to medical 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-10948

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 20, 1998

Mr. Richard Kostivitch
94-A-5549
Wallkill Correctional Facility
P.O. Box G
Wallkill, NY 12589-0286

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

Dear Mr. Kostivitch:

I have received your letter of July 1, as well as the materials attached to it.

As I understand the matter, your request for records of the Suffolk County Police Department for records pertaining to you resulted in an erroneous disclosure of records relating to your co-defendants. You wrote that a second request was "ignored."

In this regard, the Committee on Open Government is authorized to offer advice concerning the Freedom of Information Law; it is not empowered to enforce that statute 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, for purposes of clarification, I note that you referred in the correspondence to 5 USC 552 and 552a as the basis of your requests. Those provisions are, respectively, the federal Freedom of Information and Privacy Acts. They apply only to records of federal agencies. The applicable statute in this instance is the New York Freedom of Information Law, which pertains to records maintained by entities of state and local government. As you may be aware, 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.

Lastly, while the federal Act includes provisions regarding the waiver of fees, the New York counterpart does not contain fee waiver provisions. Further, 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 I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Derrick Robinson, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2916
FOIL-AO-10949

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 20, 1998

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 4 in which you raised issues concerning the inclusion of various libraries within the coverage of the Freedom of Information Law and Open Meetings Laws.

Materials were sent to you previously which, in my view, offered the basis for distinguishing between the variety of libraries that may be characterized as "public". While all provide services for the general public, some among them are not governmental entities but rather are private not-for-profit corporations.

As you are aware, the Freedom of Information Law pertains to agencies, and §86(3) of that statute defines the term "agency" to mean, in brief, an entity of state or local government. Since some public libraries and library systems are not part of government, they are not likely subject to the Freedom of Information Law. While there is no judicial decision that deals squarely with the issue in terms of the Freedom of Information Law, as referenced in an opinion sent to you on April 15, an Appellate Division decision involving a so-called free association library indicated that such a library, as a not-for-profit corporation rather than a public corporation, was not subject to certain requirements imposed upon governmental entities [see French v. Board of Education, 72 AD2d 196 (1980)]. Based on that decision, it appears that the same conclusion would be reached regarding the coverage of the Freedom of Information Law.

In contrast, §260-a of the Education Law specifies that virtually all public libraries, irrespective of their corporate status, are required to comply with the Open Meetings Law.

Consequently, depending on their nature, some libraries are subject to both the Freedom of Information Law and the Open Meetings Law; others, the not-for-profit non-governmental entities, are required to comply only with the Open Meetings Law due to the direction provided by §260-a

of the Education Law. I note that the not-for-profit non-governmental entities would not be subject to the Open Meetings Law but for the enactment of §260-a of the Education Law.

With respect to the work of this office, since you have been communicating with the Committee on Open Government for many years, you know that its function involves offering advice and opinions based on the law and its judicial interpretation in a manner that gives greatest effect to the intent of open government statutes. The Committee is not empowered to change the law; that can be accomplished only by the State Legislature.

If you wish to communicate with the members of the Committee, you may do so through this office, which is the Committee's only office. At the moment, there is no meeting of the Committee that is scheduled.

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-10950

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 20, 1998

Ms. Kathleen McGinnis
Village Clerk-Treasurer/FOIL Officer
Incorporated Village of WestHampton Beach
92 Sunset Avenue
WestHampton Beach, NY 11978-2393

The staff of the Committee on 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. McGinnis:

I have received your letter of July 8 and the materials attached to it. You have sought my opinion concerning a matter involving the Freedom of Information Law.

In brief, the correspondence indicates that a resident attended a meeting of the Board of Trustees and complained that a Village Police officer had been rude and acted inappropriately. The Chief of Police reported to the Board that "he reviewed a tape recording of the police officer's dealings with her and that it was the basis for his determination that the officer was totally professional in his behavior." When the person who made the complaint requested the tape recording of the exchange between herself and the officer, the Chief wrote that the "tape is the personal property of Officer Cunneen, is not in the possession of the Police Department, and cannot be released by me."

From my perspective, the tape recording is clearly subject to the Freedom of Information Law, and because she was a party to the conversation, it must be made available to the person requesting it. In this regard, I offer the following comments.

First and most importantly, the Freedom of Information Law pertains to all 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)].

Most recently, in a decision rendered by the Court of Appeals involving records similar to the tape recording, the New York City Police Department contended that police officers' "activity logs", "the leather-bound books in which officers record all their work-related activities", were the officers' personal property and not subject to the Freedom of Information Law. The Court rejected that contention, stating that "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 document squarely within the statutory definition of 'records'" [Gould v. New York City Police Department, 89 NY2d 267, 278 (1996)].

Like the activity logs, the tape recording would have been prepared in conjunction with the performance of an officer's duties. Therefore, based on the direction provided by the state's highest court, I believe that the tape recording would constitute a "record" that falls 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. While I believe that the tape recording could be withheld from the public at large to protect the privacy of the complainant, since she was a party to the taped conversation, none of the grounds for denial could in my opinion be asserted to withhold the tape from her.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Chief Conrad W. Teller

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 20, 1998

Mr. PO F. Dillon #344
New York State Park Police
Babylon, NY 11702

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

Dear Mr. Dillon:

With a letter dated July 2 that reached this office on July 17, the State Commission of Investigation forwarded correspondence to this office in which you contended that the Long Island State Park Police have failed to respond to your request made under the Freedom of Information Law. The Committee on Open Government, a unit of the Department of State, is authorized to offer advice concerning that statute.

One item of correspondence is a memorandum of March 19 in which you asked to be informed of the disposition of an allegation that you had made concerning a State Park Police Supervisor. From my perspective, that memorandum would not have related to a request under the Freedom of Information Law. That statute pertains to existing records, and the initial request appears to have involved a record that had not been prepared at the time of the initial request.

The second item, which is dated April 1, pertains to existing records and, in my view, should have been treated as a request made under the Freedom of Information Law. The request involved a "verbatim list of the specific allegations made pursuant to complaints lodged against" you by certain individuals. Without knowledge of the nature of the complaints or status of any investigation relating to them, 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.

The remaining aspect of that request involved a record of your responses to questions posed during certain interviews, as well as the questions. According to the correspondence, both the questions and your responses "were entered into a computer during the interviews, printed, and shown to [you] for concurrence." Since the material in question was shown to you, I do not believe that there would be any basis for a denial of access.

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

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

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

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

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

Since the Long Island State Park Police is part of the Office of Parks, Recreation and Historic Preservation, appeals following denials of access to records may be directed to Commissioner Bernadette Castro.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Captain O'Donnell

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10952

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 21, 1998

Mr. Philip Gerace
88-A-5369
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. Gerace:

I have received your letter of June 30. You have sought an advisory opinion concerning a situation in which an agency fails to respond to a request within the statutory time.

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

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

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

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

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

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10953

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 21, 1998

Mr. Bennie Bates
76-B-1469
Mid-Orange Correctional Facility
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. Bates:

I have received your letter of July 6. You indicated that you requested certain statistics from the Division of Parole, which granted the request and informed you that the records consist of 26 pages. Based on a fee of 25 cents per photocopy, you were also informed that the fee for copies would involve a total of $6.50.

According to your letter, you do not have the money to pay for the copies, which are needed for a legal brief. You asked what I might do to assist you in obtaining the records.

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 obtain records on behalf of individuals or compel an agency to disclose records.

With respect to the legal aspects of your inquiry, the New York Freedom of Information Law permits agencies to charge up to 25 cents per photocopy for records up to 9 by 14 inches, and there is nothing in that statute that refers to the waiver of fees. I point out further that it has been held in a judicial decision that an agency is authorized to charge its established fee, even when the applicant is an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

In short, there is no requirement that the Division of Parole waive or reduce the fees it seeks to charge.

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: David Molik

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 21, 1998

Mr. Rich DePaolo
[redacted]

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

Dear Mr. DePaolo:

I have received your letter of July 8. You have sought an advisory opinion concerning a request made to the Town of Ithaca relating to "Cornell University's Lake Source Cooling proposal." The Town, as well as other governmental entities, have been asked to approve the proposal, and Cornell recently requested that the Town change the zoning of a parcel that it owns.

When you requested records pertaining to the discussions and negotiations between representatives of the Town and "elected or appointed representatives and Cornell University", with the exception of audiotapes of a meeting and a hearing, the Town denied access based on its assertion of the attorney-client privilege and the "intra-agency exclusion."

From my perspective, while some aspects of the records may likely be justifiably withheld, others should likely 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. Both of the grounds for denial cited by the Town are pertinent to an analysis of rights of access.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that

records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

Based on the foregoing, assuming that the privilege has not been waived, records falling within the scope of the privilege would be confidential pursuant to §4503 of the Civil Practice Law and Rules and, therefore, exempted from disclosure under §87(2)(a) of the Freedom of Information Law.

The other ground for denial of potential significance, §87(2)(g), permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical

or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the record in question consists of an expression of opinion. If that is so, it could be withheld under §87(2)(g).

I point out that Cornell University is neither a client nor apparently an agency in the circumstances as you described them. As an applicant seeking an approval from the Town, there would be no privilege that relates to the communications between the Town and Cornell. Further, while it has been held that Cornell is an "agency" as that term is defined in §86(3) of the Freedom of Information Law insofar as records pertain to its four statutory colleges [see Stoll v. New York State College of Veterinary Medicine at Cornell University, 664 NYS2d 851, ___ AD2d ___ (1997)], it does not appear that Cornell is acting in the situation described as a governmental entity; on the contrary, it appears to be acting as a private entity seeking an approval from government.

If the assumption in the preceding paragraph is accurate, §87(2)(g) would not be applicable with respect to communications between representatives of the Town and Cornell.

Insofar as the remaining documentation falls within the scope of §87(2)(g), its content would determine the extent to which it must be disclosed or may be withheld. I point out that one of the contentions offered by the New York City Police Department in a recent decision rendered by the Court of Appeals 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 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][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)..." [Gould et al. v. New York City Police Department, 87 NY2d 267, 276 (1996)].

In short, that records do not relate to or reflect a final determination 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)" (id., 276-277).

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: John Barney, Town Attorney
Joan Noteboom, Town Clerk
Mary Saxton
Cathy Valentino
Fred Wilcox

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1095

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July 21, 1998

Carol Quinn, Esq.
P.O. Box 825
Clifton Park, NY 12065

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

Dear Ms. Quinn:

I have received your letter of July 9 in which you sought an advisory opinion concerning the propriety of "repeated denials of FOIL requests for the curriculum vitae or resumes of certain professors at the State University of New York at New Paltz." You expressed an understanding that personal information might justifiably be withheld, but you also wrote that you believe that you should have the ability to obtain:

"- work histories;

- academic degrees and schools attended;

- a list of professional publications;

- a list of memberships in professional organizations (we have no interest in party affiliation or any nonprofessional affiliations);

- a list of professional exhibitions, speeches, and presentations; and

- a list of references."

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) provides in part that an agency is not require to create a record in response to a request. Therefore, insofar as the "lists" in which you are interested do not exist, agency staff would not be required to prepare new records on your behalf.

Second, with respect to the contents of existing records, i.e., curriculum vitae or resumes, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 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 point out that §89(2)(b) of the Freedom of Information Law contains a series of examples of unwarranted invasions of personal privacy, the first of which pertains to "disclosure of employment, medical or credit histories or personal references of applicants for employment." Based on that provision, those portions of the records sought that include "references" may in my view be withheld. Similarly, portions of the records that pertain to individuals' private employment outside of government may be withheld. However, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes consisting of information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I

> believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

Lastly, if indeed the resumes include lists of memberships in professional organizations associated with the performance of one's official duties or of professional exhibitions, speeches and the like, those items would not in my view be "personal" or intimate in nature; rather, they would relate to activities known to great numbers of people. Consequently, if they appear in the records, I believe that they would be available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Martin T. Reid
Karen L. Summerlin
Carolyn Pasley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 22, 1998

Ms. Mona Graves
88-G-0305
Bedford Hills Correctional Facility
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. Graves:

I have received your letter of July 2, which reached this office on July 13. You described difficulty in obtaining records from the New York City Police Department pertaining to your case. In several instances, the Department indicated that the request "was too broad and did not request specific documents maintained by the Police Department."

In this regard, I am unfamiliar with the names of records maintained by the Police Department. Nevertheless, there is no requirement that an applicant identify records of interest. The issue in my view involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant must "reasonably describe" the records sought. 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 opinion, 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 Department maintains records pertaining to cases. If you can provide sufficient detail to enable Department staff to locate the records of your interest, I believe that you would comply with the standard of reasonably describing the records. In addition, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) indicate that an agency's records access officer is responsible for ensuring that agency personnel assist the requester in identifying the records sought, if necessary. As such, it might be worthwhile to contact the records access officer with as much identifying information as possible, and if that is insufficient, ask that the access officer or other staff provide information regarding the nature of the Department's records pertaining to you so that you make an appropriate request.

Lastly, although the courts and court records 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). Since you were involved in a trial, it is possible that many of the records in which you are interested would have been made part of the court record. If that is so, you might request the records from the clerk of the court in which the proceeding was conducted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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July 22, 1998

Mr. Gary R. Gunther
[redacted]

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

Dear Mr. Gunther:

I have received your letter of July 10 in which you complained with respect to the fee charged by the Division of State of State Police in conjunction with your request for an accident report. You also referred to inconsistences in charges for services by municipalities and state agencies.

In this regard, §87(1)(b)(iii) of the Freedom of Information Law provides that agencies can charge up to twenty-five cents per photocopy up to nine by fourteen inches or the actual cost of reproducing other records (i.e., computer tapes or disks), unless a different is prescribed by statute. Therefore, in the context of your comments, unless an act of the State Legislature authorizes an agency to charge in excess of twenty-five cents per photocopy, it would be limited to that fee.

One of the rare instances in which an agency may charge a fee different from that generally permitted by the Freedom of Information Law relates to the situation that you described. Specifically, §66-a of the Public Officers Law, a statute that deals with accident reports and certain other records maintained by the Division of State Police, provides in subdivision (2) that:

> "Notwithstanding the provisions of section twenty-three hundred seven of the civil practice law and rules, the public officers law, or any other law to the contrary, the division of state police shall charge fees for the search and copy of accident reports and photographs. A search fee of fifteen dollars per accident report shall be charged, with no additional fee for a photocopy. An additional fee of fifteen dollars shall be charged for a certified copy of any accident report. A fee of twenty-five dollars per photograph or contact sheet shall be charged. The fees for investigative reports shall be the same as those for accident reports."

Based on the foregoing, it is clear that a statute separate from the Freedom of Information Law authorizes the Division of State Police to charge fifteen dollars for the search and copy of accident reports.

I note that §202 of the Vehicle and Traffic Law, which pertains only to records maintained by the Department of Motor Vehicles, contains similar provisions regarding fees for copies of accident reports. It is emphasized, however, that a municipal police or sheriff's department would be governed by the Freedom of Information Law and would be limited to charging twenty-five cents per photocopy in response to a request for an accident report.

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
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COMMITTEE ON OPEN GOVERNMENT

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July 21, 1998

Mr. Jeffrey K. Branch
[redacted]

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

Dear Mr. Branch:

I have received your recent undated letter, which reached this office on July 10. You referred to an appeal sent to the Committee on Open Government on June 2 concerning a denial of a request for records of the Village of Lake Placid and indicated that you had not received a response from the Committee.

In this regard, as a general matter, this office does not prepare responses to the hundreds of appeals that it annually receives. The reason for refraining from commenting on appeals is that determinations following appeals frequently result in disclosures reflective of compliance with law. In other instances, denials of access by agencies may be justified. In those cases, there is generally no need to comment.

With respect to the substance of the matter, you wrote in your appeal, which is also undated, that the records withheld pertain to the to the Village Electric Department and involve "the rates charged per kilowatt-hour to all business and organizations, both public and private, and the amount of and length of, all delinquencies over the last four months for business and organizations, both public and private." In denying access, the Village Clerk wrote that you could review the list of commercial electric customers, "but that information regarding past due accounts, including amounts past due and length of delinquency would not be made available..." for "[d]isclosure of this credit history information concerning customers...would constitute an unwarranted invasion of personal privacy."

I disagree with the Clerk's conclusion and 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.

The basis for denial upon which the Clerk relied, §87(2)(b), authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." In addition, §89(2)(b) contains a series of examples of unwarranted invasions of personal privacy, the first of which includes reference to "credit histories."

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 records pertaining to entities other than natural persons. On the contrary, since the records sought relate to commercial users of electricity, I do not believe that any of the grounds for denial would be applicable.

Lastly, you asked "what further action [you] can take." In this regard, while advisory opinions rendered by this office are not binding, it is my hope that they are educational and persuasive. In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this opinion will be forwarded to Village officials so that they might reconsider the denial of your request. If the Village chooses not to disclose notwithstanding the transmission of this opinion, your remedy would involve the initiation of a lawsuit under Article 78 of the Civil Practice Law and Rules. I note that when such a proceeding is brought under the Freedom of Information Law, the government agency has the burden of proof.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Trustees
Eileen M. Valentine, Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1095

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July 22, 1998

Ms. Linda M. Rontey
[redacted]

The staff of the Committee on 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. Rontey:

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

According to your letter, you were recently granted access to records by the Berlin Central School District. Due to the financial burden that would be imposed if you sought photocopies of the records, you asked to videotape them with your own video recorder, which is "approximately a 5 inch cube, is battery powered, and is suspended from [your] neck on a lanyard." Nevertheless, the District's Records Access Officer indicated that the District's attorney, in your words, "objected on the grounds that video taping allowed [you] to circumvent the administrative charges that the district would recover if they did the copying at $0.25 per sheet." Due to that objection, you have been inspecting the records and transcribing portions of them. You added that "the process is time consuming, tedious and error prone," and because the access officer supervises access, "the cost burden to the district is much higher than it would have been had [you] been allowed to make [your] own video copy."

From my perspective, there is no valid basis for precluding you from copying records through the use of your own video camera. Section 87(2) of the Freedom of Information Law specifies that accessible records must be made available for inspection and copying. Sections 87(1)(b)(iii) and 89(3) indicate that the only fee that an agency can charge involves its reproduction of records at the request of an applicant. Further, the regulations promulgated by the Committee on Open Government, which have the force and effect of law (21 NYCRR Part 1401), specify that no fee may be charged for the inspection of records.

Since no fee can be charged for inspecting records or for copying the contents of records by hand, the District would not lose any proceeds by your video recording of the records. Further, your use of the video camera, due to its size and independent power source, would not involve any use of District resources or disruption of its activities different from inspection of records.

In good faith, I note that it has been held that a rule prohibiting the use of one's own photocopier has been found to be valid and reasonable when such use would cause disruption [see Murtha v. Leonard, 210 AD2d 411 (1994)]. However, the situation that you described is different, for there would be no use of the District's space or electricity, and there would be no distinction in terms of the District's efforts in retrieving the records between the more traditional inspection of records and the use of your video recorder. In short, I believe that the prohibition of the use of your video recorder is unreasonable and inconsistent with law.

You also wrote that the District has not designated a person to determine appeals made under the Freedom of Information Law. In this regard, 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 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, and the Board of Education as the governing body has the obligation to determine appeals or designate a person or body to do so within ten business days of the receipt of an appeal.

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:tt

cc: Board of Education
Fran Zuke, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 22, 1998

Ms. Gareth Griffiths
[redacted]

The staff of the Committee on 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. Griffiths:

I have received your memorandum of July 13, as well as related materials. As in the case of previous correspondence, the matter involves your efforts to obtain records from Albany County relating to the use of Lawson Lake.

Although some records were disclosed, others were apparently withheld, and one of the difficulties is that there was no indication in the correspondence with the County that some of the records sought were withheld. From my perspective, if a request is granted in part but also denied in part, an agency is required to indicate in its response to a request that records or portions thereof have been withheld and that the applicant has the right to appeal the denial.

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 any employee or 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. In addition, as indicated above, if any aspect of a request is denied, the applicant must be so informed.

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.

Insofar as the records falling within the scope of your request do not involve communications between or among officials of state or local government, I do not believe that any of the grounds for denial would be applicable or pertinent. To the extent that the records do consist of such communications, §87(2)(g) would, in my view, govern 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 emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 one of the contentions offered by the New York City Police Department in a recent decision rendered by the state's highest court, the Court of Appeals, 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 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][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)..." [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)" (id., 276-277).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Thomas G. Clingan
Paul M. Collins

FOIL-AO-10961

From: Robert Freeman
To: internet:tpfowler@co.franklin.oh.us
Date: 7/23/98 8:23am
Subject: Personnel Records of Law Enforcement Personnel

Dear Ms. Fowler:

I have received your recent communication concerning the possibility that there may be laws in New York that deal with the confidentiality of records pertaining to law enforcement personnel.

In this regard, the primary statute that deals with the issue is section 50-a of the Civil Rights Law, which focuses on personnel records relating to police and correction officers. That statute provides, in brief, that personnel records pertaining to police and correction officers that are used to evaluate performance toward continued employment or promotion are confidential. Several judicial decisions indicate that the intent of section 50-a is to protect against potentially embarrassing or harassing disclosures of information that could be used in a litigation context. Most recently, an appellate court reversed a denial of access to names of police officers who had been reprimanded because the records were sought by newspapers, and because the possibility of the use of the records in a litigation context was remote

It is also noted that the Freedom of Information Law includes grounds for denial that enable agencies to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy" or "endanger the life or safety of any person".

To obtain additional information on the subject through our website, go to the index to advisory opinions under the Freedom of Information Law and click to the key phrase "Police & Correction Officers' Personnel Records. For information regarding records relating to public employees generally, click on to the key phrase entitled "Privacy- Public Employee".

If you would like to discuss the matter, I can be reached at (518) 474-2518.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2920
FOIL-AO-10962

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 24, 1998

Mr. Rodney Bordeaux
[redacted]

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

Dear Mr. Bordeaux:

I have received your letter of July 14 in which you requested an advisory opinion concerning certain actions of the Board of Trustees of the Wyandanch Public Library.

According to your letter, at a recent meeting, the Director of the Library "went to collect...paper ballots for offices of the President and Vice President from each elected board member." After doing so, he "read out the final tally." You expressed the view that "voting by paper ballots does no give the true determination for what each elected member voted" and that the Board "should hold the nomination for seats such as President and Vice President out in the open for the public to view."

First, as you may be aware, §260-a of the Education Law specifies that library boards of trustees are required to comply with the Open Meetings Law.

Second, paragraphs (a) through (h) of §105(1) specify and limit the subjects that may properly be considered during an executive session. As such, a public body cannot conduct an executive session to discuss the subject of its choice.

In my opinion, discussions regarding the election of officers would not ordinarily fall within any of the grounds for entry into executive session. The only provision that appears to be relevant to the possibility of engaging in a private discussion, §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..."

Although the discussion and election of officers involves consideration of particular individuals, it is unlikely that any of the specific subjects included within §105(1)(f) would have been applicable in conjunction with deliberations involving the selection of school board officers. In short, while "matters leading to" certain actions relating to specific persons may be discussed during executive sessions, matters leading to the election of officers is rarely among them.

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

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

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

In terms of the rationale of §87(3)(a), it appears that the State Legislature in precluding secret ballot voting sought to ensure that the public has the right to know how its representatives may have voted individually with respect to particular issues. Although the Open Meetings Law does not refer specifically to the manner in which votes are taken or recorded, I believe that the thrust of §87(3)(a) of the Freedom of Information Law is consistent with the Legislative Declaration that appears at the beginning of the Open Meetings Law and states that:

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

Moreover, in an Appellate Division decision that was affirmed by the Court of Appeals, it was found that "The use of a secret ballot for voting purposes was improper." In so holding, the Court stated that: "When action is taken by formal vote at open or executive sessions, the Freedom of Information Law and the Open Meetings Law both require open voting and a record of the manner in which each member voted [Public Officers Law §87[3][a]; §106[1], [2]" Smithson v. Ilion Housing Authority, 130 AD 2d 965, 967 (1987); aff'd 72 NY 2d 1034 (1988)]. If a vote to elect an officer does not result in a majority for any candidate, and the vote is not "final", I do not believe that the votes of each member must be recorded. Under §87(3)(a), the members' votes must be memorialized only in the case of a "final" vote.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Wendell Cherry, Director

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10963

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July 27, 1998

Mr. Constantinee Jackson
93-B-0074
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. Jackson:

I have received your letter of July 8 in which you sought assistance in obtaining information under the Freedom of Information Law.

According to your letter, while on a "Doctor's call out" that occurred at the Wende Correctional Facility, you fell and injured your leg. When the event occurred, a woman indicated that if you need her as a witness, she would be willing to help you. You wrote that she is incarcerated at the Albion Correctional Facility and asked for guidance in attempting to locate her.

In this regard, assuming that the woman was present for the purpose of receiving medical care, I do not believe that you would have the right to obtain a record that identifies her.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, one of which deals with "disclosure of items involving the medical or personal records of a client or patient in a medical facility." In my opinion, a record indicating that a person was receiving medical treatment would if disclosed result in an unwarranted invasion of privacy and may be withheld.

Since you apparently do not have a right under the Freedom of Information Law to gain access to a record identifying the person in question, it is suggested that you contact the appropriate official at the Albion Correctional Facility, explain the situation, and ask that a review be made of the records identifying those present at the Doctor's call out on the date in question and that the women be contacted to ascertain whether the person in question would be willing to contact you or otherwise consent to the disclosure of her identity.

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-10964

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

July 28, 1998

Mr. Bruce T. Reiter
[redacted]

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

Dear Mr. Reiter:

I have received your letter of July 14 and the materials attached to it. You asked that I provide "instructions" to the Superintendent of the Green Island School District to disclose certain information that you requested in December.

In this regard, the Committee on Open Government is authorized to offer advice and opinions concerning the Freedom of Information Law. The Committee is not empowered to issue "instructions" to an agency or otherwise compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

First, I point out that the Freedom of Information Law generally pertains to existing records. Section 89(3) of the Law states in part that an agency is not required to create a record in response to a request. One element of your request pertains to a "breakdown of the compensation paid to...Board members." If no breakdown exists, the District would not be required to prepare such a record on your behalf.

Second, insofar as 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. Relevant to the matter 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."

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 point out that §89(2)(b) of the Freedom of Information Law contains a series of examples of unwarranted invasions of personal privacy, the first of which pertains to "disclosure of employment, medical or credit histories or personal references of applicants for employment." Based on that provision, those portions of the records sought that include "references" may in my view be withheld. Similarly, portions of the records that pertain to individuals' private employment outside of government may be withheld. However, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that portions of resumes consisting of information detailing one's public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

Similarly, if a license or certification is issued by a government agency, that kind of item would also be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Charles S. Dedrick, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 29, 1998

Ms. Linda Green
Town Clerk
Town of North Hempstead
P.O. Box 3000, 200 Plandome Rd.
Manhasset, NY 11030

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

Dear Ms. Green:

I have received your communication of July 16 in which you sought my views concerning the propriety of two forms used or proposed by the Town of North Hempstead to enable members of the public to seek records under the Freedom of Information Law.

Prior to review of the forms, it is noted that 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

A standard form could be completed by a requester while his or her written request is timely processed by the agency. In addition, an individual who appears at a government office and makes an oral request for records could be asked to complete the standard form as his or her written request.

The first form near the top of the page states: "RECORDS ACCESS OFFICER...Name of Agency...Address". Below that heading, an individual could apply to "inspect" records. In my opinion, because the Law pertains to the right to inspect and copy, the form might be improved by referring to the right to seek copies. Under the line entitled "For Agency Use Only", there are various reasons for a denial of a request. The first involves a "confidential disclosure". The quoted language does not appear in the Freedom of Information Law. If a record is indeed "confidential", it would fall within a different exception appearing on the form, that pertaining to records that are "Exempted by statute other than the Freedom of Information Act."

The second form also refers only to a request to inspect records. More importantly, it includes a requirement that an applicant affirm that the records sought would not be used for commercial or fund-raising purposes. In this regard, 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)].

Based on the foregoing, 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.

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); Federation of New York State Rifle and Pistol Clubs, Inc. v. New York City Police Dept., 73 NY 2d 92 (1989); Goodstein v. Shaw, 463 NYS 2d 162 (1983)].

Following an applicant's signature is a line entitled "Representing". For reasons described above, who an applicant may represent is irrelevant; records are accessible under the law to any person, or they are not. Consequently, I believe that the line entitled "Representing" is irrelevant and inappropriate.

In the section in which the agency would identify a basis for denial, for reasons expressed earlier, the phrase "confidential disclosure" in my view should be stricken. Another exception on the form pertains to "investigatory files". That phrase appeared in the original Freedom of Information Law enacted in 1974; it has not been part of the law since 1978. That, too, in my view, should be removed.

Lastly, at the bottom of the form, reference is made to a response to an appeal being given within seven days of the receipt of the appeal. While an agency may in its discretion shorten the time for determining an appeal, I note that §89(4)(a) of the Freedom of Information Law indicates that an agency must determine an appeal within ten business days of the receipt of an appeal.

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-10966

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July 29, 1998

Ms. Christine P. Potocki
[redacted]

The staff of the Committee on 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. Potocki:

I have received your letter of July 14 and the materials attached to it.

You have complained with respect to the process by which the Town of New Hartford has purchased or leased computer equipment, as well as its failure to respond to your Freedom of Information Law request on the subject. In this regard, I offer the following comments.

First, having reviewed your request addressed to the Town Supervisor, I note for purposes of clarification that the title of the Freedom of Information Law is somewhat misleading. That statute pertains to existing records, and §89(3) states in part that an agency is not required to create a record in response to a request. Similarly, while agency officials may respond to questions or provide explanations, they are not required to do so by the Freedom of Information Law. In several aspects of your request, you sought information by raising questions. In the future, it is suggested that you seek records rather than attempting to elicit answers to questions.

Second, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) that deal with the procedural implementation of the Freedom of Information Law indicate that the governing body of a municipality, i.e., the Town Board, 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 ordinarily should be directed to that person. I believe that the Town Clerk in the Town of New Hartford is the designated records access officer. Notwithstanding the foregoing, any agency official in receipt of a request for records must in my opinion either respond to the request in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

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)].

Next, insofar as records are maintained by or for 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.

One aspect of your request related to "a study done by an outside agency to aid in the development of a new system." Assuming that the study was prepared by a different governmental entity or by a consultant, rights of access would be determined on the basis of §87(2)(g) of the Freedom of Information Law. That provision pertains to communications between and among agency officials. In addition, based upon a decision rendered by the state's highest court, the Court of Appeals, it also pertains to records prepared by consultants for agencies. 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 agency staff and by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld 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 agency staff or by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I note, too, that the Court of Appeals recently considered §87(2)(g) and expressed its general view of the intent of the Freedom of Information Law in a recent decision cited 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).

The Court in Gould 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)" (id. 276-277).

With respect to other elements of your request, records reflective of expenditures by the Town, sources of funding and the like should in my opinion be accessible. In short, none of the grounds for denial would be pertinent. Similarly, if there is a written policy or procedure relating to the Town's purchases, I believe that would be available. Again, the records would constitute "intra-agency materials"; however, they would be reflective of the agency's instructions to staff or policy relating to purchasing.

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Gail Young
Gustave DeTraglia, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10967

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July 29, 1998

Mr. Jason Gallagher
97-R-5848
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. Gallagher:

I have received your undated letter, which reached this office on July 15. You have asked for an opinion concerning the right to obtain records that you requested from the Dutchess County Sheriff.

Specifically, you referred to the Freedom of Information Law and §500-f of the Correction Law, and you requested a copy of the "commitment and discharge" papers pertaining to an individual who had been in the Dutchess County Jail earlier this year. Although the County offered to make available certain records, you were informed that it maintains no "form with the title 'commitment and discharge'." In short, the person who responded, Lt. Joseph A. Roberto, wrote that he does not know "what you mean by a 'discharge' document."

In this regard, for purposes of clarification, my understanding is consistent with that of Lt. Roberto in that there is no particular form or document characterized as a "commitment and discharge." Although §500-f of the Correction Law is entitled "Records of commitments and discharges", I do not believe that individual records are maintained or created with respect to each prisoner. The cited provision states that:

> "Each keeper shall keep a daily record, to be provided at the expense of the county, of the commitments and discharges of all prisoners delivered to his charge, which shall contain the date of entrance, name, offense, term of sentence, fine, age, sex, place of birth, color, social relations, education, secular and religious, for what and by whom committed, how and when discharged, trade or occupation, whether

> so employed when arrested, number of previous convictions. The daily record shall be a public record and shall be kept permanently in the office of the keeper."

Rather than seeking a record that does not exist, it is suggested that you request that portion of the record kept pursuant to §500-f pertaining to the individual in question.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Joseph A. Roberto
Ian MacDonald, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 30, 1998

Mr. Timothy Thorsen
96-A-6811
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. Thorsen:

I have received your letter of July 14. You have sought guidance in obtaining records from certain agencies. 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 requests should ordinarily be sent to that person.

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

The initial document to which you referred involves the "standard operating procedures" used by the Division of State Police when giving a suspect a Miranda warning. While I am unfamiliar with the contents of the records, it appears that three of the grounds for denial may be relevant to your inquiry.

Specifically, §87(2)(g) states that an agency may withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different basis for denial is applicable. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. It would appear that the records in question consist of instructions to staff that affect the public or an agency's policy. Therefore, I believe that rules and regulations would be available, unless a different basis for denial could be asserted.

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

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations of judicial proceedings...

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Under the circumstances, it appears that most relevant is §87(2)(e)(iv). The leading decision concerning that provision is Fink v. Lefkowitz, which involved access to a manual prepared by a special prosecutor that investigated nursing homes, in which the Court of Appeals held that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised the nonroutine procedures by which an agency obtains its information (see Frankel v. Securities & Exch. Comm., 460 F2d 813, 817, cert den 409 US 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to

> frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.
>
> "To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see Stokes v. Brennan, 476 F2d 699, 702; Hawkes v. Internal Revenue Serv., 467 F2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).
>
> "Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (see Cox v. United States Dept. of Justice, 576 F2d 1302, 1307-1308; City of Concord v. Ambrose, 333 F Supp 958). It is no secret that numbers on a balance sheet can be made to do magical things by scrupulous nursing home operators the path that an audit is likely to take and alerting them to items to which investigators are instructed to pay particular attention, does not encourage observance of the law. Rather, release of such information actually countenances fraud by enabling miscreants to alter their books and activities to minimize the possibility or being brought to task for criminal activities. In such a case, the procedures contained in an administrative manual are, in a very real sense, compilations of investigative techniques exempt from disclosure. The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe" (id. at 572-573).

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

> "Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized

> methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.
>
> "Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed" (id. at 573).

While I am unfamiliar with the records in 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 §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.

Next, if there is a record indicating when an agency "went to computerization of their records", such a record would in my view be available. In short, I do not believe that any of the grounds for denial would apply.

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.

In a related vein, in general, records of arrests are public unless they have been they have been sealed under §160.50 or are exempted from disclosure under a different statute pertaining to juvenile or youthful offenders.

Lastly, with regard to disciplinary action relating to a police officer, 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. It has been found that the exemption from disclosure conferred by §50-a of the Civil Rights Law "was designed to limit access to said personnel records by criminal defense counsel, who used the contents of the records, including unsubstantiated and irrelevant complaints against officers, to embarrass officers during cross-examination" [Capital Newspapers v. Burns, 67 NY 2d 652, 568 (1986)].

In another decision, which dealt with unsubstantiated complaints against correction officers, the Court of Appeals held that the purpose of §50-a "was to prevent the release of sensitive personnel records that could be used in litigation for purposes of harassing or embarrassing correction officers" [Prisoners' Legal Services v. NYS Department of Correctional Services, 73 NY 2d 26, 538 NYS 2d 190, 191 (1988)].

In terms of the judicial interpretation of the Freedom of Information Law, I point out that in situations in which allegations or charges have resulted in the issuance of a written reprimand, disciplinary action, or findings that public employees have engaged in misconduct, records reflective of those kinds of determinations have been found to be available, including the names of those who are the subjects of disciplinary action [see Powhida v. City of Albany, 147 AD 2d 236 (1989); also Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Geneva Printing Co. and 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)]. Three of those decisions, Powhida, Scaccia and Farrell, involved findings of misconduct concerning police officers. Further, Scaccia dealt specifically with a determination by the Division of State Police to discipline a state police investigator. In that case, the Court rejected contentions that the record could be withheld as an unwarranted invasion of personal privacy or on the basis of §50-a of the Civil Rights Law.

It is also noted, however, that in Scaccia, it was found that although a final determination reflective of a finding of misconduct is public, the records leading to the determination could be withheld. Further, when allegations or charges of misconduct have not yet been determined or did not result in disciplinary action, the records relating to such allegations may, in my view, be withheld, for disclosure would result in an unwarranted invasion of personal privacy [see e.g., Prisoners' Legal Services, supra; also Herald Company v. School District of City of Syracuse, 430 NYS 2d 460 (1980)]. Therefore, to the extent that charges are dismissed or allegations are found to be without merit, I believe that the records related to and including such charges or allegations may be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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July 29, 1998

Mr. John M. Orlando
President
AFSCME Local 1095
3024 Genesee Street
Cheektowaga, NY 14225-2641

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

Dear Mr. Orlando:

I have received your letter of July 15. In brief, you expressed concern relating to the disclosure of personal information, such as home addresses and "employment status", pertaining to Erie County employees.

From my perspective, while some items pertaining to public employees may be withheld, there is no obligation to do so. In this regard, I offer the following comments.

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

It is emphasized that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law.

The provision of most significance concerning the kinds of items at issue is, in my view, §87(2)(b). That provision permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy".

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 officers employees. It is clear that public officers and employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public officers and employees are required to be more accountable than others. Further, with regard to records pertaining to those persons, the courts have found that, as a general rule, records that are relevant to the performance of a their official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Powhida v. City of Albany, 147 AD 2d 236 (1989); Scaccia v. NYS Division of State Police, 530 NYS 2d 309, 138 AD 2d 50 (1988); Steinmetz v. Board of Education, East Moriches, supra; Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

While names, titles, salaries, attendance records, educational background and similar details relating to public employees have been determined to be available to the public, other details, such as social security numbers, may be withheld. Further, §89(7) of the Freedom of Information Law specifies that home addresses of present or former public employees need not be disclosed under that statute.

Most importantly, however, in terms of your inquiry, the Freedom of Information Law is permissive. Although 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. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

By means of example, even though it is clear that home addresses may be withheld, it has been held that an agency may choose to disclose, and a union's effort to prevent disclosure was dismissed [see Buffalo Teachers Federation v. Buffalo Board of Education, 156 AD2d 1027 (1990)]. Similarly, in Seelig v. Sielaff [200 AD2d 298 (1994)], the lower court enjoined a New York City agency from releasing the social security numbers of correction officers without their written consent. While the Appellate Division agreed that disclosure of social security numbers would result in an unwarranted invasion of correction officers' privacy, the Court unanimously reversed and vacated the judgment because the agency is not prohibited from disclosing social security numbers.

In sum, many items of information regarding public employees must be made available under the Freedom of Information Law. However, even when items fall within an exception to rights of access and may be withheld, there is nothing in the Freedom of Information Law that would prohibit an agency from disclosing.

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: Erie County Commissioner of Personnel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10970

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July 30, 1998

Mr. Jose Lopez
87-A-1626
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. Lopez:

I have received your letter of July 14. As I understand the matter, you submitted a complaint in December concerning two officers at your facility and asked for copies of the complaint on several occasions without success. You have sought assistance in obtaining the record.

In this regard, in my view, those in receipt of your request should have responded in a manner consistent with the Freedom of Information Law or forwarded the requests to the appropriate person. I point out that the regulations promulgated by the Department of Correctional Services indicate that requests for records kept at a facility may be made 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. Notwithstanding your previous requests, it is suggested that you resubmit a request to a person designated in the regulations.

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 its Counsel, Mr. 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

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July 30, 1998

Ms. Kathleen M. Curry
American Wilderness Resources, Inc.
138 Quaker road
Queensbury, NY 12804

The staff of the Committee on 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. Curry:

I have received your letter of July 20 and the materials attached to it.

As I understand the matter, St. Lawrence County offered for sale the 1998 tentative assessment rolls relating to towns and villages within the County by seeking bids. A contract was apparently awarded, and you were informed that "noone [sic] had access to this computer print-out, although they stated that [you] or a person from [your] company could come in and get the information manually from the assessment books." You have contended that the County's action is "illegal and discriminatory under the Freedom of Information Act." You have sought my views on the matter.

First, from my perspective, insofar as a contract is inconsistent with or diminishes public rights of access conferred by a statute, such as the Freedom of Information Law, it would be unenforceable. Stated differently, if records are available under the Freedom of Information Law or any other statute, the terms of a contract could not in my opinion reduce or abridge those rights.

Although the County has not contended that the assessment rolls are confidential, by means of the contract, it has limited the means by which the public can acquire them. Based on judicial decisions, I do not believe that such a limitation could be justified. For instance, 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, the State's highest court, it was held that a state agency's:

> "long-standing promise of confidentiality to the intervenors is irrelevant to whether the requested documents fit within the Legislature's definition of 'record' under FOIL. The definition does not exclude or make any reference to information labeled as 'confidential' by the agency; confidentiality is relevant only when determining whether the record or a portion of it is exempt..." [Washington Post v. Insurance Department, 61 NY 2d 557, 565 (1984)].

In the context of your inquiry, while the records are not being withheld, the County is apparently restricting public access by permitting only inspection of the records, and it is prohibiting public access to computer generated copies to all but the firm submitting the winning bid.

Second, in a somewhat related vein, 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)].

In short, assuming that the assessment rolls are available to the public, and I believe that to be so, an agency cannot in my view discriminate among applicants for copies of those records.

Third, 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."

In view of 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 soon after the enactment 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 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.

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)].

Additionally, 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).

Lastly, I believe that the County is required to make the records available to you in the format of your choice if it has the capacity to do so, so long as you pay the actual cost of reproduction. With regard to such fees, I point out by way of background that §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy 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 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)].

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

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Director, Department of Governmental Services
William F. Maginn, Jr., County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10972

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July 30, 1998

Mr. Michael E. Hutchinson
Concerned Citizens of Gowanda
13437 Quaker Street
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. Hutchinson:

I have received your undated letter, which reached this office on July 21. You have sought assistance relating to your request to the Gowanda Central School District for records described as "a financial report and the business manager's request to the school board to sell $900,000 in RANs." The District denied the request on the ground that the records are: "Exempt from mandatory disclosure: internal document."

From my perspective, it is likely that portions of the documentation in question must be disclosed, despite its characterization as "internal." In this regard, I offer the following comments.

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

One of the exceptions to rights of access, §87(2)(g), pertains to internal documents. Although that provision potentially serves as a basis for denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g), enables an agency to withhold records that:

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

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

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

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

One of the contentions offered by New York City in a recent decision 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 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)" (id. 276, 277).

In sum, insofar as the documentation consists of "statistical or factual" information, I believe that the District would be required to disclose those portions.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: William Burg, Superintendent of Schools
Michell Widdel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1097

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July 30, 1998

Mr. William King
87-D-0022
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. King:

I have received your letter of July 14. You have asked "to whom [you] would appeal when the District Attorney's office denies a F.O.I.L. request."

In this regard, §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 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."

Based on the foregoing, I believe that an appeal would be made to the District Attorney or his designee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Hon. Sol Greenberg, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10974

41 State Street, Albany, New York 12231
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July 30, 1998

Mr. Richard A. Gianzero
94-B-0425
Coxsackie Correctional Facility
P.O. Box 999
Coxsackie, NY 12051

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

Dear Mr. Gianzero:

I have received your letter of July 17 in which you sought guidance concerning access to certain records.

According to your letter, you wish to obtain medical records relating to gunshot wounds "inflicted upon the two victims of the crime to which [you] plead[ed] guilty." You have asked whether you can "use FOIL to obtain these records medical records from the D.A.'s Office, [your] former attorney, or the hospital at which these two men were treated..."

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

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

Based on the foregoing, while the office of a district attorney would constitute an "agency" that falls within the requirements of the Freedom of Information Law, records of a private attorney or hospital would be beyond the coverage of that statute.

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.

Pertinent to the matter is §87(2)(b), which authorizes an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) provides a series of examples of unwarranted invasions of personal privacy, one of which deals with "disclosure of items involving the medical or personal records of a client or patient in a medical facility." In my opinion, a record indicating that a person was receiving medical treatment would if disclosed result in an unwarranted invasion of privacy and may be withheld. As such, medical records pertaining to a person other than yourself maintained by an office of a district attorney in my view clearly could be withheld under the Freedom of Information Law.

It is also noted that medical records maintained by hospitals and physicians are confidential under various provisions of the Public Health Law.

In short, I do not believe that the Freedom of Information Law would serve to enable you to gain access to the records 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-10975

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July 30, 1998

Mr. Mario Hernandez
90-B-2002
Woodbourne Correctional Facility
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. Hernandez:

I have received your letter of July 16 in which you sought my opinion concerning a request for records directed to the Office of the New York County District Attorney.

In this regard, since you addressed the request to the District Attorney, I point out that, 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 response to requests for records, and requests should ordinarily be directed to that person.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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.

Since one aspect of your request involves an autopsy report, also 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." 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.

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:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10976

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July 30, 1998

E-MAIL

TO: Kenneth R. Warren, <library@unclib.lib.unc.edu>

FROM: Robert J. Freeman, Executive Director

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

Dear Mr. Warren:

I have received your communication of July 16 concerning your requests made under the Freedom of Information Law to the State Education Department.

Having discussed the matter with Joseph Porter, I was informed that your requests have been far-ranging and that the records sought are kept in various locations. Mr. Porter indicated that the Department is making every effort to comply with law and that he anticipates responding to you by the beginning of next week for the purpose of describing the records that will be disclosed and those that will be withheld in whole or in part.

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..."

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.

You asked whether "electronic requests (via e-mail) allowed if the requestor is known by the office the information is being requested from." In my view, whether the applicant is known by the agency in receipt of a request is irrelevant. As indicated earlier, §89(3) of the Freedom of Information Law enables an agency to require that a request be made in writing, and the applicant in such request is required to "reasonably describe" the records sought. While the law does not refer specifically to requests made by e-mail, I would conjecture that a court would determine that an e-mail request that reasonably describes the records would be consistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph Porter

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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July 31, 1998

Hon. Richard A. Dollinger
Member of the Senate
339 East Avenue, Suite 309
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, unless otherwise indicated.

Dear Senator Dollinger:

I have received your letter of July 20, as well as the materials attached to it. You have sought an advisory opinion concerning rights of access to records maintained by the Department of Environmental Conservation (DEC) and the New York Power Authority (the Authority).

The records sought consist of minutes of meetings and agendas of the International St. Lawrence River Board of Control (the Board), as well as records concerning the level of Lake Ontario. The records are maintained by employees of DEC and the Authority who serve as members of the Board. As I understand the situation, the Board functions under the aegis and control of the International Joint Commission (IJC), which has contended that the records sought are confidential and beyond the coverage of the New York Freedom of Information Law. The basis for its position is the International Organizations Immunities Act, 22 USC §288 et seq. and Executive Order 9972, which designated the IJC as an international organization entitled to the privileges, exemptions and immunities provided by that Act.

Section 288a(c) of the Act states that:

> "Property and assets of international organizations, wherever located and whomsoever held, shall be immune from search, unless such immunity be expressly waived, and from confiscation. The archives of international organizations shall be inviolable."

In a letter addressed to Ms. Helene Goldberger, a DEC Administrative Law Judge, the Acting Secretary of the United States Section of the IJC, James G. Chandler, wrote that:

> "The Commission considers its archives to encompass all of the official records held by Commissioners, staff, and members of Commission boards and other official Commission institutions, whether they are held in Commission offices or elsewhere."

Secretary Chandler also referred to a memorandum pertaining to the IJC and its Boards, which states that:

> "Members of an IJC board, whether or not employed by departments or agencies of government, are in no sense representatives of their employers. The serve in a personal and professional capacity, under the direction of the Commission, and their employers or superior officers are not committed in any way by the actions of the individual members or of the whole board."

In determining your appeal, DEC found that ten of the seventy-two records falling within the scope of your request were accessible; of the remainder, nearly all were found to be exempt from disclosure under the federal Act cited earlier. The primary basis for the determination is that the records consist of the "archives" of the Board, for they are "maintained in the office of a New York State employee by reason of that employee's appointment to membership on the International St. Lawrence River Board of Control." Reference was made to section 11 of the IJC's rules of procedure, which provide, in essence, that unless there is a finding to the contrary, all records of the IJC, regardless of their location, are confidential. Specifically, subdivision (5) of section 11 provides that:

> "Except as provided in the preceding paragraphs of this rule, records of deliberations, and documents, letters, memoranda and communications of every nature and kind in the official record of the Commission, whether addressed to or by the Commission, commissioners, secretaries, advisers or any of them are privileged and shall become available for public information only in accordance with a decision of the Commission to that effect."

DEC's determination stressed that the IJC "strenuously" objected to disclosure, and that a conclusion contrary to that posited by the IJC would be "antithetical to the State's best interests in fostering compatible relations" with several Canadian governments.

As of the date of this writing, the Power Authority had not forwarded a copy of its determination of your appeal to this office.

In this regard, I offer the following comments.

First, I believe that the documents at issue constitute agency records that fall within the scope of the New York Freedom of Information Law. As you may be aware, 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 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, irrespective of their origin or function, the fact that the records are in the physical possession of agencies subject to the Freedom of Information Law brings the records, in my view, within the scope of that statute.

From my perspective, based on Secretary Chandler's letter, the IJC seems to want to have the benefit of the experience and expertise of government employees while negating the reality that they are government employees. In his letter to Ms. Goldberger, Secretary Chandler wrote that:

> "We concluded early on that for us to have on our boards representatives of government, agencies or interest groups we would jeopardize our independent problem solving capacity and become just another bilateral U.S.-Canadian institution. At the same time, we recognized that the talent, expertise and resources that are available in federal, state and provincial government agencies were absolutely essential to our being able to do our work well. Accordingly, the Commission developed the practice that continues to this day of appointing board members in their personal and professional capacities and not as representatives of their employers."

If indeed those who serve on the Board do so in their personal and professional capacities and in a manner separate from their employment with government agencies, records relating to their work for the Commission would be removed from the scope of the Freedom of Information Law only if they are maintained beyond an agency's premises, custody or control. If there is no way of separating one's personal or professional functions from that of his or her functions from an agency and the records are kept by or within the confines of an agency, there would be, as suggested by the Court of Appeals, "considerable crossover" between one's activities, and the records would, according to that decision, be subject to the Freedom of Information Law.

Second, if the documents in question are agency records subject to the Freedom of Information Law, it is questionable in my view whether they could also be characterized as the "property and assets of international organizations." If they are not the property or assets of international organizations, the federal Act exempting the records from disclosure would not be applicable.

In consideration of the terms of §288 of the International Organizations Immunities Act, even if they can be considered the property and assets of an international organization, it is equally questionable in my opinion whether a request made under the Freedom of Information Law for agency records could be viewed as a "search" as that term is used in the federal Act. According to *Black's Law Dictionary*, Revised Fourth Edition, the term "search" in international law involves "the right on the part of ships of war to visit and search merchant vessels during war, in order to ascertain whether the ship or cargo is liable to seizure." While it is likely that the term "search" in international law has a broader and different construction now than when it was initially developed, it does not

appear that a disclosure pursuant to law made during a time when there is no "war" or other hostility would constitute a search. If disclosure could not be considered a search, again, the federal Act exempting the records from disclosure would be inapplicable.

As you are aware, in the only judicial decision rendered in New York dealing with the relationship between a request made under the Freedom of Information Law and the International Organizations Immunities Act, it was determined that records sought from a New York City agency that were acquired from an international organization involved "neither any search of United Nation's premises nor any interference with United Nation's property or assets." Accordingly, the Court in Burtis v. New York City Police directed that the agency disclose [659 NYS 2d 875, 876, ___ AD 2d ___ (1997)].

Lastly, it is questionable in my opinion whether the term "archives" can justifiably be construed as broadly as has been suggested by the IJC and adopted by DEC. Again, the federal Act states that "The archives of international organizations shall also be inviolable", and the IJC considers "archives" to include any records held by the IJC, its staff, and members of Commission boards, irrespective of where the records are kept or located. DEC referred to a dictionary definition of "archives" to mean "official documents." While that may be one meaning of the term, it is doubtful in my opinion that a court would find that construction to be most widely accepted. The dictionary definition to which the determination referred indicates that the term "archives" is derived from a Greek word meaning official documents, but that the primary definition is "a place in which public records or historical documents are preserved." Similarly, *Black's Law Dictionary* defines the term to mean "any place where ancient records, charters and evidences are kept" and states further that "The derivative meaning of the word (now the more common) denotes the writings themselves thus preserved, thus we say the archives of a college, of a monastery, a public office, etc." As such, the commonly accepted use of the term "archives" refers to a place in which records are preserved. If there are board members residing or working in various locations, and each maintains records in conjunction with duties associated with a board, and if the records are not kept for the purpose of preserving them for posterity, I do not believe that each location could be considered an archive as that term is commonly used.

If my contentions are accurate, the International Organizations Immunities Act would not exempt the records from disclosure; on the contrary, the Freedom of Information Law would govern 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 the exception of the records properly withheld under §87(2)(g), it appears that the records must be disclosed.

I note as an aside that I have been informed by a person who is in no way related to the controversy that substantial disclosures are routinely made with respect to the level of Lake Ontario by any number of government officers and entities. The person with whom I spoke referred to disclosures that you have made, as well as those by Senator Maziarz and Congressman LaFalce. Disclosures on the subject have also been made by municipalities on or near Lake Ontario, by the

Army Corps of Engineers and by state agencies. Very simply, it does not appear that the substance of the kinds of records you seek are or have been secret.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald E. Galloway
James G. Chandler
G.S. Peter Bergen
David E. Blabey
Anne Wagner-Findeisen

STATE OF NEW YORK
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August 3, 1998

Ms. Ruth A. Keating
Counsel
Niagara Frontier Transportation Authority
181 Ellicott Street
Buffalo, NY 14203

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

Dear Ms. Keating:

As you are aware, I have received your letter of July 22 and the correspondence attached to it. You have sought an advisory opinion concerning a request by the Niagara Gazette for information maintained by the Niagara Frontier Transportation Authority (the Authority).

On July 10, the Gazette requested records "containing the number of flights by Kiwi Airlines flying in and out of Niagara Falls International Airport to Newark, and any other destination Kiwi flies to and from that area." Having learned of the request, a letter was sent by Kiwi's General Counsel in which strong objection was raised to disclosure of the information sought. He expressed the understanding that similar statistical information relating to carriers serving the Buffalo Airport is not available, and he contended that:

> "[t]o release the aforementioned information on Kiwi when no similar information is available for other carriers serving the same relevant market is discriminatory and will result in significant economic harm to Kiwi by providing Kiwi's competitors with unfair competitive advantages."

In this regard, I offer the following comments.

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

Second, the only ground for denial of apparent relevance, §87(2)(d), authorizes an agency to withhold records that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;"

From my perspective, it is unlikely that records sought could justifiably be withheld. 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.

As I understand the situation, there is nothing secret about the cancellation of flights. By observing information posted at airports or by listening to announcements made at airports, members of the public and others can know or be made aware of canceled flights. Certainly those members of the public who reserved seats prior to cancellation would know of cancellations, and those who attempted to purchase tickets after cancellation would know of cancellations. While similar or equivalent information is apparently not compiled with respect to other carriers, the data itself is essentially made known and could be compiled by any persistent observers or callers.

Also relevant is a decision rendered by the Court of Appeals, 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" (id. 419-420).

Again, unless my assumptions are inaccurate, a competitor, or any person, could with a moderate degree of effort acquire the information in question by being present at an airport or through telephone inquiries. If that is so, I do not believe that a denial of access could be justified.

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

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

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

cc: Steven Markhoff
Teresa Hoshell
Edward Perlman

STATE OF NEW YORK
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August 3, 1998

Mr. John Deknatel
92-A-4996
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. Deknatel:

I have received your letter of July 17. You have asked that I prepare and forward copies of an advisory opinion to two correctional facilities indicating that the records you seek must be disclosed to you. The records sought include tape recordings of a Tier III disciplinary hearing, a misbehavior report, certain forms, and "any and all documents held within/under DOC's with regards to the 5/11/98 incident of misconduct."

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 would agree that a tape recording of a proceeding during which you were present as well as any records introduced into evidence at the proceeding should be disclosed. In short, none of the grounds for denial would, in my opinion, apply.

With respect to other records falling within your request, since I am unaware of their contents, I cannot offer unequivocal guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

Potentially relevant is a decision by the Court of Appeals concerning records prepared by police officers 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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 this response will be sent to the facilities identified in your letter.

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: Superintendent, Franklin Correctional Facility
Superintendent, Mid-State Correctional Facility

STATE OF NEW YORK
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August 3, 1998

E-Mail

TO: Regina - There@usa.net

FROM: Robert J. Freeman, Executive Director

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

Dear Regina _____:

I have received your communication of July 22 in which you sought guidance concerning the Freedom of Information Law.

You wrote that you requested a New York City agency's subject matter list and a description of its management information system, and that both were denied. In this regard, I offer the following comments.

First, in general, the Freedom of Information Law pertains to existing records, and an agency is not required to create a record in response to a request [see §89(3)]. An exception to that rule relates to the "subject matter list.". 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 another source of equivalent information may involve schedules that prescribe minimum retention periods pertaining to an agency's records. In New York City, those schedules are developed by the Department of Records and Information Services. It is suggested that you contact that agency for the purpose of reviewing the retention schedules applicable to the agency of your interest.

With respect to a description of an agency's management information system, I believe that such a record, if it exists, would be available in great measure, if not in its entirety. 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.

Pertinent to an analysis of rights of access is §87(2)(g), which authorizes an agency to withhold records that:

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

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

I point out that §87(2)(i) enables an agency to withhold computer access codes. Therefore, if a description of the management information system includes those codes, those portions of the record may be deleted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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August 3, 1998

Mr. Frank Georgakopoulos
Mr. George Georgakopoulos
Mr. Chris Mikellides
[redacted]

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

Dear Messrs. Georgakopoulos and Mikellides:

I have received your letter of July 16 and the materials attached to it. You have asked that the Committee on Open Government engage in "enforcement of compliance of the Freedom of Information Law" in relation to your request made to a court reporter for minutes and other information pertaining to a grand jury proceeding.

In this regard, it is noted initially that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce the law or compel disclosure of records.

Second, I point out that the Freedom of Information Law is applicable to agency records, and that §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 often 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.

Lastly, records of grand jury proceedings are presumed to be confidential. Section 190.25(4) of the Criminal Procedure Law deals those 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 and related records are generally confidential. 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

cc: Mr. Kenny Wisner

STATE OF NEW YORK
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August 4, 1998

Ms. Carol Chur
League of Women Voters
of the Greater Buffalo Area
9625 The Maples
Clarence, NY 13031

The staff of the Committee on 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. Chur:

I have received your letter of July 25. On behalf of the Clarence Unit of the League of Women Voters of the Greater Buffalo Area, you raised a variety of questions relating to the Town of Clarence Code of Ethics.

It is emphasized that the function of the Committee on Open Government involves providing advice and guidance concerning the Freedom of Information and Open Meetings Laws, and my comments will be restricted to those subjects. Issues dealing solely with an ethics code are beyond the jurisdiction or expertise of this office.

Your first series of questions is as follows:

> "Does the accused (town employee) have the legal right to know the name of his/her accuser concerning a code of ethics violation? Please discuss who is the 'accuser' -- the person submitting the original complaint, the Ethics Board, or the Town Board. At what point in the process (initial complaint, investigation, hearing, or town board decision on punishment) is an employee considered accused of a code of ethics violation?"

In this regard, as you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. When an allegation or 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 records, it has generally been advised that those portions of the complaint which identify complainants, or to use your word, "accusers," 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 a member of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted.

I cannot answer as to when a person is considered "accused" of a violation, for I believe that would be dependent on the procedural aspects of a code or local law.

Second, you asked whether a code of ethics may "state that the person submitting a complaint would have the choice of whether or not their name would be revealed to the person accused of an ethics violation, or to the public upon submittal of the complaint" or any ensuing stage of a procedure leading to a determination.

In general, whether the subject of a record prefers to authorize or preclude disclosure is, in my opinion, irrelevant in terms of an analysis of rights conferred by the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of their records to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold a record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see,

> Public Officers Law section 87[2]). We reject the contrary contention of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a claim or promise of confidentiality in my opinion is irrelevant to an analysis of rights of access to records.

Third, for reasons discussed earlier, I believe that identifying details relating to complainants may generally be withheld to protect their privacy. The same would be so in my view with respect to witnesses and others when the rationale offered earlier is applicable.

Lastly, you asked whether the Town Board "[c]an...reveal, in the minutes and to the public, the specific recommendations of the Ethics Board regarding a violation of the Ethics Code, as well as the Town Board's actions regarding the issue." In my view, the Board "can" reveal any of the records under consideration, for the Freedom of Information Law is permissive; while agencies "may" withhold records to the extent authorized by the grounds for denial appearing in §87(2), they are not required to do so [see Capital Newspapers v. Burns, 67 NY2d 562 (1986)]. Nevertheless, I believe that it would have the ability to deny access in accordance with the ensuing comments.

As indicated earlier, §87(2)(b) 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 final 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.

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 that disclosure would result in an unwarranted invasion of personal privacy.

In sum, the only record that must be disclosed, in my opinion, would be a final determination indicating that an officer or employee has been found to have engaged in misconduct. While the Town Board could choose to disclose other records relating to a possible ethics code violation, for reasons described above, I do not believe that it would be required to do so.

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-10983

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 4, 1998

Mr. Jeremiah Smith
97-R-2082
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. Smith:

I have received your letter of July 22. You have asked for guidance concerning how you might "quickly obtain" various records relating to your arrest from the New York City Police Department.

Although there may no way of obtaining the records "quickly", 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 ordinarily be directed to that person.

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

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

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

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

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

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

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

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

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 is possible that some aspects of the records in which you are interested may be withheld in accordance with the grounds for denial.

Enclosed for your review is a copy 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-1098

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August 4, 1998

Mr. Eric Davis
97-A-3523
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. Davis:

I have received your letter of July 24 and a copy of the "cropped" document that you received from the Office of the Queens County District Attorney to which you referred in previous correspondence. You wrote that you have sent a second request for that record in order to see the serial number and any other information that was cropped from the first copy sent to you. You have asked whether in my view the record in question should be made available to you.

The record, which you characterized as a "DAT", is a form that includes a variety of information that has been filled in, including your name as the defendant, dates, sex, age, docket number, the amount of bail set, and that notices were served apparently under various provisions of the Criminal Procedure Law. The words "video case" are handwritten at the top of the form, and it is stamped "Court Ready."

From my perspective, since you are the subject of the record and were convicted, it is unlikely that there would be any basis for withholding the record from you. 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. If I understand the contents of the form and the circumstances accurately, it does not appear that any of the grounds for denial would be applicable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Brian S.B. Lee, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10985

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August 4, 1998

Mr. A. Z.
Orangetown Plaza, Inc.
125 Oak Tree Road
Tappan, NY 10983

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

Dear Mr. Z_____:

I have received of July 24. Please excuse my inability to determine your last name.

Enclosed with your letter is a news article indicating that the superintendents of schools in the Pearl River and South Orangetown School Districts received "a memorandum from Orangetown Assessor Brian Denny, who told the school superintendents that the base proportions used to figure out tax rates had shifted."

Having requested a copy of the memorandum, you were informed by a clerk in the Assessor's office that you "must file a FOIL request and await the return of the assessor from a Seminar." You added that a staff person for the Town Supervisor offered the same advice and that a secretary at one of the school districts stated that "the parties who could release the memorandum were not in." It is your view that if the memorandum is available to the news media, it should be available to anyone.

In this regard, I offer the following comments.

First, assuming that any of the agencies to which you referred purposefully disclosed the record in question to the news media, I would agree that it should be available to any person. I note that the news media has no special rights under the Freedom of Information Law, and that it has been held that records accessible under that statute must 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 673, 378 NYS 2d 165 (1976)].

Second, pursuant to §89(3) of the Freedom of Information Law, an agency may require that a request for records be made in writing. Nevertheless, there is no requirement that an agency must seek a written request, and an agency may waive that requirement.

Third, the absence of the assessor or perhaps others should not serve as a basis for delaying or denying access, particularly if it has been established that a record is accessible under the law. I note by way of background that §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...
>
> (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..."

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 town or school district officials generally. However, 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. For example, in the case of a request made to the Town Assessor who was absent from his office, I believe that the request should have been forwarded to the records access officer, who is likely the Town Clerk.

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

If the record was not purposefully disclosed and your request is being treated as an initial effort to gain access, I believe that the provision pertinent to an analysis of rights of access would be §87(2)(g). Although that provision serves potentially as a ground for denial of access, due to its structure, it often requires disclosure. Specifically, §87 (2)(g) permits an agency to withhold records that:

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

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Based on the news article, it appears that the memorandum would consist largely of statistical or factual information that would be accessible.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Town of Orangetown
Records Access Officer, Pearl River School District
Records Access Officer, South Orangetown School District

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1086

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August 5, 1998

Mr. Ricky Nieves
96-A-5832
Orleans Correctional 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. Nieves:

I have received your letter of July 26. You have sought guidance concerning a situation in which you requested records from the New York City Department of Correction on July 6 but had not 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Thomas Antenen, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1098?

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August 5, 1998

Mr. Alcimus Cargill
94-R-8114
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. Cargill:

I have received your letter of July 24 in which you described a series of difficulties in obtaining records from the Division of Parole.

One of the responses indicated that your request was denied because "you are not within 60 days of any Parole Board hearing." Based on that response, you asked whether there is a "specific statute" that renders parole records exempt from disclosure under the Freedom of Information Law or whether the Freedom of Information Law governs access.

In this regard, I offer the following comments.

First, I do not believe that there is any statute that exempts parole records from disclosure or otherwise removes them from the coverage of the Freedom of Information Law. I note that §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 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 parole records can be characterized as being exempted from disclosure by statute or that the regulations serve to enable

the Division to withhold records that would otherwise be available under the Freedom of Information Law.

Second, the pendency of a hearing has no relationship to the use of the Freedom of Information Law, which may be invoked, in my view, at any time by any person. I note that it has been held that records accessible under the Freedom of Information Law must be made equally available to any person, regardless of 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)].

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. I would conjecture that the most pertinent provision concerning the records sought 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

Robert J. Freeman
Executive Director

RJF:jm
cc: Parole Officer Butera
David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 5, 1998

Mr. Karsem M. Williams
95-A-6745
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. Williams:

I have received your letter of July 27. You referred to §50-a of the Civil Rights Law concerning the confidentiality of certain personnel records pertaining to correction officers and asked whether that statute continues to apply after the death of a correction officer.

From my perspective, when a person has ended his or her service as a correction officer, the protection accorded by §50-a ends. In this regard, I offer the following comments.

By way of background, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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." As you are aware, 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 exempts records from disclosure when a request is made in a context relating 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)].

If the subjects of the records are no longer correction officers or are deceased, I do not believe that §50-a would be applicable. In short, the rationale for confidentiality accorded by that provision would no longer be present.

The foregoing is not intended to suggest that all records identifying a correction officer who is now deceased must be disclosed, for other grounds for denial may be applicable. For instance, such records may consist of "intra-agency materials" that would be accessible or deniable, depending upon their contents, under §87(2)(g) of the Freedom of Information Law.

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-10989

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 5, 1998

Mr. Francis Castagna
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Castagna:

I have received your letter of July 28. You have questioned the propriety of a fee of fifty dollars charged by the Town of Babylon Building Department for a copy of a certificate of occupancy.

From my perspective, the Town may charge a maximum of twenty-five cents per photocopy for records up to nine by fourteen inches. In this regard, I offer the following comments.

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); Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD 2d 339 (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 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. Since there is no statute that authorizes an agency to charge a fee in excess of twenty-five cents per photocopy for a certificate of occupancy, the Town's practice is, in my view, inconsistent with law.

Lastly, although compliance with the Freedom of Information Law involves the use of public employees' time, the Court of Appeals has found that the Law is not intended to be given effect "on

a cost-accounting basis", but rather that "Meeting the public's legitimate right of access to information concerning government is fulfillment of a governmental obligation, not the gift of, or waste of, public funds" [Doolan v. BOCES, 48 NY 2d 341, 347 (1979)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Attorney
Hon. Ellen McVeety, Town Clerk
Director, Building Dept.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10990

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 5, 1998

Mr. Gil Zaporta
90-A-9594
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. Zaporta:

I have received your letter of July 27. You have alleged that officials at the Mid-State Correctional Facility have 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 its Counsel, 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-1091

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 5, 1998

Mr. Rafael Robles
88-A-8275
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. Robles:

I have received your undated letter which reached this office on August 3.

You attached a response to a request that you directed to the Internal Revenue Service (IRS) for W-2 forms pertaining to certain public employees. Because the IRS denied access, you questioned whether you sent the request to the correct agency in view of opinions on the subject written by this office.

In this regard, records pertaining to taxpayers maintained by the IRS are exempt from disclosure under a federal statute (26 USC §6103). As such, that agency is prohibited from disclosing those records. Nevertheless, if the records are maintained by a person or entity other than the IRS, the confidentiality restriction does not apply. Further, when W-2 forms are maintained by government agencies subject to the Freedom of Information Law, those records fall within the scope of rights of access conferred by that statute.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

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. Those statutes are not applicable when the forms are requested from a state or local government as an employer. 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 state or local government agency in New York. 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 the decision that you cited, 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).

Based on the foregoing, it is suggested that a request be directed to the agency that employs the individuals to whom you referred in your 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- 1099

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 7, 1998

Hon. Debra J. Mazzarelli
Member of the Assembly
228 Waverly Avenue
Patchogue, NY 11772

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Assemblywoman Mazzarelli:

I have received your letter of August 3 and the application by a constituent for access to records attached to it.

The constituent's request involves the number of marriages performed by a particular Village Justice between certain dates and the fees paid to him. The request was denied on the ground that "the records are not maintained in Village Hall." You wrote that "[I]t would appear that a resident would have to know where all records are stored before they could request a copy of them, and this seems unduly burdensome..."

In this regard, I offer the following comments.

First, it is not the obligation of a person seeking records to know where they are stored in order to request them under the Freedom of Information Law. Section 89(3) of that statute requires that an applicant must "reasonably describe" the records. Therefore, an applicant need not identify equested records with particularity or know where they are kept; on the contrary, the applicant is merely required to provide sufficient information to enable agency staff to locate the records. 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 ensuring that agency personnel assist an applicant in identifying requested records, if necessary.

Second, 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, 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, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, in a decision rendered by the Court of Appeals, 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)].

Similarly, it has been 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).

In sum, insofar as records are maintained for an agency, I believe that the agency would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law or obtain them in order to disclose them to the extent required by law.

Lastly, it is doubtful in my view that the Village maintains records that are the subject of your constituent's interest. Applications for marriage licenses and copies of those records are issued and maintained by town and city clerks. It is possible that a review of records maintained by the town clerk would enable the constituent to determine the number of marriage ceremonies performed by a particular judge. Although a village justice may perform a marriage, I do not believe that a justice can charge a fee that results in the preparation of a record maintained either by a village or a village justice court. While it is possible that village justices may obtain money or items of value for performing a marriage ceremony, that kind of payment is, according to the Office of Court Administration, generally made as a gift. Moreover, such gifts may be given despite statutes dealing with conflicts of interest and the acceptance of gifts, so long as a marriage ceremony is performed

at a time other than "normal hours of business." Specifically, §805-b of the General Municipal Law entitled "Solemnization of marriages" states that:

> "Notwithstanding any statute, law or rule to the contrary, no public officer listed in section eleven of the domestic relations law shall be prohibited from accepting any gift or benefit having a value of seventy-five dollars or less, whether in the form of money, property, services or entertainment, for the solemnization of a marriage by such public officer at a time and place other than the public officer's normal public place of business, during normal hours of business. For the purpose of this section, a town or village judge's normal hours of business shall mean those hours only which are official scheduled by the court for the performing of the judicial function."

As I understand the foregoing, if a marriage is performed outside of a village judge's normal hours of business, he or she is not prohibited from accepting money or other items of value. Further, I know of no requirement in that circumstance that a record must be prepared or filed with a court or village office.

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-1093

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 10, 1998

Mr. Lasyah M. Palmer
97-A-5841
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. Palmer:

I have received your letter of July 18. You asked whether the Office of the New York County District Attorney forwarded to this office a copy of a letter to you in response to an appeal under the Freedom of Information Law in which you were informed that a further response would be rendered by July 10. You also asked what you can do if the agency does not respond by that date.

In this regard, first, having reviewed our files, a letter addressed to you by Assistant District Galperin on June 24 was sent to this office and received on July 6.

Second, as you may be aware, §89(4)(a) of the Freedom of Information Law requires that an appeal be determined within ten business days of its receipt. If an agency fails to render a determination within that period, the appellant may consider the appeal to have been denied. In that circumstance, the person seeking the records would have exhausted his or her administrative remedies and could seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules [Floyd v. McGuire, 87 AD2d 388, appeal dismissed, 57 NY 2d 774 (1082)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Gary J. Galperin

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 10, 1998

Ms. Shirley Murray
Town Clerk
Town of Wilton
22 Traver Road
Gansevoort, NY 12831-9127

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Murray:

I have received your letter of August 4 in which you sought an advisory opinion concerning access to financial records of a not-for-profit corporation.

According to your letter, a housing agency was formed and incorporated in 1983 as a not-for-profit corporation and during the same year "was awarded the management contract for the Town of Wilton's Section 8 Rental Assistance Program." In 1991-1992, a veterans center was built to provide apartments for Saratoga County veterans. The agency also manages the center pursuant to a contract with the Town. You wrote that the records maintained by the Town Assessor "relating to the tax exemption granted to The Agency contain some required financial information including financial statements and audits", and you asked whether "all or part of the Assessor's file [is] available under the Freedom of Information Law."

As I understand the situation, it is likely that the records in question would be available in their 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 only ground for denial of apparent significance would be §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 and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

Since the entity is a not-for profit corporation, it is doubtful in my view that it could be characterized as a "commercial enterprise." If that is so, §87(2)(d) would not be applicable. Even if it could be so characterized, in consideration of its functions, it is unlikely that it is in competition with other similar entities or that, therefore, disclosure would "cause substantial injury to [its] competitive murray position." Further, in situations in which records clearly pertain to commercial entities in competition with other such entities, while the disclosure of up to date financial information could be damaging to a firm's competitive position, information that is years old may indicate little or nothing about a firm's current competitive position. Consequently, if the records sought are not relatively current, even if the agency is a commercial enterprise, it is unlikely that a denial under §87(2)(d) could be justified. Further, not-for-profit corporations are required to file a Form 990, a brief financial statement, with the Internal Revenue Service each year. That statement is available to the public from both the IRS and the not-for-profit entity.

Lastly, I note that in situations in which the Assessor obtains income and expense statements or similar records from entities that are clearly commercial and competitive in nature, §87(2)(d) may be applicable as a basis for withholding those records or portions thereof, again, insofar as disclosure would cause substantial injury to their competitive position.

If my understanding of the matter is inaccurate, please contact me. 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-1095

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 11, 1998

Mr. Don Juan Britt
96-A-5388
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. Britt:

I have received your letter of August 1 in which you sought assistance concerning a denial of your request for a record by the Division of Parole.

The records sought consists of "parole hearing minutes as well as documentation confirming the Kings County Assistant District Attorney's recommendation ..." Your request was denied pursuant to §§ 87(2)(f) and 89(2)(b) of the Freedom of Information Law. You have questioned the validity of the denial since you cannot invade your own privacy.

While I am not familiar with the contents of the records, both of the provisions cited by the Division of Parole were likely intended to pertain to persons other than yourself. As you are aware, §87(2)(f) permits an agency to withhold records insofar as disclosure "would endanger the life of safety of any person." Section 89(2)(b) pertains to the authority to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." If, for example, the records include reference to victims, witnesses or other members of the public, the provisions at issue might validly have been cited to protect their safety and privacy.

I point out, too, that a recommendation transmitted by an assistant district attorney to the Division of Parole would 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.

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: David Molik

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10996

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 11, 1998

Mr. Karsem Williams
95-A-6745
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. Williams:

I have received your letter of August 3. You have raised two questions concerning rights of access to records under the Freedom of Information Law.

The first pertaining to access to records relating to a deceased correction officer was answered in an opinion addressed to you on August 5. The second involves rights of access to the "criminal rap sheet" of a person who apparently testified against you at your trial.

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 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-1097

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 11, 1998

Mr. William Keegan
92-A-0276
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. Keegan:

I have received your letter of August 4 in which you sought an advisory opinion relating to your requests for records to of the New York City Police Department.

The initial issue involves a response to a request indicating that the records could not be provided because the Department "does not keep records in the manner you seek, i.e., indict#."

In this regard, in my opinion, 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 Department, to the 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. If, for example, the Department does not maintain arrest records by indictment number, I do not believe that the request would reasonably describe the records. However, if the Department maintains the records, whether manually or electronically, in a manner that permits staff to retrieve those of your interest based on certain identifiers, filing methods or fields in a computer, I believe that a request would reasonably describe the records.

Next, you referred to a justification for a denial of access similar to a "Vaughn Index." From my perspective, the Freedom of Information Law does not require that an agency provide that degree of detail in response to a request or an administrative appeal. Further, 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 include a description of the reason for withholding each document. 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 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 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: Susan Petito, Special Counsel
Lt. Glen Suarez

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 11, 1998

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 August 7 in which you sought an opinion concerning the propriety of a denial of access to portions of a "stipulation of settlement" by the Bedford Central School District.

According to your correspondence, having requested:

> "the stipulation between the district and a 'certain employee' [you] received a document in which all but one paragraph were deleted. The Records Officer said the 'District's and the employees attorney have authorized me to release only portions of the settlement that are not confidential" (emphasis yours).

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Second, it has been held in variety of circumstances that an agreement 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, a confidentiality agreement is in my view ineffective and invalid insofar as it is inconsistent with the grounds for denial appearing in the Freedom of Information Law.

Second, since the record relates to an employee, I point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, would likely 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.

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and

> specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [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, it appears that the record in question 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 District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Bruce Dennis, Superintendent of Schools
Verna Carr, Records Access Officer

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August 11, 1998

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 August 4 in which you questioned a fee schedule adopted by the Town of Riverhead concerning certain services provided by its police department.

It appears that three aspects of the fee schedule, those involving a "letter of good conduct" and subpoenas, do not involve fees for copies of records under the Freedom of Information Law. Nevertheless, insofar as the resolution pertains to fees for copies of records, I offer the following comments.

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 reproducing the records (i.e. those that cannot be photocopied) unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

As such, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a search fee or a fee in excess of twenty-five cents per photocopy or higher than the actual cost of reproduction was valid. However, under the amendment, only an act of the State Legislature, a statute, would in my view permit the assessment of a fee higher than twenty-five cents per photocopy, a fee that exceeds the actual cost of reproducing records that cannot be photocopied, or any other fee, such as a fee for search. In addition, it has been confirmed judicially that fees inconsistent with the Freedom of Information Law may be validly charged only when the authority to do so is conferred by a statute. In Sheehan v. City of Syracuse [521 NYS 2d 207 (1987)]. a fee in excess of twenty-five cents per photocopy for certain records was established by an ordinance, and the court found the ordinance to be invalid. More recently, it was held that a fee established in the Suffolk County Code was invalid to the extent that it authorized a fee in excess of twenty-five cents per photocopy for certain records [Gandin, Schotsky & Rappaport v. Suffolk County, 640 NYS 2d 214, 226 AD2d 339 (1996). If the fee of ten dollars for copies of photographs of accident scenes reflects the Town's actual cost of reproduction, I believe that the fee would be valid. Contrarily, if the fee exceeds the actual cost of reproduction, to that extent, it would, in my view, be inconsistent with law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board

STATE OF NEW YORK
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August 12, 1998

Mr. Calvin Cole
#50244-053
U.S.P. Allenwood
P.O. Box 3000
White Deer, PA 17887

Dear Mr. Cole:

Your letters of July 24 addressed to the Department of State have been forwarded to the Committee on Open Government, a unit of the Department. The Committee is authorized to provide opinions concerning the rights of access to government records. In an effort to clarify your understanding of that statute, I offer the following comments.

It is noted at the outset the Department of State does not generally perform or carry out functions relating to criminal law or procedure. Consequently, the Department does not maintain the information in which you are interested. Since the records sought apparently pertain to an arrest and an indictment, requests should be made to the agencies that would possess the records of your interest, such as an office of a prosecutor, a police department, or a court.

Second, the statute that you cited as the basis for your request is the federal Freedom of Information Act, which applies to records maintained by federal agencies. The general statute dealing with rights of access to records maintained by state and local government in New York is the New York Freedom of Information Law. I note that although the federal Act includes provisions concerning the waiver of fees, there are no similar provisions in the state counterpart. Further, it has been held that an agency may charge its established fee for copies even when a request is made by an indigent inmate [see Whitehead v. Morgenthau. 552 NYS2d 518 (1990)].

Third, as a general matter, 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 for information. Similarly, although that statute requires the disclosure of records in accordance with its provisions, an agency is not required to provide information by answering questions.

Lastly, the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. Therefore, if in the future you seek records under that statute, it is suggested that you include sufficient detail to enable agency staff to locate and identify the records.

I hope that the foregoing clarifies your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 13, 1998

Mr. Robert E. 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 August 7 in which you raised a variety of issues pertaining to access to records of the Margaret Reaney Memorial Library and to meetings of its Board of Trustees and committees.

You described your first area of concern as follows:

> "Committees of the Board, Investments, Museum, Personnel, Fundraising and Planning do not announce their meeting dates, times and locations to the public. These committees are chaired by Trustees or the Director. With one or two exceptions, the committee members are all Trustees as well. At Board meetings, when it is divulged that a committee meeting has taken place, no written report is presented which would then be available under the Freedom of Information Law. Frequently, these committee meetings take place in restaurants at a table just large enough for committee members. It is very intimidating to try to attend and take notes, when the committee is sharing a pizza."

In this regard, I offer the following comments.

First, the Open Meetings Law is applicable 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."

Based on the foregoing, as a general matter, the Open Meetings Law pertains to governmental bodies. In addition, that statute, which is codified as Article 7 of the Public Officers Law, is applicable to boards of trustees of public libraries pursuant to §260-a of the Education Law, which 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 public libraries that are not-for-profit corporations, must be conducted in accordance with that statute.

Based on the foregoing, it is clear that a library board of trustees is required to comply with the Open Meetings Law. Whether the Margaret Reaney Memorial Library (the Library) could be characterized as a governmental entity is, in my opinion, somewhat unclear. In an effort to learn more of the matter, I contacted the Director of the Library, Ms. Dawn Capece. She indicated that the Library is a not-for-profit corporation. However, she added that the members of its Board of Trustees are designated by the governing body of the Village, its Board of Trustees, and that a substantial portion of the Library budget is derived from a school district tax levy. In view of those factors, I believe that the Library Board of Trustees is essentially governmental in nature and that it would constitute a "public body" subject to the Open Meetings Law, even if §260-a of the Education Law had not been enacted.

Similarly, since other aspects of your inquiry pertain to access to records, the Library would also, in my opinion, be subject to the Freedom of Information Law. In a situation in which a government agency maintains significant control over a not-for-profit corporation, the state's highest court held that the not-for-for profit entity is an agency required to comply with the Freedom of Information Law [see Buffalo News v. Buffalo Enterprise Development Corp., 84 NY2d 488 (1994)].

With respect to the committees to which you referred, I believe that those consisting solely of Board members would be subject to the Open Meetings Law; the others would not.

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 board of education, I believe that the Open Meetings Law is applicable. By way of background, when the Open Meetings Law went into effect in 1977, questions consistently arose with respect to the status of committees, subcommittees and similar bodies that had no capacity to take final action, but rather merely the authority to advise. Those questions arose due to the definition of "public body" as it appeared in the Open Meetings Law as it was originally enacted. Perhaps the leading case on the subject also involved a situation in which a governing body, a school board, designated committees consisting of less than a majority of the total membership of the board. In Daily Gazette Co., Inc. v. North Colonie Board of Education [67 AD 2d 803 (1978)], it was held that those advisory committees, which had no capacity to take final action, fell outside the scope of the definition of "public body".

Nevertheless, prior to its passage, the bill that became the Open Meetings Law was debated on the floor of the Assembly. During that debate, questions were raised regarding the status of "committees, subcommittees and other subgroups." In response to those questions, the sponsor stated that it was his intent that such entities be included within the scope of the definition of "public body" (see Transcript of Assembly proceedings, May 20, 1976, pp. 6268-6270).

Due to the determination rendered in Daily Gazette, supra, which was in apparent conflict with the stated intent of the sponsor of the legislation, a series of amendments to the Open Meetings Law was enacted in 1979 and became effective on October 1 of that year. 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 public body, would fall within the requirements of the Open Meetings Law, assuming that a committee discusses or conducts public business collectively as a body [see Syracuse United Neighbors v. City of Syracuse, 80 AD 2d 984 (1981)]. Further, as a general matter, I believe that

a quorum consists of a majority of the total membership of a body (see e.g., General Construction Law, §41). Therefore, if, for example, the Board of Trustees consists of nine, its quorum would be five; in the case of a committee consisting of three, a quorum would be two.

When a committee is subject to the Open Meetings Law, I believe that it has the same obligations regarding notice and openness, for example, as well as the same authority to conduct executive sessions, as a governing body [see Glens Falls Newspapers, Inc. v. Solid Waste and Recycling Committee of the Warren County Board of Supervisors, 195 AD 2d 898 (1993)].

The Open Meetings Law requires that notice be posted and given to the news media prior to every meeting of a public body. Specifically, §104 of that statute provides that:

> "1. Public notice of the time and place of a meeting scheduled at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.
>
> 2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.
>
> 3. The public notice provided for by this section shall not be construed to require publication as a legal notice."

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week an advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, "to the extent practicable", at a reasonable time prior to the meeting. Although the Open Meetings Law does not make reference to "special" or "emergency" meetings, 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.

The primary requirement relating to a record of a meeting involves the preparation of minutes, and §106 of the Open Meetings Law provides that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the

> final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based on the foregoing, minutes need not consist of a verbatim account of everything that was said; on the contrary, so long as the minutes include the kinds of information described in §106, I believe that they would be appropriate and meet legal requirements. Further, if none of the events described in §106 occurs, technically, there would be no requirement that minutes be prepared.

With regard to the location of meetings, there is nothing in the Open Meetings Law that specifies where meetings must be held. The only provision that deals somewhat directly with the issue is §103(b), which states that public bodies must make or cause to made reasonable efforts to hold meetings in locations that offer barrier-free access to physically handicapped persons. Perhaps equally pertinent is §100 of the Open Meetings Law, the Legislative Declaration, which 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 an able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy. The people must be able to remain informed if they are to retain control over those who are their public servants. It is the only climate under which the commonweal will prosper and enable the governmental process to operate for the benefit of those who created it."

As such, the Open Meetings Law confers a right upon the public to attend and listen to the deliberations of public bodies and to observe the performance of public officials who serve on such bodies.

From my perspective, every provision of law, including the Open Meetings Law, should be implemented in a manner that gives reasonable effect to its intent. Whether a meeting is held on public or private property, to give reasonable effect to the law, I believe that meetings should be held in locations in which those likely interested in attending and observing the deliberative process have a reasonable opportunity to do so. Since people are expected to purchase food in a restaurant, that kind of site would, in my view, be inappropriate for conducting a meeting of a public body.

With regard to the designation of a "records access officer", §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 an agency 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.

In addition, 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).

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..."

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.

In an effort to enhance compliance with and understanding of open government laws, a copy of this opinion will be forwarded to the Director of the Library.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Dawn Lamphere Capece

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11002

41 State Street, Albany, New York 12231
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August 13, 1998

Mr. Joseph L. Licari
Vice President
Abstracters' Information Services
138-72 Queens Boulevard
Briarwood, NY 11435

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Licari:

As you are aware, I have received your letter of August 6 and the materials attached to it.

In your capacity as a "real estate information provider", you indicated that your company has made several requests under the Freedom of Information Law to the Town of Babylon, and that the Town "has responded with the exact same time frame for every request." You have asked whether the Town "can arbitrarily decide all freedom of information requests will take approximately 30 days."

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

While an agency must grant access to records, deny access or acknowledge the receipt of a request within five business days, when such acknowledgement is given, there is no precise time period within which an agency must grant or deny access to records. The time needed to do so may be dependent upon the volume of a request, the possibility that other requests have been made, the necessity to conduct legal research, the search and retrieval techniques used to locate the records and

the like. In short, when an agency acknowledges the receipt of a request because more than five business days may be needed to grant or deny a request, so long as it provides an approximate date indicating when the request will be granted or denied, and that date is reasonable in view of the attendant circumstances, I believe that the agency would be acting in compliance with law.

Notwithstanding the foregoing, in my view, every law must be implemented in a manner that gives reasonable effect to its intent, and I point out that in its statement of legislative intent, §84 of the Freedom of Information Law states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*." Therefore, if records are clearly available to the public under the Freedom of Information Law, or if they are readily retrievable, there may be no basis for a lengthy delay in disclosure. As the Court of Appeals has asserted:

> "...the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester News v. Kimball, 50 NY 2d 575, 579 (1980)].

Further, in my opinion, if, as a matter of practice or policy, an agency acknowledges the receipt of requests and indicates in every instance that it will determine to grant or deny access to records "within thirty days" or some other particular period, following the date of acknowledgement, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. If a request is voluminous and a significant amount of time is needed to locate records and review them to determine rights of access, thirty days, in view of those and perhaps the other kinds of factors mentioned earlier, might be reasonable. On the other hand, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case in which it was found that an agency's "actions demonstrate an utter disregard for compliance set by FOIL", it was held that "[t]he records finally produced were not so voluminous as to justify any extension of time, much less an extension beyond that allowed by statute, or no response to appeals at all" (Inner City Press/Community on the Move, Inc. v. New York City Department of Housing Preservation and Development, Supreme Court, New York County, November 9, 1993).

If an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body

> of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Peter M. Casserly
Records Access Officer
Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1003

41 State Street, Albany, New York 12231
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August 13, 1998

Hon. Paul J. Feiner
Town Supervisor
Town of Greenburgh
P.O. Box 205
Elmsford, NY 10523

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Supervisor Feiner:

I have received your letter of August 5 and the correspondence attached to it.

You wrote that Assemblyman Richard Brodsky "has failed to comply with the Freedom of Information Request that [you] made for a listing of names people he sent a recent mailing to." In the request, which is dated July 17, you referred to his announcement that he would send materials to "every senior citizen in the town about the STAR program." You have sought an advisory opinion "on whether or not Mr. Brodsky has the right to refuse to acknowledge [your] letter or to provide [you] with the requested documents."

In this regard, as you may be aware, the State Legislature is subject to provisions in the Freedom of Information Law are in some instances different from those applicable to agencies of state and local government. Section 88(1) pertains to the State Legislature and states in relevant part that:

> "The temporary president of the senate and the speaker of the assembly shall promulgate rules and regulations for their respective houses in conformity with the provisions of this article, pertaining to the availability, location and nature of records, including, but not limited to:
>
> (a) the times and places such records are available;
>
> (b) the persons from whom such records may be obtained..."

I believe that the Assembly's rules include the designation of a records access officer, whose duty involves the coordination of responses to requests for records of the Assembly. In my view, Assemblyman Brodsky should either have responded in a manner consistent with the Freedom of Information Law or forwarded to the request to the records access officer, Ms. Sharon Walsh.

I note, too, that the Freedom of Information Law provides direction concerning the time and manner in which entities subject to its provisions must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Under the circumstances, you could contact the records access officer to inform her of the request or consider the request to have been denied and appeal the denial.

With respect to rights of access, in brief, as the Freedom of Information Law applies to agencies, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. As the Law applies to the State Legislature, §88(2) and (3) include reference to certain categories of records that must be disclosed. Therefore, unless records of the Legislature fall within one or more of those categories of accessible records, there is no obligation to disclose. From my perspective, it is questionable whether the record

that you requested would fall within the categories of records that must be disclosed by the State Legislature. Consequently, as a matter of law, a denial of access may be appropriate.

I point out that Assembly Rule VIII deals with public access to Assembly records and that §1 states that:

> "It is the intent of the Assembly that central administrative records maintained by the Assembly be governed by the same presumption of disclosure which governs access to executive agency records, with similar enumerated exceptions."

As such, the Assembly, by rule, has chosen to disclose or withhold its records based on standards similar to those applicable to state and local government agencies.

Section 2(2) of the rules pertains to the ability to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy". An example of an unwarranted invasion of personal privacy appearing in the ensuing provisions involves the disclosure of "names, addresses, numbers or other personal identifying details of telephone communications or mail correspondence made by or to Members of the Assembly or employees thereof."

I note that in other contexts, it has been advised that personally identifying details based on age may justifiably be withheld based on considerations of privacy. For instance, lists of senior citizens who participate in a municipality's program for the aging or lists of children who participate in a summer recreation program, indicate, by their nature, that certain people fall within particular 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.

Lastly, the Freedom of Information Law is permissive; while an entity subject to its provisions may withhold records in accordance with the grounds for denial, there is no obligation to do so [see Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)]. Therefore, even though the record sought might not be available as of right, the Assembly or Assemblyman Brodsky could choose to disclose it to you.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Richard Brodsky
Sharon Walsh

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-10004

41 State Street, Albany, New York 12231
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August 13, 1998

Mr. Theodore Kalkhuis
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kalkhuis:

I have received your letter of August 12, as well as related materials involving your efforts in gaining access to records of the Village of West Haverstraw. In short, several requests were not answered, and two appeals have not been determined within the statutory time.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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. Having reviewed your requests, the records sought would appear to be available, for none of the grounds for denial would be applicable. Nevertheless, there may be another issue of significance, notably 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 Village, to the 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 of records individually in an effort to locate those falling within the scope of a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

By means of example, among your requests were those involving copies of certificates of occupancy issued or sought within a certain time period. If those records are maintained chronologically, the task of locating them would likely be simple. However, if they are not retrievable chronologically and instead are filed only by street address or parcel number, Village officials may not have the ability to locate the records, except by reviewing all of the applications for certificates of occupancy or all certificates issued that are maintained by the Village. In that circumstance, I do not believe that the Village would be obligated to engage in that kind of effort.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
O. Fred Miller, Clerk
Karen L. Bulley, Deputy Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11005

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 17, 1998

Ms. Frances J. Thompson
[redacted]

Dear Ms. Thompson:

As you are aware, your letter of July 22 addressed to the Office of the Attorney General has been forwarded to the Committee on Open Government. In brief, you complained that a request for records sent to the New York City Law Department on April 5, 1997 had not been answered.

In this regard, I attempted to reach the Law Department's Records Access Officer, Mr. Daniel Connolly, to obtain additional information concerning the status of your request. Although a message was left asking that he return my call, I have not heard from him or any member of his staff.

Since the request was made more than a year ago, I would conjecture that it may not have reached the appropriate person or that it was lost. It is suggested that you resubmit the request if you continue to be interested in reviewing the records sought last April.

I point out for future reference that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

In an effort to enhance compliance, a copy of this response and your request will be sent to Mr. Connolly.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Daniel Connolly, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11006

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 17, 1998

E-MAIL

TO: Mr. Kenneth Warren, [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Warren:

As you are aware, I have received several communications from you recently concerning your efforts in obtaining records from the State Education Department. In addition, I have received a copy of a determination of your appeal under the Freedom of Information Law rendered by Acting Commissioner Richard H. Cate.

From my perspective, the determination is thorough, and it is clear that the Department will be making available a substantial amount of documentation following an exhaustive search for and review of the records falling within the scope of your request. Notwithstanding the foregoing, you asked that I obtain a particular record and various other information for you relating to your request.

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 obtain records on behalf of applicants or otherwise compel an agency to grant or deny access to records. For purposes of clarification, however, I offer the following comments.

It is emphasized that the Freedom of Information Law pertains to existing records, and §89(3) states in part that an agency need not create a record in response to a request. Similarly, an agency is not required by that statute to respond to questions or provide explanations of its actions or records. By means of example, you asked that I seek "a list of all information that was requested by various agencies and when it was sent." Aside from the absence of authority to obtain records for applicants, if no such list exists, an agency would not be obliged to prepare a list on behalf of an applicant.

Another example involves your desire to obtain "an explanation of this three hour time period under the Freedom of Information Law." If no written "explanation" exists, the State Education Department would not be required by that statute to prepare an explanation including the information in which you are interested. In short, an agency's duty under the Freedom of Information Law is to disclose existing records in a manner consistent with its provisions.

You also contended that you are entitled to a fee waiver. In this regard, while the federal Freedom of Information Act includes language concerning the waiver of fees, its New York counterpart does not. I point out that the federal Act pertains only to federal agencies; it has no application to records maintained by entities of state and local government. It is also noted that it has been held that an agency may charge its established fees for copies, even when the applicant is indigent [see Whitehead v. Morgenthau, 552 NYS 518 (1990)].

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: Kathy A. Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1107

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 17, 1998

Ms. Mary Buderman
District Clerk
Smithtown Central School District
26 New York Ave.
Smithtown, NY 22787-3435

The staff of the Committee on 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. Buderman:

I appreciate having received your letter of August 11 and a copy of a determination of an appeal rendered under the Freedom of Information Law by Dr. Michael B. Walsh, Superintendent of Schools.

The request involves notes of a meeting of the Committee on Special Education sought by the parent of a student who was the subject of a discussion. The request was denied by the Superintendent on the ground that "the notes...are not a public record." I respectfully disagree and offer the following comments.

First, based on the language of the Freedom of Information Law and its judicial interpretation, the notes would, in my opinion, clearly fall within its scope. 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. Nevertheless, if a parent of student requests records pertaining to his or her child, the parent ordinarily has rights of access to those portions of records that are personally identifiable to their children. If the notes pertain to one student and are shared by the maker of the notes, I believe that they would be available to the parent under FERPA.

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, an administrator or teacher 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.

Second, also 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..."

In view of 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 point out that the provisions relating to the retention and disposal of records are carried out by a unit of the State Education Department, the State Archives and Records Administration. Having communicated with that agency in the past regarding a similar issue, I believe that the notes are "records" for purposes of the Arts and Cultural Affairs Law. Further, in Schedule ED-1, section 3.[139] entitled "Student's psychological or social assessment file", records characterized as "Source materials used in preparing report, including 'protocols', tests and notes, for students classified as special education" must be retained by a school district for a minimum of six years.

In sum, if my understanding of the matter is accurate, the notes are "records" that should be available to the parent in accordance with preceding rationale.

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
cc: Lori Haver

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11008

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August 17, 1998

Mr. Jimmy Cheng
94-A-5397
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. Cheng:

I have received your letter of August 7 in which you sought an advisory opinion concerning delays in responding to your requests 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 and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Department to determine appeals is Susan Petito, Special Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: John G. Sultana, Records Access Officer
Susan Petito, Special Counsel

STATE OF NEW YORK
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August 17, 1998

Mr. Dwayne Mann
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Mann:

I have received your letter of August 10. You wrote that you are attempting to know whether a certain student attended the New York University Medical School. As such, you asked for the name and address of the "FOIA officer."

In this regard, as indicated to you during our telephone conversation, New York University, which is a private institution, is not subject to the Freedom of Information Law. That statute pertains to agencies, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally includes entities of state and local government within its scope; a private educational institution would fall beyond its coverage.

However, I believe that New York University is subject to the Family Educational Rights and Privacy Act (FERPA; 20 USC §1232g), which 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 "eligible student" is defined in the Code of Federal Regulations to mean "student who has reached 18 years of age or is attending an institution of post-secondary education" (34 CFR §99.3).

An exception to the rule of confidentiality in FERPA involves "directory information", which is defined in the regulations of the Department of Education (§99.3) 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 to eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Specifically, §99.37 of the regulations promulgated pursuant to FERPA state in relevant part that:

> "(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --
>
> (1) The types of personally identifiable information that the agency or institution has designated as directory information;
>
> (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
>
> (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information."

If the University has adopted a policy on directory information, I would conjecture that it would respond to a written request for information regarding a student's attendance in writing by either confirming the student's attendance or by indicating that the student, according to the directory, did not attend.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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August 17, 1998

Mr. Kevin Smyth
93-B-1546
POB 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. Smyth:

I have received your letter of August 9 in which you sought assistance concerning a request made under the Freedom of Information Law for records of the Department of Correctional Services.

You wrote that you sought "a copy of records in which the date of the change of location of a prisoner from one area in this prison to protective custody is displayed." You added that "[t]his information is revealed in a document called the 'change sheet' which is distributed daily throughout the prison..." Nevertheless, the request was denied due to "privacy considerations."

If the record is as you described it, I believe that it would be available under the Freedom of Information Law. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

As you inferred, one of the grounds for denial enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b). Nevertheless, the regulations promulgated by the Department of Correctional Services indicate that various kinds of information pertaining to inmates are public, including "commitment information" and "departmental actions regarding confinement and release." I note, too, that in Bensing v. LeFevre [506 NYS2d 811 (1986)], it was held that disclosure of the names of inmates and their cell locations (i.e., in a special housing unit) would not result in an unwarranted invasion of personal privacy and must be disclosed.

Lastly, since you addressed your appeal to Commissioner Goord, I point out that 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

cc: Anthony J. Annucci, Counsel

STATE OF NEW YORK
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August 19, 1998

Mr. William H. Hill
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hill:

I have received your letter of August 9, as well as the correspondence attached to it.

According to the materials, on May 27 and July 17 you wrote, respectively, to the Supervisor of the Town of Babylon and the Town's records access officer seeking information relating to a lease agreement between the Town and Greenwich Capital Markets for certain beach leases. In the initial request, you sought information in response to series of questions relating to payments and services rendered; in the latter, you sought records relating to the agreement referenced above, including invoices, the front and back of checks and correspondence between the Town and individuals or corporations pertaining to claims or payments relative to a transaction. As of the date of your letter to this office, you had not received a response from either the Supervisor or the records access officer. Consequently, you have requested assistance in the matter.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, in view of the nature of your initial request, I point out that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires agencies to provide information per se; rather, it requires agencies to disclose records to the extent provided by law. As such, while an agency official may choose to answer questions or to provide information by responding to questions, those steps would represent actions beyond the scope of the requirements of the Freedom of Information Law. Moreover, the Freedom of Information pertains to existing records. Section 89(3) of that statute states in part that an agency need not create a record in response to a request. Therefore, if, for example, there is no record indicating a total amount paid to a particular person to date, the Town would not be required to prepare a record on your behalf reflective of a total. Similarly, if there is no record indicating the necessity "to notate the payment", the Town would not be required to prepare a record consisting of an explanation.

Third, insofar as 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, the kinds of records that you requested, with one exception, should be made available in their entirety. Invoices, books of account, records of payments and services rendered, correspondence between a municipality and a commercial entity or contractor, as well as similar documentation, must be disclosed, for none of the grounds for denial would be applicable.

The one aspect of your request which in my view could be denied involves the backs of checks made payable to individuals. One of the grounds for denial, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While the front of a check would indicate an expenditure made by government that would clearly be available, the back of a check might indicated how or where an individual chooses to spend

or use his or her money. In my opinion, the manner in which an individual spends his or her own funds is unrelated to any governmental function; rather, I believe that it involves personal information that could be withheld on the ground that disclosure would result in an unwarranted invasion of personal privacy.

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:tt

cc: Hon. Richard H. Schaffer, Supervisor
Records Access Officer

STATE OF NEW YORK
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August 19, 1998

Mr. Ronald Herbert
96-A-5921
Eastern NY 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. Herbert:

I have received your letter of July 27, which reached this office on August 12. You referred to a request for records of the Sullivan County District Attorney that was denied in part, and you referred to Rosario and Brady as justification for the belief that you should have the ability to obtain the records.

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].

More 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, (1996). Nevertheless, rights conferred by the Freedom of Information Law may be different from or less extensive than in discovery.

Second, 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).

In view of 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.

Third, insofar as your request involves records not previously to you or your attorney or that are no longer in possession of yourself or attorney, I believe that the Freedom of Information Law would govern 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 decision by the Court of Appeals cited earlier, which dealt with complaint follow up reports (which are characterized by the New York City Police Department as "DD-5'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, supra, 276-277).

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.

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: Hon. Stephen F. Lungen, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1013

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

Mrs. Diane Connolly
[redacted]

The staff of the Committee on 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. Connolly:

I have received your letter of August 18 in which you sought assistance concerning your unsuccessful efforts in obtaining records from the Mt. Pleasant School District. In short, you have encountered a series of delays, and it appears that the "Freedom of Information Coordinator" is unable to carry out her duties.

In this regard, I offer the following comments.

First, 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).

Second, §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 an agency 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. Assuming that the Freedom of Information Coordinator is the records access officer, I believe that she has the responsibility of ensuring that District personnel comply with the Freedom of Information Law in response to initial requests.

In addition, 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).

Lastly, the records sought include a curriculum report pertaining to a middle school within the District and a "GAP Analysis." While I am unfamiliar with the contents of the records, I point out that, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

It would appear that one of the grounds for denial would be pertinent to the kinds of records sought. It emphasized, however, that due to its structure, that provision often requires 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 leading decision concerning §87(2)(g) rendered by the Court of Appeals, the state's highest court, a contention 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 was rejected. In so holding it was 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 record 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) id., 276-277).]

Lastly, if the records have been determined to be available by another agency, such as the State Education Department, I do not believe that the District could validly withhold them.

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:tt

cc: Board of Education
Joseph Zambito, Superintendent
District Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1104

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
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August 19, 1998

Mr. Donald Melendez
93-A-1514
Altona Correctional Facility
555 Devils Den road
Altona, NY 12910

Dear Mr. Melendez:

Your letter of August 12 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 guidance concerning the Freedom of Information Law.

You requested copies of "any new policy, rule or procedures governing parole as of 1997 of January up until now." In this regard, the Department of State performs no function directly relating to parole and it does not maintain the records sought in a manner in which they can be retrieved.

As a general matter, a request for records should be directed to the "records access officer" at the agency that possesses the records. Pursuant to the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401), the records access officer has the duty of coordinating an agency's response to requests. In view of the nature of your request, it is suggested that you send a request to the records access officer at the Division of Parole, 97 Central Avenue, Albany, NY 12206.

It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request should include sufficient detail to enable agency staff to locate and identify 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-1105

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

Mr. Nathaniel Sims
78-A-2908
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. Sims:

I have received your letter of August 10 and the materials attached to it. You have requested an advisory opinion, but I am not sure of the nature of the question. If I understand the matter correctly, you are attempting to obtain a copy of the transcript of your trial.

In this regard, the primary function of the Committee on Open Government involves providing advice concerning the Freedom of Information Law, which does not apply to a transcript of a judicial proceeding.

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.

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-1106

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

Mr. Irving Serrano
93-R-0029 B-16-B
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-5000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Serrano:

I have received your letter of August 11 in which you sought assistance in obtaining information from a correctional facility. If I understand your question correctly, you are interested in obtaining log entries or similar records indicating when an inmate was transferred to another facility or unit, such as a Special Housing Unit (SHU).

If my assumption concerning the nature of the records sought is accurate, I believe that they would be available 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 grounds for denial appearing in §87(2)(a) through (i) of the Law.

One of the grounds for denial enables an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy" [see §87(2)(b). Nevertheless, the regulations promulgated by the Department of Correctional Services indicate that various kinds of information pertaining to inmates are public, including "commitment information" and "departmental actions regarding confinement and release." I note, too, that in Bensing v. LeFevre [506 NYS2d 811 (1986)], it was held that disclosure of the names of inmates and their cell locations (i.e., in a special housing unit) would not result in an unwarranted invasion of personal privacy and must 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

FOIL-AO - 1107

41 State Street, Albany, New York 12231
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August 19, 1998

Mr. William Keegan
92-A-0276
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. Keegan:

I have received your letter of August 10. You have asked "how long exactly, or a general time frame for which an agency that handling/dealing with a F.O.I.L. request can be held accountable, prior to filing an Article 78 against such agency for constructive denial..."

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.

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).

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 1108

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

Mr. Wade M. Goldman
[redacted]

Dear Mr. Goldman:

I have received your letter of August 10 in which you sought assistance in relation to a request for information directed to the Office of Unclaimed Funds.

In an effort to obtain information concerning the status of your request, I spoke with staff persons in that office, including Mr. Stanley Primett, Supervisor of the agency's hotline. He informed me that you should have obtained or will soon obtain the information sought to the extent that the agency has the ability to provide it. Mr. Primett indicated that an "itemized list" of all unclaimed funds has been prepared and that his records indicate that there are no items which are yet unclaimed. He added, however, that it is possible that additional items will in the future be made known to his office that do not appear in its database at present. Finally, Mr. Primett informed me that his research does not indicate that any checks issued were not cashed and that any checks that remain uncashed would appear on his computer system.

While it appears that virtually all of the information sought has been or will be disclosed to you, I note for future reference 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 for information. If the information does not exist, an agency is not obliged to obtain it or prepare a new record in order to satisfy an applicant. Similarly, an agency is not required to develop new computer programs in an effort to generate requested data.

If you have questions regarding the foregoing, please feel free to contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Stanley Primett

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1119

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 19, 1998

E-MAIL

TO: Gerald Creps <gcreps@scott.skidmore.edu>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Creps:

As you are aware, I have received your email communication of August 13. You have questioned the intent of an advisory opinion prepared in 1994 (FOIL AO 8549) in relation to a denial of a request for records by Ms. Shirley Murray, Wilton Town Clerk.

In brief, that opinion dealt with a situation in which the entire content of a file had been disclosed to an individual and whether the agency was obliged to make the file available again to the same person. My response was based largely on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)]. As I understand the holding in that case, an agency may deny access to a record if it can prove that the record was previously made available to the person seeking it or to his or her representative. If such proof can be offered, the person seeking the record would have the right to obtain it again if he (or she) can demonstrate that neither he nor his representative any longer maintains the record.

In the context of your inquiry, if Ms. Murray has correspondence, a log or a similar notation indicating that certain records were made available to you in the past, she is not required, in my opinion, to make the same records available again unless you can prove that you (or your representative) do not have possession of the record. Stated differently, both the agency and the applicant for the records would be required to demonstrate some sort of proof. The agency would have to prove, presumably by means of written material, that a record was disclosed to an individual. For that individual to obtain a second copy, I believe that he must prove that the record is no longer in his possession or his representative's possession.

Since you referred to federal constitutional issues, I do not believe that those issues are pertinent here, for the matter is governed by the New York Freedom of Information Law and its judicial interpretation.

Lastly, you asked whether town officials must answer your questions or whether they may refer you to the town attorney. In this regard, I know of no law that generally requires town or other government officials to respond to questions. Certainly they may do so if responding is within the scope of their duties; nevertheless, there is no obligation to do so.

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. Shirley Murray

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-4020

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 21, 1998

Mr. Jose Perez
96-A-7250
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Perez:

I have received your letter of August 13 in which you complained that a request for records has not been answered in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person at the Department of Correctional Services designated 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: Joseph V. Williams, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1102

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 21, 1998

Mr. Reginald Mitchell
91-A-2025
Groveland Correctional Facility
P.O. Box 104
Sonyea, NY 14556-0001

Dear Mr. Mitchell:

As you may be aware, the Attorney General has forwarded a copy of your letter to the Oneida County Court to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to advise with respect to the Freedom of Information Law.

Having reviewed your request for records apparently maintained by that court, 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 provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that the foregoing serves to clarify your understanding of the matter and 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 - 1402

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 21, 1998

Mr. Anthony Bender
96-B-1936
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. Bender:

I have received your letter of August 17 and the materials attached to it. Based on their contents, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) states in part that an agency is not required to create a record in response to a request. As I understand the matter, the record or records in which you are interested do not exist and are not maintained by Onondaga County. If that is so, the Freedom of Information Law does not apply.

It is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

Second, since you also complained about delays, 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Martin Farrell
Sgt. Thomas J. Metz

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

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 August 19. You raised a question concerning "discovery" in a criminal proceeding.

In this regard, discovery in a criminal proceeding pertains to the effort on the part of a defendant to obtain records and information from a prosecutor pursuant to provisions of the Criminal Procedure Law (CPL) relevant to the case and which may be exculpatory.

I note that 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, 89NY 2d 267, (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.

Since you indicated that you may be in this area on certain dates and expressed an interest in discussing issues of importance to you, I regret to inform you that I will be on vacation for that period and during the entirety of the work week beginning Monday, August 31. I note, too, that there is no Radisson Hotel in the Albany area.

I hope that your stay will be beneficial 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 - 11024

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

Mr. Pedro Busted
93-A-1375
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. Busted:

I have received your letter of August 18. You wrote that you reviewed a file pertaining to you maintained by the Department of Correctional Services and asked that inaccuracies be corrected. The Department has indicated that the corrections have been made, and you asked whether you have the right under the Freedom of Information Law to review the records again.

In this regard, if a copy of a record was made available to you in the past, I do not believe that you would have a right to obtain a second copy of the same record unless it could be proven that neither you nor your attorney, for example, any longer maintains a copy of the record [see Moore v. Santucci, 151 AD2d 677 (1989)]. In this instance, however, since the Department has indicated that changes in the records have been made, a second request would, in my view, involve an attempt to review new or altered records. If that is so, I believe that you would have the right under the Freedom of Information Law to request, inspect and copy the records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 1025

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

Mr. Kenneth A. Crippen
96-A-5069
Orleans Correctional Facility
3531 Gains Basin Road
Albion, NY 14411-9199

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Crippen:

I have received your letter of August 16 in which you sought assistance in obtaining what appear to be medical records from the Visiting Nurse Service Association of Schenectady.

In this regard, the Freedom of Information Law pertains to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally includes entities of state and local government within its coverage; it would not include a private organization such as the Visiting Nurse Service Association. Similarly, the other statute that you cited, the federal Freedom of Information Act, applies to records maintained by federal agencies; it would not apply in this instance.

Nevertheless, I point out that a different statute, §18 of the Public Health Law, generally grants rights of access to medical records to the subjects of the records. It is suggested that you send a new request to the Association 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

FOIL-AO-1026

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

Mr. Thomas Woodman
The Gazette Newspapers
2345 Maxon Road
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, unless otherwise indicated.

Dear Mr. Woodman:

I have received your letter of August 20 and the correspondence related to it. You have sought an advisory opinion concerning the propriety of a denial of access to a record by the Mohonasen Central School District.

The matter pertains to the attempts by a Gazette reporter, Michael DeMasi, to obtain records concerning a teacher employed by the District. In a request dated August 5, Mr. DeMasi wrote as follows:

> "...I hereby request any records that reflect any action involving teacher James Constantino, arising our of any allegation or wrongdoing impropriety or misconduct.
>
> This includes any document placed in Mr. Constantino's personnel file in connection with any such allegation. This includes, but is not limited to, any agreement or settlement in which the district and Mr. Constantino agreed with respect to the action relating to the allegation.
>
> Also, I request any correspondence received by the school district concerning Mr. Constantino. This includes, but is not limted to, requests that students not be assigned to classes taught by Mr. Constantino. I understand that names or other identifying details of the parents and/or students could be withheld to protect their privacy."

In a response to your request dated August 11, the District's records access officer, Ms. Kathleen Wetmore, denied access, stating that:

> "The documents you descrive would be personnel file documents and with the exception of any document covered by your request for 'any agreement or settlement', would not be statistical or factual tabulations or data instructions to staff affecting the public, or final agency policy or determinations. Such records, if in existence, would be exempt from disclosure both as inter-agency material and as records which if disclosed, would constitute an unwarranted invasion of personnel privacy."

In a second letter prepared on the following day, Ms. Wetmore added that:

> "Regardless of whether documents such as you described are kept in the personnel file, such documents would be exempt from disclosure for the reasons set forth in the August 11, 1998 denial. This would include 'any correspondence received by the school district concerning Mr. Constantino, including but not limited to requests that students not be assigned to classes taught by Mr. Constantino'."

Most recently, I received a letter from the District Clerk indicating that the Board of Education voted on August 17 to deny Mr. DeMasi's appeal of the denial of his request for essentially the same reasons as those offered by Ms. Wetmore.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I note that it has been held in variety of circumstances that an agreement 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, a confidentiality agreement would in my view be ineffective and invalid insofar as it is inconsistent with the grounds for denial appearing in the Freedom of Information Law.

Second, since the record relates to an employee, I point out that there is nothing in the Freedom of Information Law that deals specifically with personnel records or personnel files. Further, the nature and content of so-called personnel files may differ from one agency to another, and from one employee to another. In any case, neither the characterization of documents as "personnel records" nor their placement in personnel files would necessarily render those documents "confidential" or deniable under the Freedom of Information Law (see Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980). On the contrary, the contents of those documents serve as the relevant factors in determining the extent to which they are available or deniable under the Freedom of Information Law. Two of the grounds for denial are relevant to an analysis of the matter; neither, however, would likely 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.

In another decision involving a settlement agreement between a school district and a teacher, it was held in Anonymous v. Board of Education [616 NYS 2d 867 (1994)] that:

> "...it is disingenuous for petitioner to argue that public disclosure is permissible...only where an employee is found guilty of a specific charge. The settlement agreement at issue in the instant case contains the petitioner's express admission of guilt to a number of charges and specifications. This court does not perceive the distinction between a finding of guilt after a hearing and an admission of guilt insofar as protection from disclosure is concerned" (id., 870).

The court also referred to contentions involving privacy as follows:

> "Petitioner contends that disclosure of the terms of the settlement at issue in this case would constitute an unwarranted invasion of his privacy prohibited by Public Officers Law § 87(2)(b). Public Officers Law § 89(2)(b) defines an unwarranted invasion of personal privacy as, in pertinent part, '(i) disclosure of employment, medical or credit histories or personal references of applicants for employment.' Petitioner argues that the agreement itself provides that it shall become part of his personnel file and that material in his personnel file is exempt from disclosure..." (id.).

In response to those contentions, the decision stated that:

> "This court rejects that conclusion as establishing an exemption from disclosure not created by statute (Public Officers Law § 87[2][a]), and not within the contemplation of the 'employment, medical or credit history' language found under the definition of 'unwarranted invasion of personal privacy' at Public Officers Law § 89(2)(b)(i). In fact, the information sought in the instant case, i.e., the terms of settlement of charges of misconduct lodged against a teacher by the Board of Education, is not information in which petitioner has any reasonable expectation of privacy where the agreement contains the teacher's admission to much of the misconduct charged. The agreement does not contain details of the petitioner's personal history-but it does contain the details of admitted misconduct toward students, as well as the agreed penalty. The information is clearly of significant interest to the public, insofar as it is a final determination and disposition of matters within the work of the Board of Education and reveals the process of and basis for government decision-making. This is not a case where petitioner is to be protected from possible harm to his professional reputation from unfounded accusations (*Johnson Newspaper Corp. v. Melino*, 77 N.Y.2d 1, 563 N.Y.S.2d 380, 564 N.E.ed 1046), for this court regards the petitioner's admission to the conduct described in the agreement as the equivalent of founded accusations. As such, the agreement is tantamount to a final agency determination not falling within the privacy exemption of FOIL 'since it was not a disclosure of employment history.'" (id., 871).

Most recently, in LaRocca v. Board of Education of Jericho Union Free School District [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).

The record of "agreement or settlement" to which Ms. Wetmore referred is, in my view, analogous the records considered in the decisions cited in the preceding analysis and, therefore, must be disclosed.

With respect to other aspect of the request, correspondence received by the District in which requests were made that students not be assigned to classes taught by a particular teacher, for reasons discussed earlier, insofar as those materials include reference to unsubstantiated allegations regarding the conduct of the teacher, I believe that those portions of the records may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

However, records received from students or parents would be neither inter-agency nor intra-agency materials. Those persons would not be officers or employees of the District (the agency); consequently, §87(2)(g) would not serve as basis for withholding those records.

Most relevant to determining access to those records 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.

If, for example, a letter from a parent consists only of a request that a child not be assigned to a particular teacher's class and includes no statement relating to the conduct of the teacher, the letter would in my opinion be accessible following the disclosure of any personally identifying details pertaining to a student.

In an effort to enhance compliance with and understanding of applicable law, copies of this opinion will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Education
Kathleen Wetmore
L. Oliver Robinson

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

Mr. Ron Herbert
96-A-5921
Eastern New York 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. Herbert:

I have received your recent undated letter, which reached this office on August 21. Having reviewed the correspondence attached to it, I believe that the issues raised in that letter were extensively considered in an opinion rendered on August 19.

While I do not believe that it is necessary to reiterate the content of or advice rendered in that opinion, since one of the requests for records involves the Port Authority of New York and New Jersey, I note that neither New York nor New Jersey has the ability to impose its laws beyond its borders. As you may be aware, §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

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, I do not believe that the Port Authority is subject to the Freedom of Information Law.

As you requested, the materials attached to your letter are being returned to you.

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-1028

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 24, 1998

Mr. Luis Rivera
95-B-2531 (S-Block - B1-16T)
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rivera:

I have received your letter of August 19. You have sought guidance concerning the means by which you might obtain the name of an officer who worked on March 3, 1997 in a particular housing unit at the Wyoming Correctional Facility. In this regard, I offer the following comments.

First, pursuant to the rules and regulations promulgated by the Department of Correctional Services, a request for records kept at a correctional facility may be directed to the facility superintendent or his designee.

Second, if a record exists identifying employees assigned to a particular unit on a particular date, I believe that those records would be available under the Freedom of Information Law.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in section 87(2)(a) through (i) of the Law. Although two of the grounds for denial relate to the matter, 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.

The records in question could be characterized as "intra-agency materials." However, they would consist of "statistical or factual" information accessible under §87(2)(g)(i).

Perhaps most relevant is §87(2)(b), which permits an agency to withhold record or portions of records when disclosure would result in "an unwarranted invasion of personal privacy." The Committee has advised and the courts have upheld the notion that records that are relevant to the performance of the official duties of public employees are generally available, for disclosure in such instances would result in a permissible as opposed to an unwarranted invasion of personal privacy [Gannett, supra; Capital Newspapers v. Burns, 109 AD 2d 292, aff'd 67 NY 2d 562 (1986) ; Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, October 30, 1980; Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975) ; and Montes v. State, 406 NYS 664 (Court of Claims 1978)].

In a decision affirmed by the State's highest court dealing with attendance records, specifically those indicating the days and dates of sick leave claimed by a particular employee, it was found, in essence, that disclosure would result in a permissible rather than an unwarranted invasion of personal privacy (see Capital Newspapers, supra).

Again, based on the preceding analysis, if the record sought exists, I believe that it must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Superintendent, Wyoming Correctional Facility

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1709

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 25, 1998

Ms. Teri Knight
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Knight:

I have received your letter of August 20 in which you sought guidance in obtaining certain records from the Town of Verona Justice Court.

You stated that you are the victim of a crime and that the defendant was convicted and given the option of making restitution or spending two days in jail. Although you indicated that the defendant has the resources to make restitution, he chose to spend the two days in jail. Since you want to pursue the matter in a civil proceeding, you wrote that you need the records pertaining to the incident. Nevertheless, you indicated that your requests directed to the court have been "ignored".

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, does not apply to the courts or court records. That statute pertains to agency records, and §86(3) defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

While court records are not subject to the Freedom of Information Law, they are often available under other statutes. For example, in this instance, the court is a town justice court, and §2019-a of the Uniform Justice Court Act, entitled "Justices' criminal records and docket", states in relevant part that "[t]he records and dockets of the court except as otherwise provided by law shall be at reasonable times open for inspection to the public..."

It is suggested that you resubmit your request to the clerk of the Town of Verona Justice Court, citing the statute referenced above as the basis of your request.

In the alternative, since the law enforcement agency that made the arrest and the office of the Oneida County District Attorney are "agencies" subject to the Freedom of Information Law, requests could be made to those agencies under that statute. I note that the regulations promulgated by the Committee on Open Government require that each agency designated one or more persons as "records access officer." That person has the duty of coordinating the agency's response to requests, and a request for agency records should ordinarily be directed to him or her.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since you are the victim, since the criminal proceeding is closed, and since the defendant was convicted, it is unlikely in my opinion that any of the grounds for denial would be pertinent with respect to the kinds of records in which you are interested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Justice Court, Town of Verona

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1030

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

August 25, 1998

Mr. Elis J. DeLia, 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. DeLia:

I have received your letter of August 21 and the materials attached to it. You requested an advisory opinion concerning the propriety of a denial of access to a record by the Town of New Hartford.

You requested a "copy of the legal opinion/research presented to Town Bd. by Town Atty...giving opinion &/or town/state law which allows Town Supervisor to be appointed economic development director through budget process." The Town Clerk denied the request on the ground that "the opinion is of an inter-agency nature and was an aid in a decision-making process..."

From my perspective, the denial of your request was consistent with law. In this regard, I offer the following comments.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision to which the Town Clerk referred, §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 a decision rendered by the Court of Appeals, the State's highest court, that considered the extent to which an agency may deny access under §87(2)(g), it was determined that intent of that provision "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])... this limited aim [is] to safeguard internal government consultations and deliberations..."

In short, based on the foregoing, I believe that the denial of access to the record in question was justifiable.

I note that another basis for a denial of access also could likely have been asserted. The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his client and that records prepared in conjunction with an attorney-client relationship are considered privileged under §4503 of the Civil Practice Law and Rules. Further, since the enactment of the Freedom of Information Law, it has been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

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: Gail Wolanin Young, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 1103

41 State Street, Albany, New York 12231
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August 25, 1998

Mr. John 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 letter of August 18, as well as the correspondence attached to it. You have sought an advisory opinion concerning your unsuccessful efforts in obtaining certain records from the Town of Evans.

Your request involves "information on final determinations on all discipline records where there were final misconducts found." The determinations pertain to:

"1. Town of Evans Police Dept. for past the 15 yrs.
2. Town of Evans Water Dept. for past the 15 yrs.
3. Town of Evans Parks Dept. for the past 10 yrs.
4. Town of Evans Highway Dept. for the past 10 yrs."

In the latest response to your request, the Town Attorney wrote that the request "is over-broad and lacks specificity and also seeks an unreasonable invasion of personal privacy and is otherwise exempt."

In this regard, I offer the following comments.

First, from my perspective, the initial 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 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. It is possible that records falling within the scope of the request, particularly those involving events occurring years ago, 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.

In short, it is reiterated that insofar as the records sought can be located with reasonable effort, the request would "reasonably describe" the records. I would conjecture that determinations reached within the recent past could likely be found readily. If the older determinations are not kept in a manner that permits their retrieval without unreasonable effort, it would be unlikely in my view that that aspect of the request would meet the standard of reasonably describing.

Second, to the extent that the records can be located, it is emphasized that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, three of the grounds for denial are pertinent in consideration of rights of access to the records in question.

The provision to which the Town Attorney alluded, §87(2)(b), 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].

A second ground for denial of significance, §87(2)(g), states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld. Insofar as a request involves final agency determinations, I believe that those determinations must be disclosed, again, unless a different ground for denial could be asserted.

In terms of the judicial interpretation of the Freedom of Information Law, 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.

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.

In sum, it has clearly been established by the courts that disclosure of determinations indicating that public employees have been found to have engaged in misconduct would not constitute an unwarranted invasion of personal privacy.

I note that an additional consideration relates to records concerning police officers. Section 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)].

I note that recent decision rendered by the Appellate Division, Third Department, reversed a lower court decision in which it was held that the names of police officers who had been reprimanded and which were sought by newspapers were shielded by §50-a of the Civil Rights Law [Daily Gazette et al. v. City of Schenectady, 673 NYS 2d 783, ___AD2d___, (1998)]. In rejecting the lower court's conclusion that police officers and others whose records are the subject of §50-a "are afforded an almost impenetrable cloak of secrecy", the Appellate Division reviewed the holdings of the Court of Appeals cited earlier and found that:

> "Clearly, the purpose of the information request in Prisoners' Legal Servs. was potentially adversarial or litigious in nature. However, the Court of Appeals was careful to contrast the scenario with one where, as here in Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, (supra), the media is merely seeking the information to report as news and not with even a remote view toward any litigation. In making a key distinction between the request in Capital Newspapers and the FOIL request before it in Prisoners' Legal Services, the Court of Appeals, referring to its holding in Capital Newspapers, states:
>
> > * * * we by no means suggested that the application of [§50-a] was limited to an ongoing litigation. Rather, we simply recognized that the legislative intent in enacting the [correction officer] amendment to section 50-a was to prevent release of sensitive personnel records that could be used in litigation for the purpose of harassing or embarrassing correction officers * * * records having remote or no such potential use, like those sought in Capital Newspapers, fall outside the scope of the statute (Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. Of Correctional Servs., supra, at 33, 538 N.Y.S.2d 190, 535 [citation omitted]).
>
> "The use or potential use in litigation remains a critical factor in assessing Civil Rights Law § 50-a protection as evidenced in other cases ordering disclosure. For example, in a pre-Prisoners' Legal Servs. decision, this court permitted access to a disciplinary determination action against a police investigator, citing Capital Newspapers and stating that the protection afforded under Civil Rights Law § 50-a 'is only intended to prevent access to police

personnel records * * * for purposes of harassment of the police on cross-examination or otherwise in the context of a civil or criminal action' (Matter of Scaccia v. New York State Div. of State Police, 138 A.D.2d 50, 54 530 N.Y.S.2d 309). Similarly, a post-Prisoners' Legal Servs. decision in Supreme Court, Oneida County, ordered disclosure of the final determination of a firefighter's suspension hearing to a local newspaper, citing Capital Newspapers and specifically rejecting the notion that Civil Rights Law § 50-a(1) prohibited its release concluding:

> * * *the court finds that in this non-litigation context, [petitioner newspaper] is entitled to disclosure of the final determination in this fireman's suspension hearing, without disclosing all the supporting allegations, complaints or witness names (Matter of Rome Sentinel Co. v. City of Rome, 145 Misc 2d 183, 186, 546 N.Y.S.2d 304)" (id. at 786).

At the end of the decision, the Court held that:

> "...Prisoners' Legal Servs. did not broaden the scope of the Civil Rights Law § 50-a exemption to include FOIL requests made in a context unrelated to litigation. Accordingly, respondents have failed to demonstrate that the information requested by petitioners comes squarely within the Civil Rights Law § 50-a FOIL exemption because they have not established, in any convincing way, that the information sought would be used in existing or potential litigation. The names of the police officers involved and the respective discipline imposed must be released to petitioners" (id. at 787).

Lastly, in view of the intent of §50-a of the Civil Rights Law, if a person is no longer employed as a police officer, I do not believe that §50-a would serve as a basis for denial. In that instance, a final determination reflective of a finding of misconduct pertaining to a former police officer would in my view be available in the same manner as other public employees.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: J. Grant Zajas, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1103

41 State Street, Albany, New York 12231
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August 25, 1998

Mr. Richard Bernard Lyon
82-C-0626
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. Lyon:

I have received your letter of August 13, which reached this office on August 24.

You have raised a variety of issues relating to your attempt to obtain records pertaining to your case from the Steuben County District Attorney.

You asked initially whether an office of a district attorney is subject to the Freedom of Information Law. In this regard, 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, it is clear that an office of a district attorney constitutes an "agency" subject to the Freedom of Information Law.

Second, pursuant to §87(1) of the Freedom of Information Law, the governing body of a public corporation is required to adopt rules and regulations pertaining to the procedural implementation of the Law. One of the duties that must be accomplished involves the designation of one or more persons as "records access officer" (21 NYCRR Part 1401). The records access officer has the duty of coordinating an agency's response to requests, and requests ordinarily should be directed to that person.

Based upon the correspondence attached to your letter, it appears that Christine Kane has been designated as records access officer for agencies within Steuben County. Consequently, it is suggested that you heed the response offered by the Chairman of the County Legislature and direct your request to Ms. Kane.

In my view, if a recipient of a request is not the records access officer, he or she should either respond to the request in a manner consistent with the Freedom of Information Law or forward the request to the records access officer.

It is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Insofar as your request cited the Freedom of Information Law, I believe that it was proper. The cases you cited, i.e., Rosario and Brady, deal with discovery and are irrelevant when a request is made under the Freedom of Information Law. 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 (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. 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 the holding in Gould as it pertained to records 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, it was determined that the agency could not claim that the 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.

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.

It is also noted that in a decision concerning a request for records maintained by the office of a district attorney that would ordinarily be exempted from disclosure under the Freedom of Information Law, it was held that "once the statements have been used in open court, they have lost their cloak of confidentiality and are available for inspection by a member of the public" [see Moore v. Santucci, 151 AD 2d 677, 679 (1989)]. Based upon that decision, it appears that records introduced into evidence or disclosed during a public judicial proceeding should be available. 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, you asked whether it would be more appropriate to initiate an Article 78 proceeding or a "CPL 440.10(1) motion" as a "vehicle to obtain the information" in which you are interested. I cannot offer legal advice concerning matters unrelated to the Freedom of Information Law. Since §440.10 of the CPL involves a motion to vacate a judgment, issues regarding the use of that provision are beyond the jurisdiction or expertise of this office.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. John C. Tunney, District Attorney
Hon. Stoner E. Horey, M.D., Chairman
Christine Kane

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1033

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August 26, 1998

Hon. Cindy W. Suitor
Town Clerk
Town of Niagara
7105 Lockport Road
Niagara Falls, NY 14305

The staff of the Committee on 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. Suitor:

I have received your letter of August 25 and the materials relating to it.

As I understand the matter, following a request for bills pertaining to a certain period of time, you acknowledged the receipt of the request and indicated that you would contact the applicant in order to advise him of the time when the records would be made available. Soon after preparing that acknowledgement, you received a memorandum from the Town Attorney in which he indicated that he would respond on behalf of the Town. A second memorandum was sent to you later the same day in which the Town Attorney "directed [you] not to produce any materials...at this time" and "to await further instruction" from him.

You wrote that it is your "understanding that it is [your] responsibility to produce public records and that the attorney for the Town can not direct [you] not to do so." If you, in your capacity as Town Clerk, have been designated as records access officer, I would agree with your contention. In this regard, I offer the following comments.

By way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural aspects of the Law (see 21 NYCRR Part 1401). In turn, §87(1)(a) of the Law states that:

> "the governing body of each public corporation shall promulgate uniform rules and regulations for all agencies in such public

> corporation pursuant to such general rules and regulations as may be promulgated by the committee on open government in conformity with the provisions of this article, pertaining to the administration of this article."

In this instance, the governing body of a public corporation, the Town Board, is required to promulgate appropriate rules and regulations consistent with those adopted by the Committee on Open Government and with the Freedom of Information Law.

The initial responsibility to deal with requests is borne by an agency's records access officer, and the Committee's regulations provide direction concerning the designation and duties of a records access officer. Specifically, §1401.2 of the regulations provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so."

As such, the Town Board has the ability to designate "one or more persons as records access officer". Further, §1401.2(b) of the regulations describes the duties of a records access officer, including the duty to coordinate the agency's response to requests. If you, as Town Clerk, have been designated records access officer, I believe that you have the authority to make initial determinations to grant or deny access to records in response to requests made under the Freedom of Information Law; the Town Attorney would not have such authority.

Further, the kinds of records that have been requested would in my opinion generally be accessible. 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. Books of account, vouchers, bills and similar records reflective of revenues and expenditures associated with local governments have long been available (see General Municipal Law, §51).

Moreover, records that are equivalent in substance to those requested are required to be maintained and made available pursuant to §29(4) of the Town Law. That provision states that the supervisor:

> "Shall keep an accurate and complete account of the receipt and disbursement of all moneys which shall come into his hands by virtue of his office, in books of account in the form prescribed by the state

> department of audit and control for all expenditures under the highway law and in books of account provided by the town for all other expenditures. Such books of account shall be public records, open and available for inspection at all reasonable hours of the day, and, upon the expiration of his term, shall be filed in the office of the town clerk."

In addition, subdivision (1) of §119 of the Town Law states in part that:

> "When a claim has been audited by the town board of the town clerk shall file the same in numerical order as a public record in his office and prepare an abstract of the audited claims specifying the number of the claim, the name of the claimant, the amount allowed and the fund and appropriation account chargeable therewith and such other information as may be deemed necessary and essential, directed to the supervisor of the town, authorizing and directing him to pay to the claimant the amount allowed upon his claim."

That provision also states that "The claims shall be available for public inspection at all times during office hours."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Kevin M. Kearney, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1034

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August 27, 1998

Mr. Alfonso Rizzuto
88-A-288
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

Dear Mr. Rizzuto:

I have received your letter of August 18, which reached this office on August 26. You have appealed a denial of access to certain records by the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide guidance 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."

For your information, the person designated to determine appeals at the Department of Correctional Services is Anthony J. Annucci, Counsel to the Department.

I hope that 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-2933
FOIL-AO-1035

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August 27, 1998

Mr. James P. Lamb
President
BBI Consulting Services
405 Imperial Way
Bayport, NY 11705

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lamb:

I have received your letter of August 18 in which you requested an advisory opinion relating to both the Freedom of Information and Open Meetings Laws.

You referred to the regulation of the motor carrier industry in New York by the State Department of Transportation and particularly its Intermodal Operations Bureau. The Bureau's Carrier Assistance Section, according to your letter, conducts audits of motor carriers to ensure compliance with law. You indicated that in some instances, the Department's inquiries lead to the issuance of notices of violations, which are adjudicated before an administrative law judge at a hearing. In relation to the foregoing, you raised the following questions:

> "(1). **Is the Department's monthly hearing schedule,** which: (1) identifies the respondents scheduled to appear, the violation numbers and the Department's issuing agents; and (2) advises the date, time and location of the Department's monthly hearings, **accessible to me under the state *Freedom of Information Law.***
>
> (2). **Are the individual *Notices to Appear*** sent to carriers advising them of the date, time and location of their hearing **accessible to me under the state *Freedom of Information Law.***
>
> (3). **I would like to know if the administrative hearings referred to above are required to be open to the public under the *Open Meetings Law.*"**

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. If the Department does not prepare a monthly hearing schedule that contains the items that you described, for example, it would not be required to prepare such a record on your behalf.

Second, 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.

From my perspective, a monthly hearing schedule and notices to appear would be accessible. In short, none of the grounds for denial in my opinion would be pertinent. Although an agency has the ability to withhold records when disclosure would constitute an unwarranted invasion of personal privacy [see Freedom of Information Law, §87(2)(b)], the records in question as I understand them relate to business entities or persons acting in a business capacity. If that is so, the exception regarding the protection of privacy, which pertains only to natural persons, would be inapplicable.

Lastly, the Open Meetings Law in my view would be inapplicable. That statute pertains to meetings of public bodies, and §102(2) of the Law defines the phrase "public body" to mean an entity consisting of two or more members that performs a governmental function collectively as a body. A hearing before a single administrative law judge would not involve the presence of a public body. Moreover, §108(1) exempts from the coverage of the Open Meetings Law judicial and quasi-judicial proceedings. As I understand the matter, a hearing before an administrative law judge would be a quasi-judicial proceeding.

Notwithstanding the foregoing, I believe that the hearings in question must generally be open to the public. In a decision rendered by the Court of Appeals, the state's highest court, it was held that administrative proceedings are "presumed to be open, and may not be closed to the public unless there is demonstrated a compelling reason for closure..." [Herald Company, Inc. v. Weisenberg, 59 NY2d 378, 380 (1983)]. Based upon the holding of the Court of Appeals, I believe that the hearings at issue would be presumptively open to the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Charles Bauer
John Dearstyne

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11036

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August 28, 1998

Ms. Ruth Keels
[redacted]

The staff of the Committee on 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. Keels:

I have received your letter of August 20 in which you sought assistance concerning a request made under the Freedom of Information Law.

According to your letter, on July 13 an employee of the Town of the Town of Huntington Department of Public Safety came to your home to conduct an inspection to determine whether there was an illegal apartment. You added that he informed you "that a petition has been circulated and signed by one hundred and five people, which stated that there was illegal selling of drugs from [your] house." Your request to review the petition was denied on the ground that disclosure of the names of those who signed would constitute "an unwarranted invasion of personal privacy."

From my perspective, it is likely that the petition should have been 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. Among the grounds for denial is the provision cited by the Deputy Town Attorney, §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would result an unwarranted invasion of personal privacy.

I note that the determination of your appeal referred to the protection of privacy of "complainants." In my view, in a typical situation in which an individual complains to a government agency, the identity of the complainant may justifiably be withheld. The communication in that instance is solely between the person making the complaint and a government agency, and I believe that there is generally an expectation of privacy.

In contrast, when a petition is circulated, usually those who sign can and often do read the names of others who have signed; often, because their friends and neighbors have signed, that public expression of opinion or support for certain action appearing on a petition encourages others to add their names to it. When people sign a petition, frequently their action represents an exception if not a desire on the part of those who signed the petition that their names would be disclosed, and the submission of a petition generally represents an indication that the signatories have essentially waived the protection of privacy that they might otherwise enjoy. In short, it is my view that a petition signed by citizens is intended to publicly inform an entity of government as well as the public at large that a group of named individuals seek to express a point of view relative to a particular subject.

If my assumptions are accurate, I do not believe that the Town could justify a denial of access based on a contention that disclosure would result in an unwarranted invasion of personal privacy.

In an effort to encourage the Town to reconsider its determination, a copy of this opinion will be forwarded to the Deputy Town Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Thelma Neira, Deputy Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1037

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August 28, 1998

Ms. Wanda Lynch
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Lynch:

I have received your letter of August 20 and the materials attached to it. You have sought assistance in obtaining a copy of a complaint that you made concerning a police officer from the City of Niagara Falls. You indicated that the City's Corporation Counsel advised that access be granted following your appeal, but that the Police Chief refused to grant access to the record.

In this regard, first, from my perspective, since the person designated to determine appeals has been given the authority to grant or deny access to records by the City's governing body, that person's determination should be binding on all City employees. If the Corporation Counsel was given that authority, I believe that his determination must be heeded.

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.

As suggested in the correspondence, most relevant to the matter is the first ground for denial, §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §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, 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)].

It appears that §50-a of the Civil Rights Law could appropriately be cited as a basis for withholding the record in question from the public. I note that there is no decision of which I am aware that deals with a situation in which the person who submitted a complaint requests the complaint. In that circumstance, since the content of the record is known to the person requesting it, the rationale for withholding records under §50-a may not be applicable. Nevertheless, it is unclear in my view what the outcome would be if the issue were considered by a court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony Fera, Chief of Police
Robert P. Merino, Corporation Counsel
Elsie Paradise, City Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1038

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August 28, 1998

Ms. Tina M. London
[redacted]

Dear Ms. London:

As you are aware, your correspondence sent to the Attorney General has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to offer guidance concerning the Freedom of Information Law. In brief, the matter involves your unsuccessful efforts in obtaining records from the Department of Correctional Services.

Having reviewed the materials, I offer the following comments.

First, while I believe that the person in receipt of your request for records should have responded in a manner consistent with the Freedom of Information Law or forwarded the request to the appropriate official, I note that the regulations of the Department of Correctional Services indicate that a request for records kept at a correctional facility should be made to the facility superintendent or his designee. It appears that the records sought would be maintained at a facility, and it is suggested that a request be sent to the superintendent.

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 to determine appeals is Anthony J. Annucci, Counsel to the Department.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Since I am unaware of the contents of the records of your interest, I cannot offer specific guidance concerning rights of access. However, it is emphasized that communications between or among staff of an agency fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be

asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In addition, there are exceptions concerning the protection of personal privacy [§87(2)(b)], jeopardy to lives and safety [§87(2)(f)] and perhaps others that may be pertinent.

In an effort to enhance your understanding of the matter, enclosed is a copy of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Anthony J. Annucci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1039

41 State Street, Albany, New York 12231
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August 28, 1998

Hon. Paul J. Feiner
Supervisor
Town of Greenburgh
P.O. Box 205
Elmsford, NY 10523

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Supervisor Feiner:

I have received your letter of August 19 in which you referred to an advisory opinion addressed to you on August 13. In that opinion, it was advised that a list of senior citizens could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. You indicated that "the letter that Richard Brodsky sent to residents of Greenburgh was sent to people throughout the Town, even though some were not senior citizens", and expressed the understanding "this would change the interpretation of the law."

In this regard, in order to acquire additional information concerning the matter, I contacted Assemblyman Brodsky. He informed me that he list used for the mailing pertains to residents who are 45 years of age or over. Consequently, while your contention that some on the list are not senior citizens is accurate, the list nonetheless identifies people on the basis of an age qualification. Because the list is based upon a distinction in terms of age, my opinion is the same as that offered to you on August 13. In short, while Assemblyman Brodsky could choose to disclose the list to you, I do not believe that he would be obliged to do so.

If a list is not based upon any personal characteristics, such as age, ethnicity, income level or similar qualifier, it would likely be available, unless the list would be used for commercial or fund-raising purposes [see Freedom of Information Law, §89(2)(b)(iii)]. In this instance, because the list is based upon age, for reasons expressed in the earlier opinion, there would be no obligation, in my view, to disclose.

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: Hon. Richard Brodsky

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1040

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August 28, 1998

Mr. Vernon M. Allen
[redacted]

The staff of the Committee 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. Allen:

I have received your letter of August 18. You have raised a series of issues concerning what you characterized as "stonewalling" by the Village of Clayton concerning your request for 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)].

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.

Second, while I am unfamiliar with the specifics of your request, I note that the Village Clerk-Treasurer indicated that "it will take [her] considerable time to go into the archives and research the information you requested." Based on her statement, of possible relevance is 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 Village, 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 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. It is possible that records falling within the scope of the request, particularly those involving events occurring years ago, may be maintained in several locations by a variety of units within Village, and that those units maintain their records by means of different filing and retrieval methods.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Judith M. Cornick, Clerk-Treasurer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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August 28, 1998

Ms. Mary Lee Lasota
[redacted]

The staff of the Committee on 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. Lasota:

I have received your letter of August 23 in which you raised a variety of issues concerning the implementation of the Open Meetings and Freedom of Information Laws by the Hilton Central School District Board of Education. In the ensuing commentary, I will attempt to respond to the issues, but not necessarily in the order in which you presented them.

First, it is emphasized 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)].

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.).

I note that it has also been held that "a planned informal conference" or a "briefing session" held by a quorum of a public body would constitute a "meeting" subject to the requirements of the Open Meetings Law [see Goodson-Todman v. Kingston, 153 Ad 2d 103, 105 (1990)].

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathers to conduct public business, any such gathering would, in my opinion, constitute a "meeting" subject to the Open Meetings Law. Further, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law.

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, if the Board has entered into executive session and a member wants to discuss a matter that is not supposed to be discussed in private, you asked what the proper procedure should be. While I am not sure that I understand the question, if a public body has entered into an executive

session appropriately, but a new subject arises that does not fall within any ground for consideration in executive session, the public body in my opinion should return to an open meeting. In any situation in which a subject is being considered in executive session that should be discussed in public, it is my hope that there is always a member or other person present who is sufficiently vigilant and knowledgeable regarding the Open Meetings Law to suggest the public body discuss the issue in public.

Fourth, although it is used frequently, the term "personnel" appears nowhere in the Open Meetings Law. Although one of the grounds for entry into executive session often relates to personnel matters, from my perspective, the term is overused and is frequently cited in a manner that is misleading or causes unnecessary confusion. To be sure, some issues involving "personnel" may be properly considered in an executive session; others, in my view, cannot. Further, certain matters that have nothing to do with personnel may be discussed in private under the provision that is ordinarily cited to discuss personnel.

The language of the so-called "personnel" exception, §105(1)(f) of the Open Meetings Law, is limited and precise. In terms of legislative history, as originally enacted, the provision in question permitted a public body to enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the language quoted above, public bodies often convened executive sessions to discuss matters that dealt with "personnel" generally, tangentially, or in relation to policy concerns. However, the Committee consistently advised that the provision was intended largely to protect privacy and not to shield matters of policy under the guise of privacy.

To attempt to clarify the Law, the Committee recommended a series of amendments to the Open Meetings Law, several of which became effective on October 1, 1979. The recommendation made by the Committee regarding §105(1)(f) was enacted and states that a public body may enter into an executive session to discuss:

> "...the medical, financial, credit or employment history of a <u>particular</u> person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a <u>particular</u> person or corporation..." (emphasis added).

Due to the insertion of the term "particular" in §105(1)(f), I believe that a discussion of "personnel" may be considered in an executive session only when the subject involves a particular person or persons, and only when at least one of the topics listed in §105(1)(f) is considered.

It has been advised that a motion describing the subject to be discussed as "personnel" or "specific personnel matters" is inadequate, and that the motion should be based upon the specific

language of §105(1)(f). For instance, a proper motion might be: "I move to enter into an executive session to discuss the employment history of a particular person (or persons)". Such a motion would not in my opinion have to identify the person or persons who may be the subject of a discussion. By means of the kind of motion suggested above, members of a public body and others in attendance would have the ability to know that there is a proper basis for entry into an executive session. Absent such detail, neither the members nor others may be able to determine whether the subject may properly be considered behind closed doors.

It is noted that the Appellate Division has confirmed the advice rendered by this office. In discussing §105(1)(f) in relation to a matter involving the establishment and functions of a position, the Court stated that:

> "...the public body must identify the subject matter to be discussed (See, Public Officers Law § 105 [1]), and it is apparent that this must be accomplished with some degree of particularity, i.e., merely reciting the statutory language is insufficient (see, Daily Gazette Co. v Town Bd., Town of Cobleskill, 111 Misc 2d 303, 304-305). Additionally, the topics discussed during the executive session must remain within the exceptions enumerated in the statute (see generally, Matter of Plattsburgh Publ. Co., Div. of Ottaway Newspapers v City of Plattsburgh, 185 AD2d §18), and these exceptions, in turn, 'must be narrowly scrutinized, lest the article's clear mandate be thwarted by thinly veiled references to the areas delineated thereunder' (Weatherwax v Town of Stony Point, 97 AD2d 840, 841, quoting Daily Gazette Co. v Town Bd., Town of Cobleskill, supra, at 304; see, Matter of Orange County Publs., Div. of Ottaway Newspapers v County of Orange, 120 AD2d 596, lv dismissed 68 NY 2d 807).
>
> "Applying these principles to the matter before us, it is apparent that the Board's stated purpose for entering into executive session, to wit, the discussion of a 'personnel issue', does not satisfy the requirements of Public Officers Law § 105 (1) (f). The statute itself requires, with respect to personnel matters, that the discussion involve the 'employment history of a particular person" (id. [emphasis supplied]). Although this does not mandate that the individual in question be identified by name, it does require that any motion to enter into executive session describe with some detail the nature of the proposed discussion (see, State Comm on Open Govt Adv Opn dated Apr. 6, 1993), and we reject respondents' assertion that the Board's reference to a 'personnel issue' is the functional equivalent of identifying 'a particular person'" [Gordon v. Village of Monticello, 620 NY 2d 573, 575; 207AD 2d 55, 58 (1994)]

Fifth, you referred to situations in which you believe that board members hold telephone conversations and send e-mail messages "in which they argue and iron out their differences." In this regard, there is nothing in the Open Meetings Law that would preclude members of a public body from conferring individually, by telephone or by e-mail. However, a series of communications between individual members or telephone calls, or exchanges made through an electronic "chat room" 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 suggested earlier, §102(1) of the Open Meetings Law defines the term "meeting" to mean "the official convening of a public body for the purpose of conducting public business". Based upon an ordinary dictionary definition of "convene", that term means:

> "1. to summon before a tribunal;
>
> 2. to cause to assemble syn see 'SUMMON'" (Webster's Seventh New Collegiate Dictionary, Copyright 1965).

In view of that definition and others, I believe that a meeting, i.e., the "convening" of a public body, involves the physical coming together of at least a majority of the total membership of the Board. While nothing in the Open Meetings Law refers to the capacity of a member to participate or vote at remote locations by telephone or e-mail, 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 by phone, *via* e-mail or similar means.

In sum, while I believe that members of public bodies may consult with one another individually, I do not believe that they may validly conduct meetings by means of telephone conferences or chat rooms, or that they may make collective determinations by means of a series of telephonic or electronic communications.

Fifth, if a member of the public contacts a Board member to discuss a problem or concern, you asked whether it is "required that the School Board discuss this in private." Similarly, if a Board member objects to the manner in which meetings are held or objects to the actions of another member, you questioned whether the discussions are "required" to be conducted in private.

In both instances, the nature of the issues would determine the extent two which private discussions would be permissible. If a concern expressed by a resident involves the curriculum, the budget, the District's policy on a given issue, or any number of other subjects, there would be no basis for conducting an executive session or otherwise closing a meeting. If a Board member questions the use of e-mail to communicate between Board meetings or raises other issues relating to the Board or its members, it is reiterated that the subject matter, not the source of the discussion or issue, should determine the extent to which the public may be excluded from a meeting.

In the context of a school board's duties, of potential relevance is §108(3), which exempts from the Open Meetings Law:

> "...any matter made confidential by federal or state law."

Here I direct your attention to the federal Family Educational Rights and Privacy Act ("FERPA", 20 USC §1232g) and the regulations promulgated pursuant to FERPA by the U.S. Department of Education. In brief, FERPA applies to all educational agencies or institutions that participate in funding or grant programs administered by the United States Department of Education. As such, it includes within its scope virtually all public educational institutions and many private

educational institutions. The focal point of the Act is the protection of privacy of students. It provides, in general, that any "education record," a term that is broadly defined, that is personally identifiable to a particular student or students is confidential, unless the parents of students under the age of eighteen waive their right to confidentiality, or unless a student eighteen years or over, a so-called "eligible student", similarly waives his or her right to confidentiality. The regulations promulgated under FERPA define the phrase "personally identifiable information" to include:

> "(a) The student's name;
> (b) The name of the student's parents or other family member;
> (c) The address of the student or student's family;
> (d) A personal identifier, such as the student's social security number or student number;
> (e) A list of personal characteristics that would make the student's identity easily traceable; or
> (f) Other information that would make the student's identity easily traceable" (34 CFR Section 99.3).

Based upon the foregoing, disclosure of students' names or other aspects of records that would make a student's identity easily traceable must in my view be withheld in order to comply with federal law. Further, the term disclosure is defined in the regulations to mean:

> "to permit access to or the release, transfer, or other communication of education records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic means."

In consideration of FERPA, if the Board discusses an issue involving personally identifiable information derived from a record concerning a student, I believe that the discussion would deal with a matter made confidential by federal law that would be exempt from the Open Meetings Law.

Next, you asked whether Board minutes and other records accessible to the public under the Freedom of Information Law (i.e., teachers' names and salaries) may be published on the Internet. In short, if a record is available under the Freedom of Information Law, the recipient may do with the record as he or she sees fit. It is not uncommon for accessible records to be placed on the Internet.

Lastly, you asked whether a school district must always act in response to request made under the Freedom of Information Law, even if a person or group "files frivolous FOIL requests." Without additional information concerning the nature of so-called "frivolous" requests, I cannot offer specific guidance. However, I point out as a general matter that 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.

If you could provide details regarding allegedly frivolous requests, perhaps I could provide a more precise response.

In an effort to enhance compliance with and understanding of open government laws, 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

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September 9, 1998

Mr. Harvey M. Elentuck
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Elentuck:

I have received your letter of August 22, as well as the ensuing related correspondence.

Since numerous opinions have been prepared over the course of years at your request, I will not reiterate points of law or interpretations that have previously been provided.

I note, however, that I disagree with your contention that "the 'observations' that are contained in observation reports [of teachers] consist of factual data in the same manner that the 'witness observations' in the reports in **Gould** do." In considering the exception concerning inter-agency and intra-agency materials, the Court of Appeals in **Gould** found that the intent is "to safeguard internal government consultations and deliberations" [89 NY2d 267, 276 (1996)], and that a witness statement "is far removed from the type of internal government exchange sought to be protected by the intra-agency exemption" (id., 277). In short, the observation of a witness, a member of the public, is in my view quite different from that of a government officer or employee who prepares a report for use by an agency.

Moreover, while I have not seen observation reports, I would conjecture that much if not all of their contents would be reflective of opinion. For example, statements in reports that a teacher was calm or nervous, or that his or her teaching style was effective or ineffective would, in my view, constitute opinions that could justifiably be withheld.

Lastly, you asked whether I might recall the name of the person who claimed that a certain response to you contained a typographical error. If my memory is accurate, the person with whom I spoke is an attorney for the Board, Susan Jonides Deedy.

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: Michael J. Valente

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 9, 1998

Mr. John J. Culkin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Culkin:

I have received your letter of August 23 in which you asked "[w]hat are the penalties for refusing access to information that is inappropriately denied."

In this regard, there are no "penalties" per se relating to a failure on the part of an agency to grant access to records that must be made available under the Law. However, as you may be aware, if a lawsuit is initiated to challenge an agency's denial of access, a court may award attorney's fees, payable by an agency, in certain circumstances. Specifically, §89(4)(c) of the Freedom of Information Law states that:

> "The court in such a proceeding may assess, against such agency involved, reasonable attorney's fees and other litigation costs reasonably incurred by such person in any case under the provisions of this section in which such person has substantially prevailed, provided, that such attorney's fees and litigation costs may be recovered only where the court finds that:
>
> i. the record involved was, in fact, of clearly significant interest to the general public: and
>
> ii. the agency lacked a reasonable basis in law for withholding the record."

Based on the foregoing, the discretionary authority of a court to award attorney's fees is somewhat limited.

The other provisions pertaining to what might be viewed as a "penalty" are §240.65 of the Penal Law and its companion, §89(8) of the Freedom of Information Law (which is Article 6 of the Public Officers Law). The former 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, or when an agency cannot locate a record that must be maintained.

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-1104

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 9, 1998

Hon. Joseph A. Provoncha
Essex County Clerk
Essex County Government Center
Elizabethtown, NY 12932

The staff of the Committee 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. Provoncha:

I have received your letter of September 4 in which you raised questions concerning the right to copy records under the Freedom of Information Law.

The initial issue involves requests by individuals who are "searching out their 'roots'." You indicated that your office maintains what you characterized as "Naturalization Books" and that a representative from the federal government specified that the contents of those books can be inspected, but that they cannot be copied. The notice attached to your letter states in relevant part that:

> "Clerks of the Court are prohibited by law from making and issuing certifications of a naturalization record or any part thereof, except upon order of the Court. There is no prohibition against furnishing information orally from naturalization records, without Court Order."

In order to obtain additional information regarding the federal law that would govern, I contacted the FOI/Privacy Unit of the Immigration and Naturalization Service on your behalf. I was informed that the prohibition against copying involves the preparation of "certifications" of naturalization records that can be used to prove citizenship. I was also informed that there is nothing in federal law that would prohibit a municipal clerk from providing a photocopy of the kind of records to which you referred. Consequently, I believe that, on request, you would have the authority to prepare a photocopy of the contents of Naturalization Books.

The second issue involves the recreation of the content of old deed books. Some of those books are fragile, and although you permit individuals to inspect their contents, you do not permit

them to reproduce the contents by means of a copy machine. In short, you wrote that your policy is "due to the fragile nature of the books and the fact that with a spine broken we could lose old deeds." You asked whether the Freedom of Information Law requires that a deed must be copied, on request, on a copying machine, or whether an alternative method is acceptable.

From my perspective, while there is an obligation to comply with the Freedom of Information Law, there is also an obligation imposed upon local government officials to preserve and maintain the custody of their records. Specifically, subdivision (1) of §57.25 of the Arts and Cultural Affairs Law states in relevant part that:

> "It shall be the responsibility of every local officer to maintain records to adequately document the transaction of public business and the services and programs for which such officer is responsible; to retain and have custody of such records for so long as the records are needed for the conduct of the business of the office; to adequately protect such records; to cooperate with the local government's records management officer on programs for the orderly and efficient management of records including identification and management of inactive records and identification and preservation of records of enduring value; to dispose of records in accordance with legal requirements; and to pass on to his successor records needed for the continuing conduct of business of the office..."

In my opinion, although an agency ordinarily would be required to photocopy a paper record on request, under the circumstances that you described in which photocopying could destroy the record, you would have the authority to limit the ability to copy to the alternatives that you described.

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-2410
FOIL-AO-11045

41 State Street, Albany, New York 12231
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September 10, 1998

Ms. Linda Oleksiak
[redacted]

The staff of the Committee on 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. Oleksiak:

I have received your letter of August 26 and the materials attached to it. You have sought an opinion concerning requests made under the Freedom of Information Law for records relating to a complaint that you initiated with the Division of Human Rights and under the Personal Privacy Protection Law to amend or correct records maintained by the Division.

Having reviewed your contentions, I offer the following comments.

First, with respect to your request for records, in a letter dated July 17, Mr. Lawrence Kunin, General Counsel to the Division, indicated that you may arrange to inspect and copy the content of your case file by contacting the Division's Records Access Officer. Consequently, it does not appear that you have been denied access to any records that you requested. Mr. Kunin added that the case file does not include any "transcripts, sworn testimony, tape recordings, or recordings via any other electronic or mechanical device." 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.

Second, it is emphasized that the ability to attempt to amend or correct a record under the Personal Privacy Protection Law is limited to "a record or personal information...pertaining to that data subject, which he or she believes is not accurate, relevant, timely or complete..." [§95(2)]. As I understand your contentions, they deal primarily with the Division's practices and procedures, the nature and scope of its investigation of your complaint, alleged failures on the part of your employer to present evidence or reasons for its actions, and the Division's interpretations and conclusions

relating to the matter. In those instances, your criticisms essentially involve the conduct of the investigation, its completeness, and the merits of your claim; they generally do not involve the accuracy of personal information pertaining to you. Despite your sentiments, insofar as the information or records at issue do not involve the accuracy or completeness of personal information pertaining to you, I do not believe that the right to seek to amend or correct records under the Personal Privacy Protection Law would be applicable.

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: Lawrence Kunin
Andrew Nitzberg

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11046

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 9, 1998

Mr. Anthony Carty
92-A-9491
Green Haven 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. Carty:

I have received your undated letter, which reached this office on August 26. You have questioned the ability of the Division of Parole to delay responding to an appeal.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11047

41 State Street, Albany, New York 12231
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September 10, 1998

Mr. Richard Champion
97-B-1527
Eastern Correctional Facility
P.O. 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. Champion:

I have received your letter of August 24. You allege that your pre-sentence report includes a "false statement" to the effect that you are "a suspect in a fire that took place 3 years ago..." You have questioned whether a volunter fire department and a town police department are subject to the Freedom of Information Law and, if so, whether you can obtain records indicating whether the fire was "suspicious" and if you are a suspect.

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.

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. Since a town is a municipality, it is also clear that records of a town police department fall within the coverage 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. From my perspective, if records exist containing the information in question, several of the grounds for denial would be pertinent to an analysis of rights of access.

Of potential significance is §87(2)(b), which permits an agency to withhold records or portions thereof when disclosure would constitute "an unwarranted invasion of personal privacy". That provision might be applicable relative to the deletion of identifying details in a variety of situations, i.e., where a record identifies a confidential source or a witness, for example.

Perhaps the most relevant provision concerning access to records maintained by law enforcement agencies is §87(2)(e), which permits an agency to withhold records that:

> "are compiled for law enforcement purposes and which, if disclosed, would:
>
> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my view, the foregoing indicates that records compiled for law enforcement purposes can only be withheld to the extent that disclosure would result in the harmful effects described in sub- paragraphs (i) through (iv) of §87(2)(e). Since the fire occurred three years ago, the extent to which this exception would apply is questionable.

The remaining relevant ground for denial of like significance 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 advice or conjecture, for example, that could be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chief of Police, Town of Kirkland

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1104B

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September 11, 1998

Mr. Wallace S. Nolen
94-A-6723
Clinton Correctional Facility
P.O. Box 2001
Dannemora, NY 12929-2001

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Nolen:

I have received your letter of August 18, which reached this office on August 26.

You enclosed hand written facsimiles of two forms used at Clinton Correctional Facility for use by prisoners who seek medical records pertaining to themselves from the facility's medical department. The practice of the facility involves a requirement that inmates complete a particular form in order to seek medical records. On that form they must choose whether to seek the records and pay fees in accordance with the Freedom of Information Law or §18 of the Public Health Law. You questioned the requirement that the form be completed and which statute would be applicable. You also referred to the staff of the Department of Correctional Services being "under the false assumption that all medical records requests get processed as FOIL with regard to appeals." It is your view that appeals should be directed to the State Department of Health Access to Patient Records Division.

In this regard, I offer the following comments.

First, there are no judicial decisions of which I am aware that deal with the issue of which statute applies, the Freedom of Information Law or §18 of the Public Health Law. In response to one area of inquiry, I believe that the Public Health Law applies; in response to another, it appears that the Freedom of Information Law applies.

With respect to rights of access, 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.

Medical records prepared by Department staff pertaining to inmates would in my opinion constitute "intra-agency materials" that fall within the scope of §87(2)(g). Under that provision, although statistical or factual information must be disclosed, opinions and recommendations, for example, may be withheld. As such, if the Freedom of Information Law governs rights of access to medical records, diagnostic opinions could justifiably be withheld. Under §18 of the Public Health Law, however, in most instances, the entirety of the contents of medical records is available to the subject of the records.

Further, in situations in which one statute deals with a subject generally and another statute deals with a particular area within the general subject, the particular prevails over the general. In this instance, the Freedom of Information Law deals with access to government records generally; §18 of the Public Health Law deals specifically with access to medical records, some of which are maintained by governmental entities. From my perspective, it is likely that a court would determine that rights of access are governed by the Public Health Law rather than the Freedom of Information Law.

As you may be aware, it has consistently been advised that a request made under the Freedom of Information Law is adequate so long as it is made in writing and reasonably describes the records sought. It has also been advised that an agency cannot compel an applicant to complete its prescribed form. The rationale for that advice is that people seeking records often cannot appear in person at a government office to complete a form. Moreover, requests are often made at locations distant from the site of the records. A requirement that an applicant complete a prescribed form would be unnecessarily time consuming and delay responses to requests.

In this instance, if the Freedom of Information Law does not apply, our general advice regarding the use of forms would not be applicable. Even if it does apply, the basis for the Committee's opinions on the subject would not appear to be pertinent. In short, inmates are present at the facility from which the records in question are sought. Delays due to mailing to and from distant locations would not be an issue. In short, it does not appear that the requirement that a form be completed is unreasonable as I understand the circumstances.

With respect to an appeal, I note that appeals are made under §18 of the Public Health Law with respect to denials of access to records maintained by health care facilities. Section 18(1)(c) of the Public Health Law defines "health care facility" or "facility" to mean a hospital, a home care services agency, a hospice, a health maintenance organization, or a shared health facility, as those terms are defined in other provisions of the Public Health Law. Having conferred with a representative of the Access to Patient Records Division, it was advised that a medical treatment unit at a correctional institution is neither a "health care facility" nor a "facility" as those terms are defined in the Public Health Law. Consequently, an appeal would not be directed to the Department of

Health; rather, I believe that an appeal would be made to the person designated in the Department's rules and policies.

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-1104

41 State Street, Albany, New York 12231
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September 17, 1998

Mr. Gregory M. Jackson
93-A-0126
Orleans Correctional 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. Jackson:

I have received your letter of August 25 in which you complained that the American General Life Insurance Company has failed to comply with the Freedom of Information and Privacy Acts.

In this regard, the statutes that you cited apply only to records maintained by agencies of the federal government. Similarly, the New York Freedom of Information Law applies to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law generally pertains to records maintained by entities of state and local government in New York.

In short, neither the New York Freedom of Information Law nor the federal Freedom of Information and Privacy Acts would apply to records of a private insurance company.

You might consider discussing the problem with 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-11050

41 State Street, Albany, New York 12231
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September 17, 1998

Mr. Augustine Papay Jr.
Inter-Pro Investigation
P.O. Box 143
Chester, NY 10918

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Papay:

I have received your letter of August 27, as well as the materials relating to it.

As I understand the matter, you requested a variety of records from the Office of the Jefferson County District Attorney pertaining to an unsolved homicide that occurred in 1968. As of the date of your letter to this office, you had received no response to the request.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, the Freedom of Information Law 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 Gould, supra, 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, 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 an effort to enhance compliance with the Freedom of Information Law, a copy of this response will be forwarded to the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. James King

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1105

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Wayne Gardine
96-A-5097
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. Gardine:

I have received your letter of August 24 in which you sought guidance concerning the ability to acquire information from a court.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, 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.

It is suggested that a request for court records be directed to the clerk of the court in possession of the records, and that you cite 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

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Diallo Rafik Madison
94-A-7376
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Madison:

I have received your letter of May 6. For reasons unknown, it did not reach this office until September 3. Please note that the Committee's address has changed. The letter consists of an appeal relating to a request for records of the Department of Correctional Services.

In this regard, the Committee on Open Government is authorized to provide advice and guidance 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 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."

For your information, the person at the Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department.

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 - 11053

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Harold Marshall
92-A-7833
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. Marshall:

I have received your letter of August 24.

As I understand the matter, you requested records in August, 1996 from the New York City Police Department. The Department responded in March of 1997, indicating that it granted the request in part, that photocopies of available records were prepared, and they would be made available upon payment of $3.75. However, you apparently appealed beyond the statutory time and never paid for or received the photocopies of available records.

In response to a recent request for records of the same agency, you were informed that the request would not be processed until you pay the money owed.

In this regard, 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.

In my opinion, if an agency has prepared copies of records in good faith and the applicant fails or refuses to pay the fee, I do not believe that the agency would be required to make available those copies that have been prepared. In my view, it follows that an agency should not be required to honor ensuing requests until the applicant has fulfilled his or her responsibility by tendering the fee for copies previously made.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sgt. Richard Evangelista
Susan Petito

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1105 4

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Xavier Gonzalez
93-A-3107
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. Gonzalez:

I have received your letter of August 31. You have sought an opinion concerning your right to obtain your sentencing minutes under the Freedom of Information Law from the court in which you were sentenced.

In this regard, I point out that the Freedom of Information Law is applicable to agency records, and that §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.

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-1105

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Anthony Vitiello
895-98-00109
Rikers Island - NIC
1500 Hazen Street
E. Elmhurst, NY 11370

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vitiello:

I have received your letter of August 30. Your primary area of inquiry involves delays by an agency in granting or denying your request for records.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a

constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

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.

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 remaining area of inquiry involves procedural issues relating to litigation. Since those issues do not involve the interpretation of the Freedom of Information Law, they fall beyond the advisory jurisdiction of this office. It is suggested that you confer with your attorney or 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-11056

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Stephen Grant
94-R-7072
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. Grant:

I have received your letter of August 30. You have sought guidance concerning your unsuccessful efforts in obtaining records form the City of Buffalo Department of Police. One request involved records pertaining to your arrest; the other appears to involve the case against "an intruder at [your] home."

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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.

Second, when a request is denied, the applicant has the right to appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body of the entity, or the person 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."

Lastly, it is suggested that you review your request for the records involving the case against the intruder and that you describe your relationship to the matter.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Lt. Katherine A. Plesac

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11057

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Ronald M. Herbert
96-A-5921
Eastern NY 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. Herbert:

I have received your letter of August 30. You have sought assistance relating to requests for records that " have been completely ignored."

In this regard, I believe that the substances of your requests in terms of rights of access was considered at length in opinion addressed to you on August 19. As such, I will not reiterate commentary offered in that response.

With respect to the disregard of your requests, I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1105B

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

E-Mail

TO: Gerald Creps <gcreps@bart.skidmore.EDU

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Creps:

I have received your communication of September 7. You wrote that "NYS DHCR claims they do not have to mail foiled materials but rather [you] as a disabled person must drive to Albany to pick it up."

If indeed that is the agency's position, I fully disagree. It is noted 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, I believe that is implicit that agencies must respond to requests by mail. It is noted that the statement of legislative intent appearing at the beginning of the Freedom of Information Law (§84) states in part that agencies are required to make records available "wherever and whenever feasible." Based on the clear intent of the Law, I reiterate that agencies must, in my view, mail accessible records to an applicant. However, in addition to the fee for photocopying, an agency could in my view also charge for the cost of postage.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Patrice Huss, Records Access Officer
David Diamond

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Leland C. Flocke
[redacted]

The staff of the Committee 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. Flocke:

I have received your letter September 4 in which you sought and advisory opinion concerning a delay in the production of records by the Governor's Office of Employee Relations.

Although I believe that your reqest has been granted, for future reference I point out that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

> explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rebecca L. Caudle

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. Candido Rodriguez
91-A-4028
Franklin Correctional Facility
P.O. Box 10
Malone, NY 12953

Dear Mr. Rodriguez:

I have received your letter of September 2 concerning a request for court records made pursuant to the Freedom of Information Law.

In this regard, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) 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 n

Based on the provis and court records are not subject to the Freedom of Information La court records are not generally available to the public, for other pro ary Law, §255) may grant broad public access to those records. E / deal with access to court records, the procedural provisions asso formation Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

I hope that the foregoing serves to clarify your understanding of the matter and 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 - 1106

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 17, 1998

Mr. T. Thomas
93-A-9430
Attica Correctional Facility
Box 149
Attica, NY 14011-0149

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Thomas:

I have received your undated letter, which reached this office on September 4.

You asked where you should write "to obtain copies of a misbehavior report and all papers filed with that report." It is assumed that the records in question pertain to an inmate.

In this regard, I offer the following comments.

First, pursuant to the regulations promulgated by the Department of Correctional Services, a request for records maintained at a correctional facility may be directed to the facility superintendent or his designee.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Since I am unaware of the contents of the records in which you are interested or the effects of their disclosure, I cannot offer specific guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records in question.

In considering the records falling within the scope of your request, relevant is a decision by the Court of Appeals concerning records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in relation to an incident.

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 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
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September 17, 1998

Mr. David G. Quimby
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Quimby:

I have received your letter of September 7. In brief, you have questioned whether the Freedom of Information and Personal Privacy Protection Laws pertain to records of "a local college."

In this regard, the Freedom of Information Law is applicable to agency records, and for purposes of that statute, §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. If the college is part of the State University or is a community college, it would constitute an "agency" required to comply with the Freedom of Information Law. If, however, the College is a private institution, it would fall outside the coverage of the Freedom of Information Law.

The Personal Privacy Protection Law is applicable to state agencies [see definition of "agency" in that statute, §92(1)]. As such, if the college is a unit of the State University, it would be subject to the Personal Privacy Protection Law. If it is a community college, as an arm of one or more local governments, it would be outside the coverage of the Personal Privacy Protection Law. Again, if it is a private entity, the Personal Privacy Protection Law would not apply.

Assuming that the Personal Privacy Protection Law is applicable, §96(1) specifies and limits the circumstances under which personal information may be disclosed.

Enclosed for your review are explanatory brochures dealing with the Freedom of Information Law and the Personal Privacy Protection Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

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September 17, 1998

Ms. Mary Lee Lasota
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lasota:

I have received your letter of September 9 in which you raised questions relating to both the Freedom of Information Law and the Open Meetings Law.

First, in my view, school board members do not "have exactly the same rights of privacy as a private citizen with respect to their School Board activities." As you know, the Open Meetings Law is applicable to school boards, and that statute limits the authority of those boards to engage in private discussions. Similarly, although the Freedom of Information Law provides that an agency may withhold records when disclosure would result in "an unwarranted invasion of personal privacy" [see §87(2)(b)], 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].

Second, you referred to the application of §105(1)(f) of the Open Meetings Law as it relates to "the actions of a School Board member." The cited 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..."

In my view, unless an issue under consideration falls within the specific terms of §105(1)(f), there would be no basis for entry into executive session to discuss the actions of a board member.

Third, judicial decisions indicate generally that entities that include 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 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.

I note that when a committee consists solely of members of a public body, the Open Meetings Law is applicable. The phrase "public body" is defined in §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."

The definition makes specific reference to "committees, subcommittees and similar bodies" of a public body. Therefore, 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, 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)].

Lastly, with respect to the disclosure of requests made under the Freedom of Information Law, among the few instances in my view in which the records at issue may be withheld in part would involve situations in which, due to the nature of their contents, disclosure would constitute an unwarranted invasion of personal privacy. For instance, if a recipient of public assistance seeks records pertaining to his or her participation in a public assistance program, disclosure of the request would itself indicate that he or she has received public assistance. In that case, I believe that identifying details could be deleted to protect against an unwarranted invasion of personal privacy.

Another would involve a request by a parent of a student for records relating to the student. In that situation, I believe that the Family Educational Rights and Privacy Act (20 USC §1232g) would preclude a school district from disclosing information that would make a student's identity easily traceable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education

STATE OF NEW YORK
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September 17, 1998

Mr. Scotty D. Huntington
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Huntington:

I have received your letter of September 1, as well as the materials attached to it.

You have questioned the propriety of a denial of a request for videotapes showing the use of "chemical agents" by the staff of the Department of Correctional Services "in cell extractions." The Department denied your request, citing §87(2)(f) of the Freedom of Information Law. The correspondence indicates that you are a correction officer and that you would like to use the tapes in a grievance proceeding.

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, I note that your intended use of the records is irrelevant to your rights of access. When records are accessible under the Freedom of Information Law, it has been found that they must be made 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) and M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984)]. Conversely, insofar as the records sought fall within a ground for denial, I believe that they may be withheld, irrespective of the purpose of the request.

From my perspective, two of the grounds for denial are pertinent to an analysis of rights of access. The extent to which they may properly be asserted is, in my opinion, dependent on the nature of the depictions on the videotapes.

Relevant are §87(2)(b), which authorizes an agency to withhold records when disclosure would constitute " an unwarranted invasion of personal privacy", and §87(2)(e)(ii), which enables an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person."

I note that the court of Appeals, the State's highest court, has stressed that the Freedom of Information Law should be construed expansively. Most recently, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, 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 Police Department contended that "complaint follow up reports" 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 that 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), 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 request, all of the videotapes that you requested have been withheld. While I am not suggesting that they must be disclosed, based on the direction given by the Court of Appeals, the records must be reviewed individually by the agency 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, an agency may deny access records under an exception "as long as the requisite particularized showing is made" (id., 277).

In a case involving a request for videotapes made under the Freedom of Information Law, it was unanimously found by the Appellate Division 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)].

Nevertheless, the Court stated that "portions of the tapes showing inmates in states of undress, engaged in acts of personal hygiene or being subjected to strip frisks" could be withheld as an unwarranted invasion of personal privacy (id., 112), and that "[t]here may be additional portrayals on the tapes of inmates in situations which would be otherwise unduly degrading or humiliating, disclosure of which 'would result in *** personal hardship to the subject party' (Public Officers Law § 89 [2] [b] [iv])" (id.). The court also found that some aspects of videotapes might be withheld on the ground that disclosure would endanger the lives or safety of inmates or correctional staff under §87(2)(f).

Further, in a case involving videotapes of events occurring at a correctional facility, in the initial series of decisions relating to a request for videotapes of uprisings at a correctional facility, it was determined that a blanket denial of access was inconsistent with law [Buffalo Broadcasting Co. v. NYS Department of Correctional Services, 155 AD2d 106]. Following the agency's review of the videotapes and the making of a series of redactions, a second Appellate Division decision affirmed the lower court's determination to disclose various portions of the tapes that depicted scenes that could have been seen by the general inmate population. However, other portions, such as those showing "strip frisks" and the "security system switchboard", were found to have been properly withheld on the grounds, respectively, that disclosure would constitute an unwarranted invasion of personal privacy and endanger life and safety [see 174 AD2d 212 (1992)].

In sum, based on the language of the Freedom of Information Law and its judicial interpretation, I believe that the Department is required to review each videotape falling within the

scope of your request to attempt to ascertain the extent to which their contents fall within the grounds for denial appearing in the statute.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Anthony J. Annucci

STATE OF NEW YORK
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September 17, 1998

Ms. Patricia Pagano
[redacted]

The staff of the Committee on 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. Pagano:

I have received your letter of September 8. You have sought assistance relating to your efforts in obtaining records from the Village of Manorhaven.

First, you indicated that the Village has failed to respond to requests in a timely manner. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 referred particularly to " a denial of a request for a proposed building plan on the grounds that it involved Attorney-Client privilege." You added that since your husband formerly served as mayor, you "know that is not the case."

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The first ground for denial, §87(2)(a), pertains to records that are "specifically exempted from disclosure by state or federal statute." For more than a century, the courts have found that legal advice given by a municipal attorney to his or her clients, municipal officials, is privileged when it is prepared in conjunction with an attorney-client relationship [see e.g., People ex rel. Updyke v. Gilon, 9 NYS 243, 244 (1889); Pennock v. Lane, 231 NYS 2d 897, 898, (1962); Bernkrant v. City Rent and Rehabilitation Administration, 242 NYS 2d 752 (1963), aff'd 17 App. Div. 2d 392]. As such, I believe that a municipal attorney may engage in a privileged relationship with his 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 been found that records may be withheld when the privilege can appropriately be asserted when the attorney-client privilege is read in conjunction with §87(2)(a) of the Law [see e.g., Mid-Boro Medical Group v. New York City Department of Finance, Sup. Ct., Bronx Cty., NYLJ, December 7, 1979; Steele v. NYS Department of Health, 464 NY 2d 925 (1983)]. Similarly, the work product of an attorney may be confidential under §3101 of the Civil Practice Law and Rules.

In a discussion of the parameters of the attorney-client relationship and the conditions precedent to its initiation, it has been held that:

> "In general, 'the privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived

by the client'" [People v. Belge, 59 AD 2d 307, 399 NYS 2d 539, 540 (1977)].

From my perspective, a building plan does not involve the rendition of advice of a legal nature or be the kind of record that would be prepared by an attorney acting in his or her capacity as an attorney. Therefore, I do not believe that the record at issue would be subject to the attorney-client privilege or deniable by the Village on that basis.

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

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September 17, 1998

Ms. Linda Mangano
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Mangano:

I have received your letter of September 4 and the materials attached to it.

According to your letter:

> "Within the past year or so the Clerk in the Parking Violations Bureau has shown [you] at least two file folders containing hundreds and hundreds of parking summonses that are 'awaiting trial'. On 08/26/98 [you] wrote a FOIL request to Mrs. Fuesy, Village Clerk, asking to review said pending parking summonses. Not being fully familiar with the PVB's filing system, [you] asked for what [you] considered every feasible manner of filing."

You added in your request that you are not interested in names or other personal information contained in the records, but rather in "the number of summonses awaiting a trial date and the dates of the receipt of said summonses."

The clerk of the Parking Violations Bureau advised the Village Clerk that " the information requested.... is not available in list or any other form." Consequently the clerk wrote that the information sought "is not available in the form requested." Nevertheless, you wrote that you:

> "personally have been shown file folders in the PVB's possession that contained HUNDREDS AND HUNDREDS of parking summonses awaiting trial. The PVB would NOT have to "create a file" to fill [your] request; all they'd have to do is give [you] the file folders containing these summonses which [you] had already been shown,

> thought at that time [you] did not review the entire file folders" (emphasis yours).

In this regard, I offer the following comments.

First, as you are aware, an agency is not required to create a record in response to a request. Therefore, if for instance, there is no list of "summonses awaiting trial", the Village would not be required to prepare a list on your behalf. Similarly, if there is no record containing a figure reflective of a total number of summonses awaiting trial, the Village would not be required to tabulate or prepare a total on your behalf.

Second, however, I believe that you have the right to review the summonses in question, assuming that they are kept in file folders as you described, for the purpose of preparing your own total or analysis. From my perspective, due to the nature of the records in question, they would be available under the Freedom of Information Law.

Third, if the records are kept in file folders in the manner that you suggested, I believe that a request to review the summonses in the folders would "reasonably describe" the records as required by §89(3) of the Freedom of Information Law. As you may be aware, it has been held by the Court of Appeals that to deny a request on the ground that it fails to reasonably describe the records, an agency must establish that "the descriptions were insufficient for purposes of locating and identifying the documents sought" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

The Court in Konigsberg found that the agency could not reject the request due to its breadth and also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise, potentially requiring a search of every file in the possession of the agency'])" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping system.

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. In Ruberti, Girvin &

Ferlazzo v. Division of State Police [218 AD2d 494, 641 NYS2d 411 (1996)], one element of the decision pertained to a request for a certain group of personnel records, and the agency argued that it was not required to search its files those requested "because such records do not exist in a 'central file' and, further, that FOIL does not require that it review every litigation or personnel file in search of such information" (id., 415). Nevertheless, citing Konigsberg, the court determined that:

> "Although the record before this court contains conflicting proof regarding the nature of the files actually maintained by respondent in this regard, an agency seeking to avoid disclosure cannot, as respondent essentially has done here, evade the broad disclosure provisions FOIL by merely asserting that compliance could potentially require the review of hundreds of records" (id.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Marie Fuesy, Clerk
Grace DiCuirci

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September 17, 1998

Ms. Carol Perry
[redacted]

The staff of the Committee on 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. Perry:

I have received your letter of August 28 in which you asked whether a certain entity is subject to the federal Freedom of Information Act.

According to your letter:

> "The Malone Economic Development Corporation (MEDCO) was created in 1981 by the Village of Malone to administer and Economic Development Fund, financed by a HUD Small Cities Community Development Block Grant. The grant is administered as a revolving loan fund. The Village of Malone incorporated MEDCO under the New York State Business Section 1411 and Section 402 Not-for-Profit."

In response to a recent request for certain records from MEDCO, you were informed that because it is a private corporation, the federal Freedom of Information Act is inapplicable.

In this regard, the federal Freedom of Information Act pertains to records maintained by federal agencies. Consequently, I do not believe that MEDCO would be subject to that statute. Nevertheless, based on the facts that you presented, it appears that MEDCO is required to comply with a different statute, the New York Freedom of Information Law.

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).

More recently, in Buffalo News v. Buffalo Enterprise Development Corporation [84 NY 2d 488 (1994)], the Court of Appeals, the State's highest court, 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 MEDCO and the Village of Malone is similar to that of the BEDC and the City of Buffalo, the MEDCO would constitute an "agency" required to comply with the Freedom of Information Law. Since MEDCO was created by the Village, particularly if the Village has significant authority concerning the selection of MEDCO's Board of Directors, I believe that MEDCO would constitute an "agency" required to comply with the Freedom of Information Law. I note that the BEDC is also an economic development agency subject to §1411 of the Not-for-Profit Corporation Law.

Alternatively, I point out that 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."

If MEDCO was created by the Village of Malone, which clearly is an agency, and carries out its functions for or on behalf of the Village, it would maintain its records *for* the Village, thereby bringing the records within the coverage of the Freedom of Information Law. I note that the Court of Appeals has determined that records maintained by a not-for-profit corporation acting as an agent of the State University were University records subject to the Freedom of Information Law even though the records were not in the physical possession of the University [Encore College Bookstores, Inc. v. Auxillary Service Corporation of the State University, 87 NY2d 410 (1995)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Executive Director, MEDCO

FOIL-AO-11068

From: Robert Freeman
To: SMTP("Laurence_Stevens@tax.state.ny.us")
Date: 9/24/98 8:17am
Subject: FOIL and transcripts of hearing -Reply

L y --

The issue has arisen in the past. It might be resolved easily if the agency is subject to the State Administrative Procedure Act (SAPA). Section 302(2) states in relevant part that: "Except when any statute provides otherwise, the agency is authorized to charge not more than its cost for the preparation and furnishing of such record or transcript or any part thereof, or the rate specified in the contract between the agency and a contractor if prepared by a private contractor."

If SAPA doesn't apply, my feeling is that the Freedom of Information Law governs, and that the agency is limited to charging 25 cents per photocopy. From my perspective, even if prepared by a stenographer pursuant to a contract, the transcript would have been prepared for an agency and would, therefore, constitute an agency "record" as that term is defined in section 86(4) of the FOIL.

If you would like to discuss the matter, please feel free to call.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11069

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 24, 1998

Mr. Alvaro A. Sanchez
87-A-7358
Drawer B
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sanchez:

I have received your letter of September 7. You criticized a response addressed to you on August 7 based upon my transmission of a copy to the Office of the Queens County District Attorney.

In this regard, as a matter of policy and practice, this office transmits copies of opinions to the agencies involved. The function of an advisory opinion is to educate recipients, and in the context of the letter of August 7, it was not unreasonable in my view to forward a copy of a response in that it stated, in brief, that the Personal Privacy Protection Law does not apply to offices of district attorneys. Moreover, frequently when an agency receives a copy of a response indicating that an individual will seek records, it can better prepare for the request.

You stated that "there has to be some standard for the maintenance and retention" of files of an office of a district attorney. I point out that the issue was addressed in an opinion sent to you on July 17. Once again, to obtain information on the subject, you may contact the State Archives and Records Administration at the State Education Department.

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 matter.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1107O

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 24, 1998

Mr. Gregory P. Klibansky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Klibansky:

I have received your letter of September 2 and the materials attached to it. As in the case of previous correspondence, the matter involves your efforts in gaining access to records of the Office of the Suffolk County District Attorney concerning a claim that you "surreptitiously faxed" a person some sort of record. Your requests to date have been denied on the ground that an agency is not required to create a record in response to a request.

In this regard, the Freedom of Information Law pertains to existing records. In a letter of August 21 sent to you by Assistant District Attorney Joanne V. Smith, she certified that the fax that is alleged to have been transmitted could not be found after having made a diligent search. On June 25, in response to a request for the name of the detective who "investigated the alleged fax", you were informed by Ms. Smith that the Freedom of Information Law "does not require this agency to create a document in response to an applicant's request." As I interpret her statement, there is no record that names the detective who might have been involved in the matter, and providing the name would require the preparation of a record, an action that an agency is not required to take.

If, for example, communications concerning the subject of your interest were made orally, and if no records were prepared, the Freedom of Information Law, in short, would not apply. On the other hand, if records exist, with or without the name of the detective, any such records would be subject to rights conferred by the Freedom of Information Law. This is not suggest that any such records must be disclosed in whole or in part. As indicated in my response to you of July 6, although the Freedom of Information Law is based on a presumption of access, several grounds for denial of access may be pertinent in determining rights of access to any existing records that fall within the scope of your request.

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joanne V. Smith, Assistant District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1107

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 25, 1998

Mr. Basil Constable
96-R-3391
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. Constable:

I have received your note and a copy of a letter sent to Ms. Susan Petito, Special Counsel to the New York City Police Department.

You have asked that this office "conduct some type of inquiry" concerning the "evasive tactics" employed by the Department in avoiding disclosure of "unedited" copies of certain records from which a plaintiff's age and date of birth were deleted. You referred to §87(2)(e) and (g) of the Freedom of Information Law and contended that those provisions would not justify a denial of access to the items in question.

In this regard, I would agree that those provisions would not serve as grounds for a denial of access. Nevertheless, I note that §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." From my perspective, an individual's age and date of birth generally may be withheld pursuant to §87(2)(b).

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: Susan Petito, Special Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11072

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 25, 1998

Mr. Virgil L. LaChance
95-B-0769
Eastern Correctional Facility
Box 338
Napanoch, NY 12458-0338

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. LaChance:

I have received your letter of September 9. You have sought assistance in obtaining records from your former attorney.

In this regard, the Freedom of Information Law pertains to agency records, and §89(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental 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 my view, records maintained by a private attorney, even if he or she has been assigned by a court, would not constitute agency records subject to the Freedom of Information Law. Further, I know of no judicial decision indicating that records of a private attorney designated as assigned counsel fall within the scope of the Freedom of Information Law by virtue of that designation. I note, too, that every attorney upon admission to the bar, is an officer of the court.

If the attorney was designated through an assigned counsel program of a county government, it is suggested that you contact that office.

I regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-2418
FOIL-AO-1107 3

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 25, 1998

Mr. Gary Fusfield
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fusfield:

I have received your letter of September 10, as well as a variety of correspondence relating to it. You have sought an advisory opinion concerning rights of access to records maintained by the Workers' Compensation Board relating to an investigation of your conduct as a licensee.

Your initial requests were made under the Freedom of Information Law and, while some aspects of the records sought were disclosed, others were withheld on the basis of §§87(2)(e) and (g) of that statute. Those provisions deal respectively with the ability to withhold records compiled for law enforcement purposes under certain circumstances and certain contents of inter-agency or intra-agency materials. More recently, a request was made for all records concerning the investigation pursuant to the Personal Privacy Protection Law.

From my perspective, there may be a distinction in terms of your rights of access under the Freedom of Information Law as opposed to the Personal Privacy Protection 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 likely in my view that the denials of access under the Freedom of Information Law were appropriate.

The Personal Privacy Protection Law generally confers rights of access to a "data subject", a natural person about whom information has been collected by a state agency [see Personal Privacy Protection Law, §92(3)], to records pertaining to him or her. Section 95(1) of the Personal Privacy Protection Law states in part that, upon request for records by a data subject for records pertaining to him or her, a state agency must disclose such records, unless access is "not required to be provided pursuant to subdivision five, six or seven" of that section.

Subdivision (5) of §95 enables an agency to withhold information "compiled for law enforcement purposes" when disclosure would:

> i. interfere with law enforcement investigations or judicial proceedings;
>
> ii. deprive a person of a right to a fair trial or impartial adjudication;
>
> iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
>
> iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

In my, view the only exception in the Personal Privacy Protection Law that is pertinent currently is §95(5). As such, insofar as disclosure of records compiled for law enforcement purposes would interfere with the Board's investigation, I believe that it has the ability to deny access.

It is noted that there is no exception in the Personal Privacy Protection Law comparable to §87(2)(g) of the Freedom of Information Law. Therefore, while inter-agency or intra-agency materials might justifiably be withheld under the Freedom of Information Law, the contents of those records might nonetheless be available to a data subject under the Personal Privacy Protection Law.

Although the records sought may pertain to you, it is likely that they also identify others, i.e., complainants, persons interviewed, etc. Relevant in that context is §87(2)(b) of the Freedom of Information Law, which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Insofar as the records sought pertain to others and disclosure would constitute an unwarranted invasion of personal privacy, I believe that the Board may deny access to the records.

Lastly, one of the items of correspondence is a letter of September 2 addressed to Chaim Malks, the Board's Records Access Officer. In that letter, pursuant to the Freedom of Information Law, you asked that a series of questions be answered. It is emphasized in this regard that the Freedom of Information Law pertains to existing records. Section 89(3) of that statute indicates that an agency is not required to create or prepare a record in response to a request for information. Similarly, while the Freedom of Information Law requires agencies to disclose existing records in accordance with its provisions, it does not in my view require that agency officials provide information by responding to questions. In the future, rather than seeking to elicit information by raising questions, it is suggested that you request existing records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Robert Snashall
Chaim Malks

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1107Y

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 25, 1998

Hon. Kathleen G. Cory
Town Clerk
Town of Lewisboro
P.O. Box 500
South Salem, NY 10590

The staff of the Committee on 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. Cory:

As you are aware, I have received your memorandum of September 16.

You wrote that there has been "controversy" in the Town of Lewisboro relating to addresses on your assessment roll. You indicated that the assessor "has prepared the roll and included the home address (not necessarily the property address) of each owner, including a post office box number if appropriate." The question involves whether disclosure would constitute an unwarranted invasion of privacy.

From my perspective, the record in question must be disclosed. In this regard, I offer the following comments.

First, §502 of the Real Property Tax Law describes the form of an assessment roll and specifies the kinds of information that must be included in an assessment roll. Pertinent to the matter is subdivision (9) of §502, which states that:

> "Provision shall be made for the entry of the tax billing address of each separately assessed parcel. For purposes of this chapter, 'tax billing address' means the address designated by the owner to which tax bills shall be sent. Such tax billing address may be entered in the form of a code."

Based on the foregoing, the assessment roll must include an address designated by the owner of a parcel for the purpose of mailing tax bills.

Second, §516 of the Real Property Tax Law states that an assessment roll is accessible to the public and must be "retained in the office of city or town clerk as a public record for a minimum of ten years from the date the final assessment roll was filed."

Lastly, although the Freedom of Information Law includes provisions that enable agencies to withhold records when disclosure would constitute an unwarranted invasion of privacy [see §§87(2)(b) and 89(2)(b)], in my opinion, they do not apply. Section 89(6) of the Freedom of Information Law states, in essence, that if records are available under another provision of law, nothing in the Freedom of Information Law can be asserted to withhold those records. Since §516 of the Real Property Tax Law requires the disclosure of an assessment roll that includes addresses, the provisions in the Freedom of Information Law pertaining to the protection of privacy would be inapplicable [see Szikszay v. Buelow, 436 NYS 2d 558, 107 Misc.2d 886 (1981)].

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-11075

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 25, 1998

Mr. Frederick J. Hill
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hill:

I have received your letter of September 9 and 11, as well as related materials.

You requested all complaints received by the City of Rensselaer from 1995 to the present relating to "overgrown vegetation", as well as all orders to cut such vegetation. Although you were initially informed that your request involved records totaling "over 300 pages", you later received far fewer records. As I understand your inference, it is your belief that many more records than those made available to you fell within the scope of your request and were constructively denied. In this regard, I offer the following comments.

First, according to §89(3) of the Freedom of Information Law and §1401.2 of the Committee's regulations (21 NYCRR Part 1401), if any aspect of a request is denied, an agency must so inform the applicant. In addition, if a request is denied in whole or in part, the agency is obliged to inform the applicant of the right to appeal. The provisions pertaining to the right to appeal are found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person 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, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the records 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Maureen G. Nardacci

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11076

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 28, 1998

Mr. Robert Henderson
97-A-3132
Mohawk Correctional Facility
6100 School Road
Rome, NY 13440

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Henderson:

I have received your letter of September 12 in which you sought assistance in obtaining your "inmate personal history", "correctional supervision history" and pre-sentence report from your facility.

In this regard, I offer the following comments.

First, according to the regulations promulgated by the Department of Correctional Services, a request for records maintained at a correctional facility may be made to the facility superintendent or his designee.

Second, §5.5 of the Department's regulations define the phrases "correctional supervision history" and "personal history". In my view, both of those series of records would be available to an inmate under the Freedom of Information Law.

Lastly, in my opinion, the Department is not required to disclose the pre-sentence report to you. 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

OML-AO-2937
FOIL-AO-11077

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 28, 1998

Ms. Laura M. Costa
[redacted]

The staff of the Committee on 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. Costa:

I have received your letter of September 17. In brief, you complained that you have encountered delays in producing records that you requested from the Village of Manorhaven under the Freedom of Information Law. You made specific reference to a delay in the disclosure of minutes of a meeting.

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 §106 of the Open Meetings Law pertains to minutes of meetings of public bodies and states that:

> " 1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meeting except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Subdivision (3) deals specifically with the time within which minutes must be prepared and made available, a period of two weeks with respect to minutes of open meetings, and one week when action is taken during executive sessions.

It is emphasized that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have not been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within

less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

In an effort to enhance compliance with and understanding of open government laws, copies of this opinion will be forwarded to Village officials. Additionally, enclosed is a copy of an explanatory brochure concerning those laws.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Enc.

cc: Board of Trustees
Village Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11078

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 28, 1998

Mr. Kerwin Hill
94-A-6634
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. Hill:

I have received your letter of September 11. You have sought assistance in obtaining information from the Office of the Dutchess County District Attorney. Although your request was sent on August 7, you indicated that as of the date of your letter to this office, you had received no response.

In this regard, having reviewed your request, I offer the following comments.

First, with respect to the portion "General Instructions", you asked that the District Attorney "specify responsive to your request", as well as the following details:

> "author; the position or tit position or title of the recipient; indic ect matter; number of pages; attachr ... or appendices; persons to whom distributed, shown or explained; date of destruction or disposal; reason for destruction or disposal; the name of the person who authorized destruction or disposal; and the name of the person who destroyed and/or who discarded the document."

You also asked that the request be "deemed continuing" in that it includes records prepared or received in the future that might fall within the scope of your request.

In short, there is nothing in the Freedom of Information Law that requires that the District Attorney or any agency take the kinds of actions or prepare the kinds of detailed analysis of records that you sought in the "General Instructions." Further, since the Freedom of Information Law pertains to existing records, an agency in my opinion is not required to honor a request that seeks records prospectively (i.e., records that have not yet been prepared or received). An agency's obligation under the Freedom of Information Law generally involves providing access to records to the extent required by that statute.

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. 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 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: Hon. William V. Grady, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11079

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September 28, 1998

Mr. William V. Camfield
Camfield-Purcell Water Works Inc.
263 Verbeck Avenue
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. Camfield:

I have received a variety of correspondence from you relating to requests for information directed to the Town of Stillwater and a request for a determination by the New York State Department of Health.

In this regard, it is emphasized at the outset that the jurisdiction of the Committee on Open Government is limited to matters involving rights of access to government records under the Freedom of Information Law. Consequently, other than contacting the person with whom you communicated at the Department of Health to ascertain the status of your request for a determination, the matter is beyond the jurisdiction of this office. Similarly, it is your belief that monies may be owed to you by the Town of Stillwater, and you asked how you may seek return of the money. That issue is unrelated to the functions of this office. To seek general guidance on the subject, it is suggested that you might contact the Office of the State Comptroller.

As the correspondence relates to the Freedom of Information Law, it appears that the issue involves a delay in the disclosure of records by the Town. Here I point out 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, who in this instance is the Town Clerk, has the duty of coordinating the Town's response to requests for records. It appears that the Clerk has attempted to do so.

With respect to the delay, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish 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)].

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 substantial delay, 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 any extended period of time.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Rose Petronis, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11080

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September 29, 1998

Mr. Jeffrey H. Greenfield
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Greenfield:

I have received your letter of September 15. I note that you referred to an attachment. That documentation, however, was not included with your correspondence.

You have asked "if it is correct and proper for the Board of Education to withhold a list of candidates and/or resumes for consideration in hiring two assistant superintendents of schools."

In this regard, §89(7) of the Freedom of Information Law states in part that nothing in that statute requires the disclosure "of the name or home address...of an applicant for appointment to public employment." Therefore, I do not believe that the names of those who applied for the positions must be disclosed.

With respect to access to resumes, 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 under the provisions of subdivision two of section eighty-nine of this article." Section 89(2)(b) includes a series of examples of unwarranted invasions of personal primary, the first of which refers to "disclosure of employment...histories or personal references of applicants for employment." However, §89(2)(a) provides in part that "an agency may delete identifying details when it makes records available" in order to prevent against unwarranted invasions of personal privacy. Further, §89(2)(c) states that unless another ground for denial applies, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy "when identifying details are deleted." Therefore, I believe that resumes would be available after identifying details concerning the applicants are deleted. I point out that in a somewhat similar situation, a request was made for the *curricula vitae* of certain faculty members at a branch of the City University of New York. In that case, the court held that the agency could delete identifying details, thereby enabling the applicant to compare his credentials to those of other professionals, while concurrently protecting the privacy of faculty members [see Harris v. City University of New York, Baruch College, 114 AD 2d 805 (1985)].

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-1108

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September 29, 1998

Mr. Thomas Austin
97-A-2493
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Austin:

I have received your correspondence of September 16. You have sought my comments concerning your right to obtain letters sent to the Parole Board opposing your release.

From my perspective, various aspects of the records in question may justifiably be withheld. In this regard, I offer the following remarks.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 an analysis of rights of access.

Section 87(2)(b) permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." I believe that personally identifying details contained within letters sent by victims, their families, neighbors or other members of the public may be withheld pursuant to the cited provision. In short, in my opinion, you do not have the right to gain access to the identities of members of the public who have written in opposition to your release.

With respect to letters or memoranda written by government officials, most 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.

If, for example, a representative of an office of a district attorney or staff person at a correctional facility offers an opinion or recommendation concerning the possibility of release, those materials may in my view be withheld under §87(2)(g).

I hope that the foregoing serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 29, 1998

Mr. Tyrone Holton
95-A-3200
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. Holton:

I have received your letter of September 15. You wrote that you are interested in obtaining the names of employees at Fay's Drugs who provided medication to the Clinton Correctional Facility during certain time periods.

It is unclear whether you are requesting the information from this office or seeking guidance. 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 does not possess records generally. However, I offer the following comments regarding your request.

First, the Freedom of Information Law pertains to agency records, and §86(3) of the Law defines the term "agency" to include entities of state and local government. As such, the Department of Correctional Services, for example, would clearly constitute an agency subject to the Freedom of Information Law. Fay's Drugs, a private company, would fall beyond the scope of that statute. Therefore, if the only source of the information of your interest is Fay's Drugs, the Freedom of Information Law would not apply.

Second, as a general matter, the Freedom of Information Law pertains to existing records maintained by an agency. If the facility does not maintain records identifying Fay's employees, it would not be required to obtain the information from Fay's on your behalf.

Third, if the facility does maintain records including the names of the employees, those records would be subject to rights of access. In brief, the Freedom of Information Law is based upon a

presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Assuming that medications obtained through prescriptions include the name of the pharmacist who filled the prescription, and also assuming that the medication is given to inmates in a manner that enables them to read the pharmacists' names, I believe that the names of those persons would be accessible, for their identities would previously have been made known. On the other hand, if the names of Fay's employees had not been disclosed or made known to inmates when the medication was dispensed, their identities could in my view be withheld on the ground that disclosure would constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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September 29, 1998

Ms. Thelma Neira
Deputy Town Attorney
Town of Huntington
199 Main Street
Huntington, NY 11743

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Neira:

As you are aware, I have received your letter of September 17 and the correspondence attached to it. You asked that I construe your letter as an appeal by the Town of Huntington relating to a denial of its request for a record of the Nassau County Police Department.

As I understand the matter, the record sought relates to an accident that occurred at a rifle range maintained by the Town of Huntington pursuant to a lease agreement. A notice of claim has been filed against the Town, and it is your understanding that a claim has also been filed against Nassau County, whose boundary is contiguous to the rifle range. The Nassau County Police Department denied access to its report pursuant to §87(2)(b) of the Freedom of Information Law on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In addition, it was stated that:

> "It is the policy of this Department to require an original notarized authorization from either a person listed on the case report or their legal representative, before we will release any information. Upon receipt of the authorization, we will process your request."

You contended in your correspondence with the Police Department that by filing a notice of claim, those named in the report have essentially "waived their right to privacy with respect to the incident and injury resulting from the shooting." You also wrote that the mother of the injured person "has given several interviews about the shooting which would also work as a waiver to any right to privacy." Further, you added that without access to Nassau County's report, the Town's "efforts to develop meaningful defense will be severely compromised."

In this regard, I offer the following comments.

First, the Committee on Open Government is authorized to offer advice and opinions 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 is found in §89(4)(a) of the Freedom of Information Law, which states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

I believe that the person designated to determine appeals regarding Nassau County government records is the County Attorney.

Second, the Town's interest as a litigant or potential litigant in this regard is, in my view, irrelevant to its rights of access under the Freedom of Information Law. It has been held that when a person or entity seeks records under the Freedom of Information Law, the applicant 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)].

Third, I believe that the policy of the Nassau County Police Department requiring a notarized authorization from a person identified in a report or his or her legal representative prior to the release of information is, as a matter of law, inappropriate. In general, whether the subject of a record prefers to authorize or preclude disclosure is, in my opinion, irrelevant in terms of an analysis of rights conferred by the Freedom of Information Law. In a case in which a law enforcement agency permitted persons reporting incidents to indicate on a form their preference concerning the agency's disclosure of the incident to the news media, the Appellate Division found that, as a matter of law, the agency could not withhold the record based upon the "preference" of the person who reported the offense. Specifically, in Johnson Newspaper Corporation v. Call, Genesee County Sheriff, 115 AD 2d 335 (1985), it was found that:

> "There is no question that the 'releasable copies' of reports of offenses prepared and maintained by the Genesee County Sheriff's office on the forms currently in use are governmental records under the provisions of the Freedom of Information Law (Public Officers Law art 6) subject, however, to the provisions establishing exemptions (see, Public Officers Law section 87[2]). We reject the contrary contention

> of respondents and declare that disclosure of a 'releasable copy' of an offense report may not be denied, as a matter of law, pursuant to Public Officers Law section 87(2)(b) as constituting an 'unwarranted invasion of personal privacy' solely because the person reporting the offense initials a box on the form indicating his preference that 'the incident not be released to the media, except for police investigative purposes or following arrest'."

Moreover, although the issue did not involve law enforcement, the Court of Appeals has held that a request for or a promise of confidentiality is all but meaningless; unless one or more of the grounds for denial appearing in the Freedom of Information Law may appropriately be asserted, the record sought must be made available [see Washington Post v. New York State Insurance Department, 61 NY 2d 557, 567 (1984)]. This is not to suggest that records or portions of records might not justifiably be withheld, but rather that a policy or promise of confidentiality in my opinion is irrelevant to an analysis of rights of access to records.

Fourth, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, based upon the correspondence, that the only ground for denial of significance is that cited by the Department, §87(2)(b). To reiterate, that provision authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of personal privacy.

While I am not familiar with the content of the report, it appears that the persons who filed the notices of claim have made substantial disclosures on their own initiative, either by filing a notice of claim or through disclosures and accounts given to the news media. Insofar as the report includes information that has already been disclosed either to the Town or through the news media, I do not believe that Nassau County could justifiably contend that disclosure would constitute an unwarranted invasion of personal privacy. With respect to the remainder of the report, if there is intimate personal information that has not been disclosed to the Town or to members of the news media, those details likely could be withheld. Other details, however, that are not intimate or sensitive might not rise to the level of what can be characterized as an unwarranted invasion of personal privacy. If that is so, those aspects of the report must in my view be disclosed.

Lastly, I emphasize that the Court of Appeals has stressed that the Freedom of Information Law should be construed expansively. Most recently, in Gould v. New York City Police Department [87 NY 2d 267 (1996)], the Court reiterated its general view of the intent of the Freedom of Information Law, 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).

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be sent to Nassau County officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Donald F. Kane, Commissioner of Police
Thomas J. King, Detective Sergeant
Owen B. Walsh, County Attorney

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
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

September 29, 1998

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 13. You have sought assistance in relation to your unsuccessful efforts in obtaining a "list of alternate housing used by the Division of Parole for the placement of sex offenders."

As I understand the matter, you asked initially that fees for copies be waived. The Division indicated that you may be entitled to the records, but that the request would not be honored without payment of the appropriate fee. You submitted a second request and specified that you were not asking for a fee waiver. However, the most recent response indicates that "the information you desire does not exist within this agency."

In this regard, I have no knowledge as whether the Division maintains any record containing the information sought. Nevertheless, it is noted that when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." If you consider it worthwhile to do so, you could seek such a certification.

I point out that in Key v. Hynes [613 NYS 2d 926, 205 AD 2d 779 (1994)], it was found that a court could not validly accept conclusory allegations as a substitute for proof that an agency could not locate a record after having made a "diligent search". However, in another decision, such an allegation was found to be sufficient when "the employee who conducted the actual search for the

documents in question submitted an affidavit which provided an adequate basis upon which to conclude that a 'diligent search' for the documents had been made" [Thomas v. Records Access Officer, 613 NYS 2d 929, 205 AD 2d 786 (1994)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1085

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 1, 1998

Mr. Richard Lenihan
83-B-2557
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. Lenihan:

I have received your letter of September 16. You wrote that your requests for records maintained at your facility have not been answered.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully

explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Anthony J. Annucci, Counsel to the Department.

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-11086

41 State Street, Albany, New York 12231
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Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 1, 1998

Mr. Steven Schrage
[redacted]

Dear Mr. Schrage:

I have received your letter of September 29 in which you requested a pamphlet describing the New York Freedom of Information Law.

Enclosed is a copy of "Your Right to Know", which describes and summarizes the Freedom of Information Law. Since your inquiry involves medical malpractice, it is noted that a different provision of law, §18 of the Public Health Law, deals specifically with access to patient records. In brief, that statute prohibits disclosure of medical records to all but "qualified persons." Subdivision (1)(g) of §18 defines the phrase "qualified person" to mean:

> "any properly identified subject, committee for an incompetent appointed pursuant to article seventy-eight of the mental hygiene law, or a parent of an infant, a guardian of an infant appointed pursuant to article seventeen of the surrogate's court procedure act or other legally appointed guardian of an infant who may be entitled to request access to a clinical record pursuant to paragraph (c) of subdivision two of this section, or an attorney representing or acting on behalf of the subject or the subjects estate."

To obtain additional information regarding access to patient information, it is suggested that you contact Mr. Peter Farr, NYS Department of Health, Hedley Park, Suite 303, Troy, NY 12180.

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-1087

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(518) 474-2518
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October 1, 1998

Mr. Samuel Canty
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Canty:

As you are aware, copies of your correspondence concerning access to an arbitrator's decision have been forwarded to the Committee on Open Government by the Office of the Attorney General. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

As I understand the situation, you are an employee of Monroe County and have attempted without success to obtain a copy of an arbitrator's decision involving layoffs of County employees. It appears that your requests have been directed to your union.

In this regard, I offer the following comments.

First, a union is not required to comply with 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."

A union, although it may represent government employees, is not itself government and, therefore, is not subject to the Freedom of Information Law.

Nevertheless, it is assumed that Monroe County, which clearly is an agency, maintains a copy of the record in which you are interested. Here I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require each agency 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 records access officer for Monroe County government is Mr. John Riley, and it is suggested that you transmit your request to him. It is also noted that §89(3) of the Freedom of Information Law requires that an applicant "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.

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, an arbitrator's decision would be public pursuant to §87(2)(g)(iii), which requires that final agency determinations be made available.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: John Riley
Renee Forgensi Davison

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11088

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October 1, 1998

Hon. Rose Marie Pernice
Incorporated Village of Manorhaven
33 Manorhaven Boulevard
Port Washington, NY 11050

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Pernice:

I have received your letter of September 16 and appreciate having the opportunity to review correspondence concerning a request by Mr. Thomas Panullo.

Mr. Panullo requested records that apparently relate to an "eminent domain" lawsuit initiated by DeJana Industries. He requested:

> "Any plans or proposals submitted to the Village of Manorhaven Inc. by DeJana, himself, and/or lawyers or architects hired by DeJana and/or DeJana Industries, on any property within the Village of Manorhaven Inc. owned by DeJana and/or DeJana Industries.
>
> "Any correspondence between the attorney for the Village of Manorhaven Inc. and DeJana and/or DeJana Industries' attorney and/or any representative of DeJana or DeJana Industries."

The Village denied the request on the advice of its attorney on the ground that the records consist of "litigation material that is protected by the attorney-client privilege and...is exempt from disclosure under the Freedom of Information Law."

If my understanding of the matter is accurate, that the records sought were communicated between DeJana Industries and the Village or the Village Attorney, there would be no basis for a denial of access.

In this regard, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant 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, i.e., between Village officials and the Village Attorney.

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 that a decision involving the assertion of the attorney-client privilege in relation to the Freedom of Information Law 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)].

As I understand the facts, the records in question were not communicated between the Village Attorney and Village officials. On the contrary, it appears that the records were sent by DeJana Industries to the Village Attorney or vice versa. If that is so, I do not believe that the records would fall within the scope of the attorney-client privilege or that any other basis for denial would be pertinent.

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: Thomas Panullo
James A. Bradley, Village Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11089

41 State Street, Albany, New York 12231
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October 5, 1998

Det. Augustine Papay, Jr.
Private Investigator
Inter-Pro Investigations
P.O. Box 143
Chester, NY 10918

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Detective Papay:

I have received your letter of September 21 and appreciate your kind words. You have sought guidance once again in relation to your request for records pertaining to a homicide committed years ago. While it is your belief that there may be a substantial number of records concerning the matter, you were informed that Jefferson County's file consists of a single page of notes.

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:jm

cc: Scott A. Schrader

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 5, 1998

Mr. Charles C. David Jr.
94-B-2094 D-1-40B
Marcy Correctional Facility
Box 3600
Marcy, NY 13403-3600

Dear Mr. David:

I have received your letter of October 1. As you requested, enclosed are copies of the advisory opinion to which you referred and the Committee's most recent supplement to its annual report.

You also sought my views concerning rights of access to a "Program & Security Assessment Summary Report." That kind of report was the subject of the enclosed opinion in which it was advised that the report in question constitutes intra-agency material [see Freedom of Information Law, §87(2)(g)], and that those portions that could be characterized as "evaluative" may be withheld.

I point out that a decision rendered in 1989 dealt with the same kind of record as that 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 report is equivalent to that described in Rowland D., it appears that it could be withheld.

I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1243
FOIL-AO-1109

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 5, 1998

Ms. Maureen E. Leidner
Pioneer Motel
Route 9N - Unit #3
Plattsburgh, NY 12901

Dear Ms. Leidner:

I have received your undated letter, which reached this office on October 2. In brief, you complained that your privacy has been violated by the Clinton County Department of Social Services and its Bureau of Adult Protective Services and asked for a copy of a brochure pertaining to the Personal Privacy Protection Law.

In accordance with your request, enclosed is a copy of "You Should Know", which describes the Personal Privacy Protection Law. However, I point out that that statute 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 county. Consequently, the Personal Privacy Protection Law would not be applicable or serve as a barrier to disclosure of records maintained by a unit of local government.

Nevertheless, there are other statutes that essentially prohibit a social services agency from disclosing certain records. For instance, §136 of the Social Services Law precludes the disclosure of information that is personally identifiable to an applicant for or recipient of public assistance. Another is §369(3) of the Social Services Law, which pertains to Medicaid and provides that:

> "Any inconsistent provision of this chapter or other law notwithstanding, all information received by public welfare and public health officials and service officers concerning applicants for and recipients of medical assistance may be disclosed or used only for purposes directly connected with the administration of medical assistance for needy persons."

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."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
Enc.
cc: Jo Robinson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 5, 1998

Mr. Patrick T. Morphy
Corporation Counsel
City of Troy Department of Law
City Hall
One 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, unless otherwise indicated.

Dear Mr. Morphy:

I appreciate having received a copy of your response to a request by Ms. Amy Ferraro of Fox News at Ten for mugshots maintained by the City of Troy Police Department relating to the arrests of four individuals.

You denied access and wrote that you "assume[d] that all of these persons have been so recently arrested that none of their criminal cases have yet been resolved, and that you have not obtained their permission for release of these records." You also expressed the view that "releasing such a photo at a time when the person has merely been accused of a crime is something that most reasonable people would find offensive". Based on those contentions, the records were denied on the ground that disclosure would constitute "an unwarranted invasion of personal privacy."

I respectfully disagree with your determination. In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I agree that the provision of greatest significance is the exception that authorizes an agency to withhold records to the extent that disclosure would result in an unwarranted invasion of privacy.

From my perspective, that standard is flexible and is subject to a variety of interpretations. A reasonable person viewing a particular item of personally identifiable information might feel that disclosure would be offensive, thereby resulting in an unwarranted invasion of personal privacy. An equally reasonable person might contend that disclosure of the same item would be appropriate or inoffensive, thereby resulting in what might be characterized as a permissible invasion of privacy.

With respect to the subjects of mugshots, all are persons who were arrested. It is assumed that all could have been seen during judicial or other proceedings (i.e., arraignments) that were open to the public. If the public can be present at or view a proceeding during which an arrestee can be identified, it is difficult to envision how a photograph of that individual would constitute an unwarranted invasion of personal privacy.

While disclosure of mugshots might embarrass or humiliate the individuals in those photos, there are many instances in which records have been determined to be available even though they represent events or occurrences that may be embarrassing. When individuals are arrested and/or convicted, their names and other details about them are generally made available and may be published; when a public employee is the subject of disciplinary action, that person's name and other details about him or her are accessible to the public, irrespective of whether the individuals to whom the records pertain may be embarrassed by their actions [see e.g., Daily Gazette v. City of Schenectady, 673 2d 783, (A.D. 3 Dept. 1998); Anonymous v. Board of Education for Mexico Central School District, 616 NYS 2d 867 (1994); Scaccia v. NYS Division of State Police, 520 NYS 2d 309, 138 AD 2d 50 (1988); Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); 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]. In short, in many cases, even though individuals may be embarrassed by particular aspects of their lives, that factor may have little or no bearing upon public rights of access to records concerning what might be considered as public events in which the public interest in disclosure outweighs an individual's interest in privacy.

In the only decision of which I am aware that dealt with facts pertinent to the instant situation, a similar argument was offered, but the court determined that the mugshots regarding all persons arrested must be disclosed, unless charges were dismissed in favor of the accused. In general, when charges against an accused are dismissed or terminated in favor of the accused, the records pertaining to the event become sealed under the Criminal Procedure Law, either §160.50 or §160.55. When the records are sealed, they are exempted from disclosure under the Freedom of Information Law [§87(2)(a)]. With respect to disclosure of the mugshots of those persons against whom the charges were pending in which the records had not been sealed, the court held that the agency could not meet its burden of proving that the privacy exception could validly be asserted [Planned Parenthood of Westchester, Inc. v. Town Board of the Town of Greenburgh, 587 NYS2d 461, 463 (1992)].

Having reviewed the decision to which you referred, I believe that it is factually different from the situation at issue. In Leibowitz v. Safir (674 NYS2d 736, AD 2 Dept. 1998), the court upheld a denial of access to records pursuant to §160.50(3)(j) of the Criminal Procedure Law, which provides that a criminal action is deemed terminated when an arrested person is released without being prosecuted. The cited provision states that a criminal action is considered terminated in favor of an accused when:

> "following the arrest of such person, the arresting police agency, prior to the filing of an accusatory instrument in a local criminal court but subsequent to the forwarding of a copy of the fingerprints of such person to the division of criminal justice services, elects not proceed further."

It is my understanding that the arresting police agency has not elected not to proceed; on the contrary, based on a discussion with a representative of Fox News at Ten, it appears that the cases against those named are proceeding. If that is so, the Leibowitz decision would not be relevant and the records would not be exempt from disclosure.

In sum, unless the cases against the individuals charged are considered to have been terminated, in which instances the mugshots would be sealed, I believe that the mugshots must be disclosed.

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: Amy Ferraro
Kathy Gazda

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11093

41 State Street, Albany, New York 12231
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October 6, 1998

Mr. Mark M. Rider
County Attorney
County of Saratoga
Saratoga Municipal Center
40 McMaster Street
Ballston Spa, NY 12020

Mr. Don Lehman
The Post-Star
P.O. Box 2157
Glens Falls, NY 12157

The staff of the Committee 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 Messrs. Rider and Lehman:

I have received correspondence from both of you regarding Saratoga County's denial of a request rendered by Mr. Rider for records sought by Mr. Lehman of the Post-Star. Mr. Lehman has sought an advisory opinion concerning the propriety of Mr. Rider's determination.

The records requested involve "an accounting of restitution payments made to ... (the Probation) department by former Moreau Supervisor Michael J. Sullivan as well as the schedule of payments dictating how often he is supposed to make them." Mr. Rider denied the request, citing §390.50 of the Criminal Procedure Law. That provision, which is entitled "Confidentiality of pre-sentence reports and memoranda", states in subdivision (1) in relevant part that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article...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 this statute or upon specific authorization of the court."

With respect to the scope of the language quoted above, Mr. Rider contended that "its application is broader than solely to presentence matters."

While I have some familiarity with §390.50, in order to obtain an expert opinion concerning its application, I contacted Ms. Linda Valenti, Counsel to the State Division of Probation and Correctional Alternatives. In short, Ms. Valenti indicated that the records at issue in her view are unrelated to "the question of sentence" and that §390.50 is inapplicable with regard to the records at issue.

Assuming that §390.50 does not apply, I believe that the Freedom of Information Law would govern rights of access. In brief, that statute is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While §87(2)(b) permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy", in view of the nature of disclosures made by means of public proceedings, I do not believe that the cited provision would serve as a basis for denial. The fact of the former Supervisor's conviction is clearly a matter of public record, as are the terms of his sentence. As in any situation in which a government agency is to be reimbursed or paid pursuant to the terms of a contract or similar agreement, the records reflective of those terms and whether or the extent to which payments have appropriately been made are, in my opinion, accessible to the public under the Freedom of Information Law.

In sum, to the extent that the records sought exist, I believe that they 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-1109

41 State Street, Albany, New York 12231
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October 6, 1998

Mr. Michael Rossi
89-C-0106
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. Rossi:

I have received your letter of September 23. You wrote that the Department of Correctional Services imposes a fee of twenty-five cents per photocopy for medical records requested under the Freedom of Information Law, and that you "know this is not correct."

From my perspective, the fee in question is not inappropriate. Section 87(1)(b)(iii) of the Freedom of Information Law authorizes an agency to charge up to twenty-five cents per photocopy for records up to nine by fourteen inches. Further, under §18 of the Public Health Law, which deals with patients' rights of access to medical records, a provider "may impose a reasonable charge for all inspections and copies", and "the reasonable charge for paper copies shall not exceed seventy-five cents per page."

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-11095

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October 6, 1998

Mr. Efrain Santiago
98-A-0738
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. Santiago:

I have received your letters dated September 30, both of which reached this office on September 25. As I understand the matter, you are attempting to obtain and correct records dealing with an "escape charge" that are maintained by the State Department of Correctional Services and the New York City Department of Correction.

In this regard, I offer the following comments.

First, since you did not identify the persons to whom your requests were made, I point out that the regulations promulgated by the Department of Correctional Services indicate that a request for records maintained at a correctional facility may be made to the facility superintendent or his designee. In the case of the New York City Department of Correction, the records access officer is Mr. Thomas Antenen.

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)].

The person designated by the State Department of Correctional Services to determine appeals is Anthony J. Annucci, Counsel to the Department. I believe that Counsel to the City Department also performs that function at that agency.

Third, while the Freedom of Information Law requires that records be disclosed in accordance with its provisions, nothing in that statute deals with the ability to amend or correct records. Nevertheless, §5.50 and the ensuing portions of the regulations adopted by the Department of Correctional Services pertain to the ability to attempt to challenge the accuracy of certain inmate records, including the correctional supervision history that would contain reference to charges and disciplinary actions or proceedings. It is suggest that you review those provisions of the regulations, which should be available in your facility library.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Superintendent
Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1096

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October 7, 1998

Mr. Jeffrey C. Smith
97-B-2689
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. Smith:

I have received your letter of September 22 in which you requested the "intervention" of the Committee on Open Government relating to failures on the part of several entities to respond to your requests for records.

In this regard, first, it is noted that the Committee is authorized to advise with respect to the New York Freedom of Information Law. The Committee is not empowered to "intervene" in the legal sense or to compel the disclosure of records.

Second, many of the entities to which you referred are not subject to the Freedom of Information Law. That statute applies to agencies, and §86(3) defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

A V.A. hospital is be part of the federal government and would be subject to the federal Freedom of Information Act, not the State law. Mortgage payment records would likely involve materials maintained by a private lender, such as a bank, that would fall outside the coverage of freedom of information provisions, either federal or state. The records of private attorneys also fall beyond the scope of those laws. However, I believe that the Ontario County Sheriff's office and the Yates County Public Defender's office are "agencies" required to comply with the Freedom of Information Law.

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 made to that person.

Next, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

While I am not familiar with the contents of the records that you are seeking from the Sheriff or the Public Defender, there may be grounds for withholding witness statements in whole or in part. Section 87(2)(b) permits an agency to withhold records insofar as disclosure would result in "an unwarranted invasion of personal privacy"; §87(2)(e) provides that records compiled for law enforcement purposes may be withheld in certain circumstances, i.e., when disclosure would identify

a confidential source. Further, §87(2)(f) authorizes an agency to deny access to records insofar as disclosure "would endanger the life or safety of any person."

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 pertaining to others 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 agency 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:tt

cc: Records Access Officer, Ontario County Sheriff
Records Access Officer, Yates County Public Defender

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1109?

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October 6, 1998

Mr. Daniel H. Hays
Assistant Editor
The National Underwriter Company
P.O. Box 770
Hoboken, NJ 07030-0770

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hays:

I have received your letter of September 25, as well as the materials attached to it. You have sought an advisory opinion concerning the propriety of a denial of access to records by the New York State Insurance Department.

According to an article that you prepared and forwarded, there are provisions of federal law (18 USC §§1033 and 1034) that prohibit individuals convicted of "a crime of dishonesty or breach of trust" from working in the insurance industry. You added that "persons with such convictions are only supposed to work...with a signed consent from a state insurance commissioner." The Metropolitan Life Insurance Company filed an application with the Superintendent of Insurance to seek consent to continue the employment of a particular employee and asked that the application and materials filed in support thereof be treated as confidential. The Superintendent consented to the continued employment of the Company's employee. Your request for the contents of the file on the matter was denied "as both an unwarranted invasion of privacy and a trade secret."

From my perspective, while portions of the records sought might properly be withheld, it is unlikely that the Insurance Department could justifiably withhold the records in their 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.

Section 87(2)(b) permits an agency to deny access to records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In general, because a conviction occurs

in open court during a public proceeding, and because records reflective of convictions are available from a court and usually other sources, I do not believe that disclosure of the fact of one's conviction would constitute an unwarranted invasion of personal privacy.

I note that the general repository of arrest and conviction data is the Division of Criminal Justice Services (DCJS), which maintains a centralized database including criminal history information. The functions and duties of that agency are described in Article 35 of the Executive Law, §§835 to 846. In Capital Newspapers v. Poklemba (Supreme Court, Albany County, April 6, 1989), it was held that conviction records maintained by DCJS are confidential in view of the legislative history of the statutes that govern the practices of that agency. Specifically, it was found that:

> "Both the language of the statute and the consistent history of limited access to the criminal records maintained by DCJS lead this court to conclude that an exception to the mandate of FOIL exists with respect to the disclosure sought by petitioner.
>
> "Having determined that POL, §87(2)(a) is applicable to the records sought by petitioner, this court shall not address the issue of whether a further exemption might be had pursuant to POL 87(2)(b) as an unwarranted invasion of personal privacy, or whether the records may be available from any other centralized source."

The Court, however, inferred that the records should be available from sources other than DCJS, for it was stated that:

> "...petitioner is correct when it asserts that the transmittal of an otherwise publicly available document to a centralized facility for inclusion in a government computer bank does not *per se* render it immune from disclosure. However, the issue is not whether the records under the control of DCJS **should** be released, but rather whether the provisions of FOIL and the Executive Law, as presently constituted, mandate the result sought by petitioner.
>
> "Certainly, the Legislature has the authority to provide for public access from a centralized location. It is equally clear that, unless otherwise sealed, a conviction record is a public document. Much has been said about potential abuses, given the ease with which these records may be obtained if the petition is sustained. Such fears are not determinative however. To argue that a criminal conviction obtained in a public proceeding in an open court system suddenly should be clothed with secrecy merely because an individual doesn't have to struggle to obtain it, makes a mockery of the right of public access. To suggest that public disclosure of conviction records is available

> only when it is through a difficult and time-consuming search of individual courthouse files or in local police stations, when the exact same information might be freely available if housed within a centralized computer bank, would be to create an irrational burden. Resolution of the question should not be resolved by how hard it is to discover the information sought. However, as aforesaid, the issue is not whether the information should be available, but rather, whether the Division of Criminal Justice Services has been statutorily directed to guard against public disclosure, thereby exempting it from the provision of FOIL" (emphasis added by the court).

As such, the court determined the issue by finding that the records maintained by DCJS were exempted from disclosure by statute, not because disclosure would constitute an unwarranted invasion of personal privacy. Additionally, the court inferred that conviction records are generally available from the courts in which proceedings resulted in convictions were conducted "or in local police stations."

While I believe that a record indicating a conviction must be disclosed, it is possible that the file includes intimate personal information submitted in order to explain circumstances or to justify one's continued employment. In my opinion, to the extent that the file includes intimate personal details, those portions may be withheld to protect privacy.

The other exception to which the Department made reference, §87(2)(d), states that an agency may withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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 the effect of disclosure upon the competitive position of the entity to which the records relate.

Pertinent is a 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).

Disclosure of the records sought would likely have no impact on "the government's ability to obtain necessary information." Further, it is doubtful in my view that disclosure would cause "substantial" injury to the competitive position of the Metropolitan Life Insurance Company. To the best of my knowledge, Metropolitan operates nationally and is a multi-billion dollar entity. To suggest that the disclosure of the fact that one of its employees has been convicted of a crime rises

to the level of "substantial injury to its competitive position" would in my opinion be difficult, if not impossible, to prove.

There are few judicial decisions that have dealt with the application of §87(2)(d), and I am aware of none that have dealt with analogous records. Typically, the proper assertion of §87(2)(d) has pertained to information such as computer models that involved a significant amount of time and money to develop (see Belth v. Insurance Department, 406 NYS 2d 649, NYLJ, January 9, 1978) or other records that have commercial value to competitors (see Encore, supra). I do not believe that the records in question could be characterized as a "trade secret" based upon the historical or traditional definition of that phrase. 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; see also 104 NY Jur 2d 234).

As I understand the nature of the records, they do not involve an opportunity on the part of Metropolitan Life "to obtain an advantage over competitors."

In sum, with the exception of the intimate personal information to which reference was made earlier, it is doubtful in my opinion that either of the grounds for denial upon which the Department relied could justifiably be asserted.

Lastly, in the context of your inquiry, it is assumed that the primary purpose of the federal law that generally bans employment of persons convicted of dishonesty or breach of trust in the insurance industry is to protect the public. It is also assumed that the exception permitting persons convicted of such offenses to continue their employment in the insurance industry with the consent of a state superintendent represents a means of ensuring that the public will be adequately protected and served. If those assumptions are accurate, it would seem that the public has the right to know when an employee of an insurance company who has been convicted of certain offenses continues to be employed by that company. Disclosure would represent a means of offering the public a choice in the marketplace and, in essence, consumer protection. In addition, disclosure in my view would enhance governmental accountability, especially in the context of the duties of a regulatory agency.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Sidney Glaser
John Mansfield
Bonnie Steingart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11098

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October 7, 1998

Mr. David Debo
Assignment Editor
WIVB TV
2077 Elmwood Avenue
Buffalo, NY 14207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Debo:

I have received your correspondence of October 2, which pertains to your efforts in obtaining the names of persons charged with crimes in the City of Jamestown. The City's Corporation Counsel indicated in a letter to you that "New York State law precludes us from divulging the name of the charged individual at this time..."

From my perspective, unless the person charged is a juvenile, or an "apparently eligible youth" charged with a misdemeanor or a violation [see respectively, Family Court Act, §784; Criminal Procedure Law, §720.15], or charges against an accused have been dismissed, I know of no law that would preclude the City from disclosing his or her identity. On the contrary, I believe that the Freedom of Information Law generally requires disclosure.

Although arrest records are not specifically mentioned in the current Freedom of Information Law, the original Law granted access to "police blotters and booking records" [see original Law, §88(1)(f)]. Even though reference to those records is not made in the current statute, I believe that such records continue to be available, for the present law was clearly intended to broaden rather than restrict rights of access. Moreover, it was held by the state's highest court, the Court of Appeals, several years ago that, unless sealed under §160.50 of the Criminal Procedure Law, records of the arresting agency identifying those arrested must be disclosed [see Johnson Newspapers v. Stainkamp, 61 NY 2d 958 (1984)].

From my perspective, unless an arrest or booking record pertaining to an adult has been sealed pursuant to §160.50 of the Criminal Procedure Law, it must be disclosed. Under that statute, when criminal charges have been dismissed in favor of an accused, the records relating to the arrest

ordinarily are sealed. In those instances, the records would be exempted from disclosure by statute [see Freedom of Information Law, §87(2)(a)].

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 Corporation Counsel.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Richard L. Sotir, Jr., Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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October 7, 1998

Ms. Florence Englander
[redacted]

The staff of the Committee on 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. Englander:

I have received your undated letter, which reached this office on September 28. You have sought assistance in your efforts in obtaining information on behalf of your husband from the New York City Employees' Retirement System.

Having reviewed the correspondence attached to your letter, it appears that you may misunderstand the Freedom of Information Law. It is emphasized that the title of the Freedom of Information Law may be somewhat misleading, for it is not a vehicle that requires the disclosure of information per se; rather, it is a vehicle that pertains to rights of access to existing records. Similarly, while that statute may require an agency to disclose records, it does not require that an agency provide answers in response to questions. I note too that, §89(3) of the Law states in part that an agency is not required to create a record in response to a request.

In your letter to the Records Access Officer, you sought to obtain information by raising a series of questions. While agency staff would not be prohibited from answering your questions, in my view, there would be no requirement to do so under the Freedom of Information Law. In short, an agency's obligation under that statute involves responding to requests for records.

In a related vein, I do not believe that the Freedom of Information Law requires that an agency perform legal research. From my perspective, when an inquiry involves questioning "what rule" an agency can use to justify certain action, it is not a request for a record.

It is suggested that, in the future, rather than seeking information by raising questions or asking for justifications of an agency's actions, you should request existing records.

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: Records Access Officer

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
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October 7, 1998

Mr. Deyon Thompson
93-A-8164, E-27-04
Wende Correctional Facility
3622 Wende Road, 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. Thompson:

I have received your letter of September 27. You have asked whether there is any law that would enable you to obtain records without payment.

In this regard, when records are accessible under the Freedom of Information Law, they must be made available for inspection and copying. An agency cannot charge a fee for the inspection of records. Further, when inspecting records, an individual may take notes concerning the contents of the records. However, under §87(1)(b)(iii) of the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy when reproducing records. It is noted that there is nothing the Freedom of Information Law relating to the waiver of fees, and that it has been held that an agency may charge its established fee for copies, even when a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

Enclosed is a copy of the Freedom of Information Law, which appears as §§84-90 of the Public Officers Law.

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

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October 7, 1998

Mr. Preston A. Smith
87-C-0186
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. Smith:

I have received your letter of September 26, as well as the correspondence attached to it. As I understand your remarks, you are complaining that a request for records maintained at your facility was not answered in a timely manner.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the Department 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:jm

cc: V. Carlson, Inmate Records Coordinator

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,102

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 7, 1998

Ms. Christine A. Wills
[redacted]

The staff of the Committee 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. Wills:

I have received your letter of September 28, as well as a variety of correspondence attached to it. You have sought my views concerning your efforts in obtaining records from the Office of the Rensselaer County District Attorney.

In brief, in the correspondence, you referred to a drug raid occurring at a certain address in the City of Troy on January 8, 1992. Despite many requests, you have not received what you consider to be a satisfactory response.

In this regard, I have contacted Joseph Ahearn, Assistant District Attorney, on your behalf to learn more of the matter. Based upon my conversation with him, the primary issue appears to involve the manner in which the Office of the District Attorney maintains its records. My understanding is that records ordinarily cannot be located on the basis of the description of an event or the location where it occurred, or the date of an event. According to Mr. Ahearn, the records maintained by the agency are generally kept by name of a defendant.

It is noted that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. I point out that it has been held 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 context of your request, it appears that the Office of the District Attorney simply cannot locate the records in which you are interested based upon the terms of your request. If you can name a defendant, it is likely that the agency could locate the records, if they exist.

Lastly, Mr. Ahearn indicated that, at this juncture, he is unaware of whether any person might have been charged or indicted in relation to the incident in question. Further, if there was no indictment, the District Attorney might not maintain records on the subject.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm

cc: Joseph Ahearn

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,103

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 8, 1998

Mr. Jean M. Belot
96-A-4612
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. Belot:

I have received your letter of September 28. You have sought assistance in relation to your efforts in obtaining records from the Office of the Dutchess County District Attorney and the City of Poughkeepsie Police Department. You indicated that the Police Department informed you that you would need a judicial subpoena to acquire the records.

Although I have located your appeal to the Police Department, I was unable to find any appeal concerning a request made to the District Attorney. Nevertheless, I offer the following comments.

First, as a general matter, the Freedom of Information Law does not distinguish among applicants for records. When records are accessible under that statute, it has been held that they must made equally available to any person, regardless of 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 and Son v. NYC Health and Hosps Corp., 62 NY 2d 75 (1984)]. Therefore, a person seeking records under that statute is treated in the same manner as any other member of the public. If a person appeals a denial of access under that statute and the appeal is denied, that person may seek judicial review of the denial by initiating a proceeding under Article 78 of the Civil Practice Law and Rules. The ability to use a judicial subpoena would be based on one's status a litigant or defendant, for example, rather than as a member of the public. The grant of a judicial subpoena would generally involve a showing of some substantial interest in the records.

Because I am not an expert on the subject of judicial subpoenas, it is suggested that you discuss the issue with your attorney or a representative of Prisoners' Legal Services.

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. 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 kinds of records falling within the scope of your requests, relevant is a decision by the Court of Appeals concerning records 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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, only to the extent that the records fall within one or more of the grounds for denial would the agencies from which you requested records have the authority to deny access to the records. If the records have justifiably been withheld under the Freedom of Information Law, the only means of gaining access would involve the use of other disclosure devices, such as discovery under the Criminal Procedure Law or perhaps a judicial subpoena or order.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Dutchess County District Attorney
Records Access Officer, City of Poughkeepsie Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,104

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 15, 1998

Ms. Juanita 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 September 29 and the materials attached to it.

With respect to your questions, the federal Freedom of Information Act pertains to records maintained by federal agencies. As such, it is not applicable to records maintained by a state correctional facility. The New York state Freedom of Information Law, however, applies to records maintained by entities of state and local government, including correctional facilities. The Committee on Open Government responds to complaints relating to the Freedom of Information Law, and its primary function involves offering advice and opinions concerning that statute. Enclosed is a copy of "Your Right to Know", which describes the work of the Committee and the operation of the Freedom of Information Law.

You complained that you requested medical records from the Green Haven Correctional Facility, which indicated that copies would be made available upon payment of a specified fee. Although you sent a money order to the facility in the proper amount in September, you have still not received the records.

In this regard, since the request involved medical records, based on the response to by the facility, it appears that the records are being made available in accordance with §18 of the Public Health Law. That statute, in brief, gives individuals rights of access to medical records pertaining to themselves, and upon payment of the appropriate fee and completion of the necessary authorizations, I believe that the facility was required to make copies of the records available.

In an effort to expedite disclosure of the records, a copies of this response will be forwarded to Health Unit at the facility and to the Office of Counsel to the Department of Correctional Services. If you do not receive copies of the records within a reasonable time, please contact me.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: L. Zwillinger
Health Unit Senior Level Clerical Person
Leslie Becher, Office of Counsel

enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,105

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 15, 1998

Mr. John J. Culkin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Culkin:

I have received your letter of October 1. You asked what penalties may be imposed if a person is found guilty of unlawful prevention of public access to records under §240.65 of the Penal Law.

That statute indicates that unlawful prevention of public access to records is a violation. The term "violation" is defined in §10.00(3) of the Penal Law to mean "an offense, other than a 'traffic infraction', for which a sentence to a term in excess of fifteen days cannot be imposed." Additionally, §80.05(4) of the Penal Law states that: "A sentence to pay a fine for a violation shall be a sentence to pay an amount, fixed by the court, not exceeding two hundred fifty dollars." Based on the foregoing, it appears that a person found guilty of a violation may serve up to fifteen days in jail and/or be fined up to §250.

I hope that I have been of ass' nce.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1106

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

Mr. Curtis Mosley
98-A-2275
Green Haven Correctional Facility
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. Mosley:

I have received your letter of October 1. You have sought guidance in obtaining records from your "18-B trial attorney."

In this regard, it is noted at the outset that the Freedom of Information Law pertains to agency records. Section 86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

As such, the Freedom of Information Law generally applies to records maintained by state and local government.

While I believe that the records of the governmental entity required to adopt a plan under Article 18-B are subject to the Freedom of Information Law, the records of an individual attorney performing services under Article 18-B may or may not be subject to the Freedom of Information Law, depending upon the nature of the plan. For instance, if a plan involves the services of a public defender, I believe that the records maintained by an office of public defender would fall within the scope of the Freedom of Information Law (see County Law, §716), for that office in my view would constitute an "agency" as defined in §86(3) of the Freedom of Information Law. However, if it involves services rendered by private attorneys or associations, those persons or entities would not in my view constitute agencies subject to the Freedom of Information Law.

If the records are maintained by a private attorney and the Freedom of Information Law does not apply, it is suggested that you contact the agency that operates the 18-B program and ask that it make contact with the attorney in question. If the attorney is a public defender subject to the Freedom of Information Law, and that person has failed to respond to your requests, it is suggested that you consider your requests to have been denied and that you appeal in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "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."

Frequently the person designated to determine appeals within county government is the county 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-11,107

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 16, 1998

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 27 in which you contend that you are "getting the runaround" from the Division of Parole.

You questioned the employment of Terrence X. Tracy and wrote that you found his name in a law diary that indicated that he works for the Department of Law. Mr. Tracy, to the best of my knowledge, has served for some time as Counsel to the Division of Parole. He is identified as Counsel to the Division of Parole in the State Directory published by the Office of General Services.

You also asked that I "remind" officials at the Division of Parole that "they must tell one whom to appeal if they deny the request." I will do so by sending a copy of this response to Mr. Tracy.

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 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:tt

cc: Terrence X. Tracy

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1108

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

Mr. James Emmett Farr
DC#038492
Santa Rosa Correctional Institution
5850 E. Milton Road
Milton, FL 32583

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Farr:

I have received your letter of October 1. You have sought assistance in obtaining records pertaining to yourself from Angel Guardian Children and Family Services, Inc.

In this regard, it is noted at the outset that the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, 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 in New York; it does not apply to private facilities. By virtue of its name, it appears that the entity that you identified is not part of government and, therefore, is not subject to the Freedom of Information Law.

Further, records relating to foster care are generally confidential under §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."

In view of the language quoted above, I do not believe that records maintained by entities having duties relating foster care can be disclosed, unless authorization to disclose is conferred by a court, a county department of social services or what is now the New York State Office of Children and Family Services. It is suggested that you contact the appropriate county agency first in order to describe your situation and to seek an authorization to disclose the records to you.

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-11,109

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

Mr. Michael A. Kless
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kless:

I have received your letter of October 4, as well as the materials attached to it. You have sought my views concerning a denial of your request by Ms. Kathleen E. O'Hara, Assistant Corporation Counsel for the City of Buffalo.

It is my understanding that you are attempting to obtain certain "emergency medical response protocols." In response to the request, Ms. O'Hara wrote that the section of the protocols of your interest "is protected by copyright and its distribution is through exclusive license only." Consequently, she denied access, citing §87(2)(d) of the Freedom of Information Law and stating that "since the document is a trade secret or was submitted to the agency by a commercial enterprise, or was derived from information obtained from a commercial enterprise and...if disclosed, would cause substantial injury to the competitive position of the subject enterprise."

In this regard, if the City has acquired software, for example, from a private entity, and the software is licensed or copyrighted, reproduction of the copyrighted material without the consent of the copyright holder would likely result in copyright infringement. Further, if reproduction of the software would defeat the purpose of the copyright and cause injury to enterprise that holds the copyright, it is likely in my view that §87(2)(d) of the Freedom of Information Law could validly be asserted.

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.).

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 may 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 software 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.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Kathleen E. O'Hara, Assistant Corporation Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,110

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

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 October 5. You have sought assistance in obtaining the "rap sheet" of prosecution witnesses from the Office of the Broome 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 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: Hon. Gerald F. Mollen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,111

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

Mr. Bernard Tartasky
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tartasky:

I have received your letter of October 2. You asked how you might obtain a copy of a judge's notes in a particular case.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in which the proceeding was conducted.

While the nature of the records of your interest is not entirely clear, I point out that it has been held that a judge's personal notes are generally not accessible to the public [see Herald Companies v. Town of Geddes, 470 NYS2d 81 (1983)].

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-1112

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 19, 1998

Ms. Ann Nathan
[redacted]

The staff of the Committee on 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. Nathan:

I have received your letter of October 12, as well as the correspondence relating to it. You have sought an opinion concerning your right to obtain the resumes and applications of applicants for the position of principal in the Katonah-Lewisboro School District.

In this regard, I offer the following comments.

First, §89(7) of the Freedom of Information Law states that an agency, such as a school district, is not required to disclose the name of an applicant for appointment to public employment. Therefore, although the District could choose disclose the identities of the applicants who were not hired, it would not be obliged to do so.

Second, notwithstanding the foregoing, I believe that many aspects of the resumes or applications submitted regarding those who were not hired, as well as a variety of details regarding the person who was hired, 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. As suggested in the correspondence, one of the grounds for denial, §87(2)(b), states that an agency may withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy."

In a case in which an individual wanted to compare his qualifications with the qualifications of others, it was determined that resumes of those others must be disclosed, following the deletion of personally identifying details [see Harris v. City of University of New York, Baruch College, 114 AD 2d 805 (1985)].

With respect to the records pertaining to the incumbent of the position, I note that the judicial interpretation of the Freedom of Information Law indicates 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 has been held that disclosure of a public employee's educational background would not constitute an unwarranted invasion of personal privacy and must be disclosed [see Ruberti, Girvin & Ferlazzo v. NYS Division of State Police, 641 NYS 2d 411, 218 AD 2d 494 (1996)]. Additionally, in a recent judicial decision, Kwasnik v. City of New York (Supreme Court, New York County, September 26, 1997), the court quoted from and relied upon an opinion rendered by this office and held that those portions of resumes, including information detailing one's prior public employment must be disclosed. The Committee's opinion stated that:

> "If, for example, an individual must have certain types of experience, educational accomplishments 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 ... to the extent that records sought contain information pertaining to the requirements that must have been met to hold the position, they should be disclosed, for I believe that disclosure of those aspects of documents would result in a permissible rather than an unwarranted invasion [of] personal privacy. Disclosure represents the only means by which the public can be aware of whether the incumbent of the position has met the requisite criteria for serving in that position.

"The Opinion further stated that:

> "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)]."

In short, it is likely that some aspects of the resume of the incumbent must be disclosed, while others could be withheld to protect personal privacy.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Karen McCarthy, Ph.D.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1113

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 20, 1998

Mr. Mike Morgan
[redacted]

Dear Mr. Morgan:

Your letter of October 16 sent to the Department of State has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the state's Freedom of Information Law.

In brief, you have sought records concerning a "rice cake plant" that you believe is located in upstate New York, as well as records concerning a named individual. In this regard, while the Department of State maintains records relating to every business incorporated in the state, those records are not filed by subject or by the location of businesses. As such, there would be no way of retrieving records that might be maintained by the Department concerning a company without additional information. Similarly, there is no single agency or public database that includes all information pertaining to individuals or that would enable the public to locate records pertaining to a particular person without additional detail. Although the Department of Taxation and Finance maintains records identifiable to taxpayers, both individuals and business entities, those records are generally confidential under provisions of the Tax Law.

For future reference, I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, a request must include sufficient detail to enable agency staff to locate and identify the records.

Lastly, while I am unaware of the nature of the records it maintains or the means by which its records are kept or filed, it is suggested that you contact the Department of Agriculture and Markets. It is possible that that agency inspects or oversees the kind of facility that you referenced and that it may be able to identify a plant that produces a certain product. In seeking records from that agency, a request may be made to the Records Access Officer, Department of Agriculture and Markets, 1 Winners Circle, Albany, NY 12235.

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-1114

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 20, 1998

Mr. Joseph Afonso
Glenview Construction, Inc.
94 Old Mill Road
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. Afonso:

I have received your letter of October 8, as well as the materials attached to it. You asked that I review the correspondence and offer an advisory opinion concerning delays in responding to requests for records of the Town of Newburgh and the appeals that followed.

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..."

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 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)].

Lastly, in view of the remarks offered by the Town Attorney, it is emphasized that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute provides in relevant part that an agency is not required to create a record a record in response to a request. Insofar as information sought does not exist in the form of a record or records, an agency would not be obliged to prepare a new record containing that information on behalf of an applicant.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Norma Jacobson
Richard J. Drake

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1115

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Mr. Steven Schrage
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schrage:

I have received your letter of October 9. You asked whether the Freedom of Information Law can serve as "a vehicle for challenging the confidentiality of the proceedings of the Board for Professional [Medical] Conduct."

In this regard, while the Freedom of Information Law provides broad rights of access, I do not believe that it would enable you to obtain the records in question.

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 thereof fall within one or more of the grounds for denial appearing in §87 (2) (a) through (i) of the Law. 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." Relevant to the matter is §230 of the Public Health Law, which pertains specifically to the State Board for 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 the Board, any committee of the Board 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 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

FOIL-AO-1116

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Mr. Johnny McCoy
96-A-7119
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

Dear Mr. McCoy:

I have received your letter of October 18. You expressed the belief that you can obtain records that describe the contents of "CS gas" used at your facility 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 possess records generally, and this office maintains no records concerning CS gas. Further, it is not the function of the Committee to obtain records on behalf of persons seeking records. Nevertheless, I offer the following comments and suggestions.

First, the regulations promulgated by the Department of Correctional Services indicate that a request for records maintained at a correctional facility may be made to the facility superintendent or his designee. To seek records maintained at the Department's central offices in Albany, a request may be directed to Mr. Mark Shepard, the Department's records access officer.

Second, the Freedom of Information Law pertains to existing records. If the information in which you are interested in not kept by the Department or at your facility, the Freedom of Information Law would not apply.

Third, as a general matter, and insofar as the Department or the facility maintains records that contain the information in question, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. I would conjecture that a description of the substances or chemicals that make up the gas would be public, for that information could likely be obtained from other sources or perhaps through the facility librarian.

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-1117

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Mr. Gary Fusfield
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fusfield:

I have received your letter of October 13, as well as the correspondence related to it. You have requested an advisory opinion concerning your requests for records of the Office of the Inspector General and the State Ethics Commission.

With respect to the former, in a letter addressed to you on October 5, Deputy Chief Inspector Joseph W. Flynn indicated that your complaint had been investigated by the Inspector General for the Workers' Compensation Board and that, therefore, his office would take no further action. As I understand his response, the Office of the Inspector General did not conduct an investigation separate from that conducted by the Workers' Compensation Board. Consequently, it does not appear that his agency maintains records on the subject of your interest.

With regard to the State Ethics Commission, rights of access to its records are not governed by the Freedom of Information Law, which is also known as Article 6 of the Public Officers Law. Specifically, §94(17)(a) of the Executive Law, which pertains to records of the State Ethics Commission, 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 inspections are:
>
> (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except the categories of value or amount, which shall remain confidential, and any other item of information deleted pursuant to paragraph (h) of subdivision nine of this section;

(2) notices of delinquency sent under subdivision eleven of this section;

(3) notices of reasonable cause sent under paragraph (b) of subdivision twelve of this section; and

(4) notices of civil assessments imposed under this section."

Based on the foregoing, the records that you are seeking from the Commission are exempt from the disclosure requirements of the Freedom of Information Law.

I hope that the preceding commentary serves to clarify your understanding of the matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Joseph W. Flynn
Richard Rifkin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1118

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Mr. Lawrence Miller
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Miller:

I have received your letters of October 13 and 14, both of which concern requests for records of the Hewlett-Woodmere School District. You complained regarding a delay in disclosure of records by the District. In addition, you contended that you have the right to inspect records without the imposition of a fee, even though the records include items that can be withheld under the Freedom of Information Law.

In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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 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)].

Second, 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 ground for denial appearing in §87(2). In that event, I do not believe that an applicant would have the right to inspect the record. In order to obtain the accessible information, upon payment of the established fee, I believe that the agency would be obliged to disclose those portions of the records after having made appropriate deletions from a copy of the record. In short, when accessible and deniable information appear on the same page, the practice preparing a redacted copy and charging the established fee, in my opinion, is justifiable.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman

Robert J. Freeman
Executive Director

RJF:jm
cc: Dr. Myrna M. Uhlich
Dr. Charles Fowler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1119

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 22, 1998

Ms. Susan Collender
[redacted]

The staff of the Committee on 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. Collender:

I have received your letter of October 7, as well as the correspondence relating to it. You have complained with respect to the delay in granting or denying access to information that you have requested from the New York City Board of Education.

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.

From my perspective, the acknowledgement of the receipt of a request indicating that a request will be granted or denied on an approximate date does not require that the applicant for the record be informed at that time of whether the records will be made available or withheld. Frequently, disclosure may be delayed due to the need to review records to determine which portions

must be disclosed or may be withheld, as the case may be. In short, when an agency acknowledges receipt of the request, it may not know at that time of the extent to which the request will be granted or denied.

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.

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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,120

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 27, 1998

Mr. Douglas Ames
90-A-4509
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. Ames:

I have received your letter of October 12, as well as the correspondence attached to it. In brief, you have complained with respect to delays in responding to your requests for records of the Office of the Kings County District Attorney.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

For your information, the person designated by the District Attorney to determine appeals is Jodi L. Mandel, Assistant District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Jodi L. Mandel
Chaim Sandler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,121

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 27, 1998

Mr. Robert J. Spence
Office of Richard J. McCord, Esq.
The Financial Center at Mitchell Field
90 Merrick Avenue, 8th Floor
East Meadow, NY 11554

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Spence:

I have received your letter of October 14, as well as the correspondence attached to it.

You indicated that you represent Comps, Inc., which has requested "property photos maintained by the New York City Department of Finance." The photos were taken from 1984 to 1989, and the Department indicated that it "has no available medium in which to provide the photos that you have requested since these photos have never been converted to digital images." Your correspondence indicates, however, that a different firm appears to have been given the opportunity to copy the photos and has a complete file that it sells on CD Rom. You have sought an advisory opinion in an effort to resolve the matter.

In this regard, I offer the following comments.

First, since your request was based upon 5 U.S.C. §552, I point out that that provision is the federal Freedom of Information Act, which applies only to records maintained by federal agencies. The applicable statute under the circumstances is 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. From my perspective, none of the grounds for denial would be pertinent, and the Department has not suggested that the photos would not be accessible.

Second, since the Department does not have the ability to reproduce the photos in the form or format of interest to your client, the issue appears to involve whether the firm has the right to reproduce the photographs with its own equipment. While §87(2) of the Freedom of Information Law states that accessible records must be made available for inspection and copying, there is little decisional law that deals with the situation in which an applicant seeks to use his or her own copying equipment to reproduce an agency's records.

Most analogous to the situation in my view is the decision rendered in Murtha v. Leonard [210 AD 2d 411, 620 NYS 2d 101 (1994)]. In that case, a small village with limited staff, space and facilities adopted rules prohibiting requesters from using their own photocopiers, and it was held that the rules constituted "a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [id., 102]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency has sufficient resources to permit the use of a personal photocopier or other reproduction equipment in a non-disruptive manner, it would likely be found that a prohibition regarding the use of one's own copying equipment would be invalid, particularly if an agency's rules or code provisions do not specifically prohibit the use of those devices. In this instance, there is no indication in the correspondence that the Department has adopted any rules pertaining to the use of copying equipment owned by a person or firm on the Department's premises. In my view, assuming that the Department has the physical space to enable the firm to reproduce the photos and that the use of that space would not be disruptive to the Department's routine and necessary business, based on the direction provided in Murtha, I believe that the Department would be obliged to permit your client to reproduce the photos.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gerald S. Koszer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO - 11,122

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 27, 1998

Mr. Samuel Tannenbaum
97-A-6649
Mid-State Correctional Facility
P.O. Box 2500
Marcy, NY 13403-2500

Dear Mr. Tannenbaum:

I have received your letter of October 21 in which you requested certain records from this office.

In this regard, the Committee on Open Government is authorized to provide advice concerning public rights of access to government records. The Committee does not maintain possession or control of records in general. In short, I cannot make the records of your interest available, because this office does not possess them. Nevertheless, I offer the following comments.

First, the regulations promulgated by the Department of Correctional Services indicate that a request for records kept at a correctional facility may be made to the facility superintendent or his designee.

Second, since you asked that fees for copies be waived, I point out that there is nothing in the Freedom of Information Law dealing with fee waivers. Further, it has been held that an agency may charge its established fee, even when records are requested by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 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. It is likely in my view that a log or similar record identifying those employees who worked on a certain date during a particular shift would be available, for it has been found that time and attendance records are accessible under the Law [see Capital Newspapers v. Burns, 109 AD2d 92, affirmed 67 NY2d 562 (1986)].

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- 11123

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 27, 1998

Mr. and Mrs. Robert W. Broderick
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. and Mrs. Broderick:

As you are aware, your letter of October 16 addressed to Attorney General Vacco has been forwarded to the Committee on Open Government. The Committee, a unit of the Department of State, is authorized to provide advice concerning the Freedom of Information Law.

As I understand the matter, it is your view that the Southern Cayuga Central School District denied your son access to an important aspect of his education without due process, and you requested records in order to ascertain the reason for the District's actions. Nevertheless, according to your letter, the District has failed to respond in a manner consistent with law. In this regard, I offer the following comments.

First, the Freedom of Information Law provides direction concerning the time and manner in which agencies, such as school districts, 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)].

Second, while your letter does not describe the nature of the records sought, I point out as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Enclosed are copies of that statute and an explanatory brochure that may be useful to you.

Assuming that some of the records sought consist of communications between or among District officials, it is likely that §87(2)(g) would be pertinent. While that provision serves as a potential basis for denial of access to records, due to its structure, it frequently requires substantial disclosure. Section 87(2)(g) permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 report is indeed the work of a consultant, it would be available or deniable, in whole or in part, based on its specific contents.

I point out that one of the contentions offered by the New York City Police Department in a recent decision rendered by the Court of Appeals, the State's highest court, was that certain reports could be withheld because they were not final and because they relate 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][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)..." [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)" (id., 276-277).

Perhaps most relevant under the circumstances would be 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 points of the Act are rights of access by certain persons 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 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 a 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 hope that I have been of assistance. Should any questions arise concerning the Freedom of Information Law, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Board of Education

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,124

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 28, 1998

Hon. Pat Haaf
Town Clerk
Town of Fallsburg
P.O. Box 830
South Fallsburg, NY 12779

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Haaf:

As you are aware, I have received your correspondence concerning our telephone conversation relating to the sufficiency of a response to a request made under the Freedom of Information Law to the Town of Fallsburg.

In brief, the response includes reference to each aspect of three requests and indicates that records involving two elements of the requests would be made available at a certain time and date. With respect to the remainder of the requests, it is stated that no records exist. From my perspective, the response is fully appropriate.

In my view, an agency must inform an applicant of the right to appeal when an agency maintains records and denies access to the records in whole or in part. I do not believe that there is any right to appeal a denial of access when the records sought do not exist or are not maintained by an agency. In that circumstance, no records would be withheld, and there would be no denial of access.

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-11,125

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 28, 1998

Ms. Lois A. Dekoskie
TAXPAYERS TV
61 Broadway
Kingston, NY 12401

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Ms. Dekoskie:

I have received your letter of October 13, as well as the materials attached to it pertaining to your efforts to obtain information from the City of Kingston School District. Related materials have also been sent to this office by Douglas A. Goodemote, Assistant Superintendent. Having reviewed the documentation, I offer the following comments.

It is emphasized at the outset that the Freedom of Information pertains to existing records. Section 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 analysis or compilation indicating portions of a budget that might have been reduced, District officials would not be obliged to prepare such an analysis on your behalf. Similarly, although an agency must disclose existing records to the extent required by law, it is not required to produce information in response to questions. In the future, rather than seeking to elicit information by posing questions, it is suggested that you seek existing records.

In a related vein, one of your requests involves an attempt to obtain the "Board of Education Package from this date forward." Once again, because packages not yet prepared do not constitute records, the Freedom of Information Law would not apply, and the District would not be obliged to honor a request that is prospective in nature that deals with records that do not yet exist.

Lastly, it is likely that the package distributed to the Board of Education prior to its meetings contains both information available under the Freedom of Information Law and information that may 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. In my opinion, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed, and several of the grounds for denial may be relevant to such an analysis in relation to the records in question..

As inferred by Mr. Goodemote, records prepared by District staff and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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 relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Items within meeting packages might in some instances fall within that exception.

I point out that although records or perhaps portions of records may be withheld, there is no requirement that they must be withheld. The Court of Appeals, the state's highest court, has confirmed that the exceptions to rights of access are permissive, rather than mandatory, stating that:

> "while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissible rather than mandatory language, and it is within the agency's discretion to disclose such records, with or

without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY 2d 562, 567 (1986)].

Consequently, even if it is determined that a record may be withheld under §87(2)(g), for example, an agency would have the authority to disclose the record.

It is also emphasized that the grounds for withholding records under the Freedom of Information Law and the grounds for entry into executive session are separate and distinct, and that they are not necessarily consistent. In some instances, although a record might be withheld under the Freedom of Information Law, a discussion of that record might be required to be conducted in public under the Open Meetings Law, and vice versa. For instance, if an administrator transmits a memorandum to the Board suggesting a change in policy, that record could be withheld. It would consist of intra-agency material reflective of an opinion or recommendation. Nevertheless, when the Board discusses the recommendation at a meeting, there would be no basis for conducting an executive session.

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: Douglas A. Goodemote

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,126

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 28, 1998

Mr. George Lithco
Jacobowitz and Gubits, LLP
Counselors at Law
158 Orange Ave.
P.O. Box 367
Walden, NY 12586-0367

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Lithco:

I have received your letter of October 20, as well as the materials relating to it.

According to your letter, your firm recently submitted a written request to the Town Clerk of the Town of Fishkill for permission to review minutes of meetings held during a certain period. Soon after, you were informed that you could not do so "due to a dispute in court conflict", but that you might be given the opportunity to inspect the minutes "in a month."

In this regard, I offer the following comments.

First, that the records sought might be pertinent to or used in litigation is, in my view, largely irrelevant to rights of access. As stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. The Court in Farbman, supra, discussed the distinction between the use of the Freedom of Information Law as opposed to the use of discovery in Article 31 of the Civil Practice Law and Rules. Specifically, it was found that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on governmental decision-making, its ambit is not confined to records actually used in the decision-making process (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request.
>
> "CPLR article 31 proceeds under a different premise, and serves quite different concerns. While speaking also of 'full disclosure' article 31 is plainly more restrictive than FOIL. Access to records under CPLR depends on status and need. With goals of promoting both the ascertainment of truth at trial and the prompt disposition of actions (Allen v. Crowell-Collier Pub. Co., 21 NY 2d 403, 407), discovery is at the outset limited to that which is 'material and necessary in the prosecution or defense of an action'" [see Farbman, supra, at 80].

Based upon the foregoing, the pendency of litigation would not, in my opinion, affect either the rights of the public or a litigant under the Freedom of Information Law.

Second, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

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)].

In my opinion, if records are clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as a month. Minutes of meetings of town boards are typically kept together, in a location where they are readily accessible. If that is so in this instance, a delay in disclosure would appear to be inconsistent with the intent of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Eloise Wittholt, Town Clerk
Ronald Blass

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1127

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

October 30, 1998

Mr. Nathaniel Sackey
Wyoming Correctional Facility
P.O. Box 501, Dumbar Road
Attica, NY 14011-0501

Dear Mr. Sackey:

I have received your letter of October 26 in which you appealed a denial of access to records by the Division of Parole.

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 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 Division of Parole to determine appeals is Terrence X. Tracy, Counsel to the Division.

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-11,128

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 3, 1998

Mr. William Schmidlin
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Schmidlin:

I have received your undated letter, which reached this office on October 19. You referred to an investigation of your mother's death by the Board for Professional Medical Conduct and asked that I obtain excerpts to support your allegations that there is "reasonable evidence that a crime was committed..."

In this regard, the Committee on Open Government is authorized to provide advice concerning rights of access to government records in New York. The Committee is not empowered to acquire or review records on behalf of an applicant. Moreover, in this instance, the records in question are beyond the scope of public rights of access.

Although the Freedom of Information Law is based on presumption of access. Section 87 (2) (a) of that statute states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute." One such statute, §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 established by the Board for Professional Medical Conduct must remain confidential, unless specific direction is given to the contrary. Similarly, §230(11)(a) requires that reports relating to professional misconduct used or obtained by the Board, its staff or members of its committees from medical societies or organizations, medical institutions, health insurance companies or others "shall remain confidential..."

In addition, the Court of Appeals, the State's highest court, 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 Freedom of Information Law 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: Robert R. Hinckley

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,129

41 State Street, Albany, New York 12231
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November 4, 1998

Mr. Anthony Feurtado
#05962-112
FCI Schuylkill
P.O. Box 759
Minersville, PA 17954-0759

Dear Mr. Feurtado:

I have received your undated correspondence, which reached this office on November 2. As I understand its contents, you have requested information pertaining to you.

In this regard, the Committee on Open Government is authorized to provide advice concerning the New York Freedom of Information Law, which applies to records maintained by entities of state and local government in New York. The Committee does not maintain possession of records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the information sought available, because this office does not possess it.

In addition, to enhance your understanding of the matter, I offer the following comments.

First, you referred to the federal Freedom of Information and Privacy Acts. Those statutes apply only to records of federal agencies; they are inapplicable to records of state and local government. Further, although those federal acts make reference to the waiver of fees, the New York Freedom of Information Law includes no such provisions, and 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].

Second, §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when making a request, an applicant must provide sufficient detail to enable agency staff to locate and identify the records.

Third, requests for records should be sent to the "records access officer" at the agency or agencies that you believe would maintain the records of your interest. The records access officer has the duty of coordinating an agency's response to requests.

I hope that the foregoing serves to improve your understanding of the scope and use 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-11,130

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 4, 1998

Mr. Lessie Anderson
97-R-8787
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

Dear Mr. Anderson:

I have received your letter of October 28. As I understand its content, you have requested records from this office relating to an incident that occurred at your facility.

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 of records generally, and it is not empowered to compel an agency to grant or deny access to records. In short, I cannot make the records of your interest available, because this office does not possess them.

I point out that the regulations promulgated by the Department of Correctional Services indicate that a request for records maintained at a correctional facility may be made to the facility superintendent or his designee.

Since you asked that fees be waived, I note that there are provisions in the federal Freedom of Information Act dealing with fee waivers. That statute, however, pertains only to records maintained by federal agencies. The applicable statute, the New York Freedom of Information Law, contains no provision regarding the waiver of fees, and 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:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO-2951
FOIL-AO-11,131

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 5, 1998

E-MAIL

TO: [redacted]

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Sir:

I have received your communication of October 31. You wrote that a village has adopted a policy under which "every person who enters the front door [must] sign in before they proceed to any office or department." You have asked whether "a citizen should be able to access the public areas of a village hall (not private offices) for information without signing in."

In this regard, the primary function of the Committee on Open Government involves providing advice and opinions concerning two statutes, the Freedom of Information Law and the Open Meetings Law. Neither of those statutes, in my opinion, would be applicable or pertinent to the issue that you presented. In short, the matter does not involve either public access to records or meetings of a public body.

I point out that various provisions of law permit the governing bodies of municipalities to adopt rules, policies or procedures to enable them to carry out their governmental duties [see e.g., Village Law, §4-412(1)]. However, it has been held in a variety of contexts that those rules, policies or procedures must be reasonable. From my perspective, the question is whether the rule or policy that you described is reasonable. Again, that is not an issue that can be determined under or that would be governed by the Freedom of Information or Open Meetings Laws.

It is noted, however, that it has been advised that members of the public cannot be required to identify themselves when in attendance at a meeting of a public body held in accordance with the Open Meetings Law. Section 103 of that statute provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the municipality or of another jurisdiction, would have the same right to attend. That being so, I do not believe that

a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body.

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-11,132

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 9, 1998

Mr. Jean M. Belot
96-A-4612
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. Belot:

I have received your letter of October 13. Having reviewed my letter to you of October 8, there is little that I can add. Nevertheless, I offer the following comments.

First, if you want to "expand" your Freedom of Information Law request, it is suggested that you do so prior to the initiation of any proceeding. If you commence a proceeding, it will only involve consideration of records requested that have been withheld.

Second, pertinent to the situation may be the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)]. According to that decision, 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).

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-11,133

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 9, 1998

Mr. Charles R. Voels
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Voels:

I have received your letter of October 15 and the correspondence attached to it. You wrote that you requested to review the file pertaining to your case before the Division of Human Rights and indicated that it "consists of 15 bound volumes of transcripts, over 100 documents that were placed into evidence, numerous memorandums of law and the final post hearing briefs." An appointment was scheduled, but the Division presented you with only preliminary investigative records rather than the case file. You have asked that the Committee "cite the Division of Human Rights in violation of New York State's Freedom of Information Law and command that the Division of Human Rights produce the documents the [you] had requested..."

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 "cite" an agency for violations of that statute or "command" an agency to grant or deny access to records.

If you have not done so already, it is suggested that you discuss the matter with the Division's Records Access Officer, Mr. Andrew Nitzberg. I would conjecture that he can resolve the problem in a satisfactory manner.

I note for future reference that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Andrew Nitzberg
Lawrence Kunin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,134

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 9, 1998

Ms. Christine Wills
[redacted]

The staff of the Committee on 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. Wills:

I have received your letter of October 13, which again concerns your efforts in obtaining records from the Office of the Rensselaer County District Attorney.

In my earlier letter to you, it was suggested, based upon a conversation with Mr. Ahearn of the District Attorney's Office, that his office would be unable to locate records absent the name or names of a defendant or defendants. In short, to reiterate, §89(3) of the Freedom of Information Law requires that an applicant must "reasonably describe" the records sought. It was pointed out that the nature of an agency's filing or recordkeeping system frequently determines whether or the extent to which a request meets the standard of reasonably describing the records. For example, in the context of your correspondence, a request for records relating to a drug raid that occurred at a certain place and time, without more, would not enable the District Attorney to locate records. Since the District Attorney maintains files by means of names of defendants, you would need to supply such names for that office to begin a search.

You attached a copy of a letter to Mr. Ahearn on October 14 in which you wrote that certain named individuals were arrested. Under the circumstances, it is suggested that you write to Mr. Ahearn again, naming those persons and providing any other details that might enable his office to locate the records in question.

I am unaware of the outcome of the arrests and note that if no charges were filed or if charges were dismissed in favor of an accused, the records would likely have been sealed pursuant to §160.50 of the Criminal Procedure Law. If that occurred, the District Attorney in my view would have no legal ability to disclose records to you. I point out, too, that if records were sealed, an order would have been transmitted to the arresting agency, the City of Troy Police Department, to seal its records relating to the incident. Consequently, depending upon the outcome of the arrest, there may or may not be records that remain 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-1135

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 9, 1998

Mr. William V. Camfield
Turning Point Enterprises
263 Verbeck Avenue
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. Camfield:

I have received your letter of October 19 in which you complained that the Town of Stillwater has failed to respond to your requests for records, which were initiated in August.

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, copies of this response will be forwarded to Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Paul Lilac, Supervisor
Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,136

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 9, 1998

Mr. James W. Fowler
[redacted]

The staff of the Committee on Open 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:

I have received several items of correspondence from you concerning access to records of the Town of Saugerties and meetings of the Town Board and the Festival Development Corporation.

You asked initially whether there is a law on "impeachment" of local government officials. In this regard, enclosed are copies of §36 of the Public Officers Law, which deals with "removal" from office, and related materials. Also enclosed is a copy of an opinion rendered more than a year ago in which it was advised that the Festival Development Corporation is required to comply with the Open Meetings Law.

With regard to the process of adopting a budget by a town board, I note that provisions of the Town Law, as well as the Freedom of Information Law, are pertinent. Specifically, enclosed are copies of §§105 through 109 of the Town law. In brief, those statutes set forth the requirements concerning the preparation, form, and content of a town budget. They also provide direction concerning public disclosure of materials prior to the adoption of a budget by a town board. With respect to the difficulties that you encountered, §108 requires that a town board shall hold a public hearing on the preliminary budget and directs that:

> "The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours. Such notice shall also specify the proposed salaries of each member of the town board, an elected town clerk and an elected town superintendent of highways."

Second, I point out that, in terms of the Freedom of Information Law, the numbers contained within a tentative budget could be characterized as "intra-agency material" [see Freedom of Information Law, §87(2)(g)]. However, intra-agency materials consisting of "statistical or factual tabulations or data" are accessible [see §87(2)(g)(i)]. Further, it has been held that numbers prepared in the budget process, even though they may be estimates that are not reflective of "objective reality", constitute statistical tabulations that are available under the Freedom of Information Law [see Dunlea v. Goldmark, 43 NY 2d 754 (1977)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

Encs.

cc: Town Board

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,137

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 10, 1998

Mr. Bob Butler
News 12 Long Island
One Media Crossways
Woodbury, NY 11797

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Butler:

I have received your letter of October 20 in which you requested an advisory opinion relating to the Freedom of Information Law.

Having sought expense records from the Hicksville Fire District, District staff "laid out the papers...on a big table", which "sat in a relatively large room that serves as the meeting place for the Department's Board of Fire Commissioners." You added that it is your belief that "the room sits idle between meetings." When you attempted to use your own portable copying machine to prepare photocopies of the records, you were given a copy of the District's rules, which appear to preclude you and others from using their own copy machines. Specifically, §4 of the District's rules provide that:

"(a) Records inspected by members of the public may be copied by those persons, or may be copied for those persons, in the following manner:

(i) the records may be copied by the person inspecting the records by his or her hand copying;

(ii) the records may be copied by the person inspecting the records by copying the same by his or her typewriter; or

(iii) the records may be copied for the person inspecting the records by Fire District personnel using Fire District mechanical reproduction equipment."

In my opinion, if the facts as you presented them are accurate, the District's prohibition concerning the use of portable copiers would be invalid.

Most analogous to the situation in my view is the decision rendered in Murtha v. Leonard [210 AD 2d 411, 620 NYS 2d 101 (1994)]. In that case, a small village with limited staff, space and facilities adopted rules prohibiting requesters from using their own photocopiers, and it was held that the rules constituted "a valid and rational exercise of the Village's authority under Public Officers Law §87(1)(b)" [id., 102]. In my opinion, the decision was based upon the reasonableness of the rules in view of attendant facts and circumstances. In situations in which an agency has sufficient resources to permit the use of a personal photocopier or other reproduction equipment in a non-disruptive manner, it would likely be found that a prohibition regarding the use of one's own copying equipment would be invalid.

In this instance, if indeed the records were made available on a large table in a room that is generally used only for meetings of the Board, it would appear that District would have adequate facilities and space to enable individuals to use their own portable copying equipment without disruption. As you suggested, the use of a portable copier would likely involve no more space or disruption than the use of a typewriter, which is permitted by the rules.

Lastly, I note that the statement of legislative intent appearing at the beginning of the Freedom of Information Law indicates that "it is incumbent upon the state and its localities to extend public accountability wherever and whenever feasible." In the context of your inquiry, if the District has adequate space to enable you to use your equipment without disruption of its operations, the direction provided by the statement of intent in my view would require the District to permit you to use your copier.

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-1138

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 10, 1998

Mr. Peter Henner
Attorney and Counselor at Law
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:

I have received your letter of October 20. You wrote that you represent a plaintiff in a case against the New York State Department of Labor and sought a variety of personnel records and related materials pursuant to FRCP Rules 26 and 34. The Assistant Attorney General representing the Department has contended that "any materials responsive to this request constitute privileged, confidential materials which may not be provided absent the consent of the named individuals and/or court order", citing Public Officers Law, §§87, 89, 95 and 96.

It is your view that some aspects of the records must be disclosed pursuant to the Freedom of Information Law, but more importantly, you contend that the records sought are "subject to disclosure in the context of litigation, except to the extent that the documents may be protected by an applicable privilege or are outside the scope of information discoverable pursuant to FRCP Rule 26." You added that it is your understanding that the phrase "constitute privileged confidential materials" has "no independent significance, under either FOIL, the Personal Privacy Protection Law, or federal rules, absent a reference to a specific statutory exemption and/or to an applicable rule."

You have sought my view on the subject, and in this regard, I offer the following comments.

First, it is noted that an assertion or claim of confidentiality, unless it is based upon a statute, is meaningless. When confidentiality is conferred by a statute, an act of the State Legislature or Congress, records fall outside the scope of rights of access pursuant to §87(2)(a) of the Freedom of Information Law, which states that an agency may withhold records that "are specifically exempted from disclosure by state or federal statute". If there is no statute upon which an agency can rely to characterize records as "confidential" or "exempted from disclosure", the records are subject to whatever rights of access exist under the Freedom of Information Law [see Doolan v.BOCES, 48 NY

2d 341 (1979); Washington Post v. Insurance Department, 61 NY 2d 557 (1984); Gannett News Service, Inc. v. State Office of Alcoholism and Substance Abuse, 415 NYS 2d 780 (1979)]. As such, an assertion of confidentiality without more, would not in my view serve to enable an agency to withhold a record.

In a related vein, 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. It is likely that two of the grounds for denial are relevant to an analysis of rights of access that may be conferred by the Freedom of Information Law to the records in question.

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].

By means of example, it is likely that performance evaluations are accessible and deniable in part under the Freedom of Information Law. 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 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 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.

In sum, the fact that documents are characterized as personnel records does not render them confidential; for purposes of determining rights of access under the Freedom of Information Law, the

contents of the records and the effects of disclosure are, in my view, the factors pertinent in relation to an agency's duty to grant or its ability to deny access.

Second, judicial decisions indicate that the Freedom of Information Law represents a vehicle separate and distinct from other disclosure devices, such as discovery under the Civil Practice Law and Rules (CPLR). 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, stating 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 on the foregoing, in general, the grounds for denial in the Freedom of Information Law would not be relevant to the standards regarding discovery under the CPLR in a civil suit; rather, in discovery, the issue would involve what is material and necessary.

In Farbman, supra, it was suggested that statutory privileges, such as the exemptions from discovery relating to attorney work product and material prepared for litigation embodied by §3101(c) and (d) of the CPLR respectively, would not be subject to disclosure under the Freedom of Information Law. Nevertheless, in the context of your inquiry, those provisions would appear to be irrelevant, for the records in question would have been prepared in the ordinary course of an agency's business.

The remaining issue, in my opinion, concerns the significance of the Personal Privacy Protection Law. Pursuant to that statute, 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)].

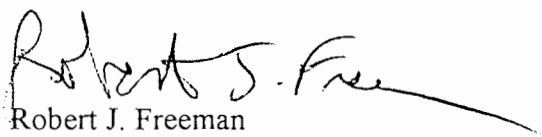
The Assistant Attorney General cited §§95 and 96 of the Personal Privacy Protection Law. Section 95 in my view has no bearing on the matter, for that series of provisions relates to rights of access by a data subject to records pertaining to him or her. Under §96, a state agency cannot disclose personal information except under a series of exceptions that authorize disclosure. One of the exceptions, §96(1)(c), involves records available under the Freedom of Information Law, i.e., those records, which if disclosed would not constitute an unwarranted invasion of personal privacy. Therefore, to the extent that the Freedom of Information Law grants access to the records at issue, the Personal Privacy Protection Law would have no impact.

I know of no judicial decisions involving the relationship between the Personal Privacy Protection Law and laws concerning discovery, such as those in the CPLR or the FRCP. If the courts determine the matter in a manner analogous to the determinations involving the Freedom of Information Law, §96 of the Personal Privacy Protection Law would, like the grounds for denial in the Freedom of Information Law, be irrelevant; access would be determined by the standards regarding disclosure in the FRCP.

If it is determined that §96 is to be used in determining the extent of an agency's disclosure, an additional issue arises, for §96(1)(k) authorizes an agency to disclose personal information "to any person pursuant to a court ordered subpoena or other compulsory legal process." If the use of discovery under the FRCP is considered "compulsory legal process", it would appear that the §96 would not serve as a barrier to discovery. If it is not considered to be compulsory legal process, it is likely that a court order would be necessary to attain full disclosure of the records sought.

I hope that I have been of assistance.

Sincerely,



Robert J. Freeman
Executive Director

RJF:jm

cc: Richard Freshour, Assistant Attorney General

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1139

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 10, 1998

F.S. Anderson
Secretary
East Hampton Town Unit
Local 852
CSEA, Inc.
P.O. Box 2516
Amagansett, NY 11930

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear F.S. Anderson:

I have received your letter of October 22 in which you requested an advisory relating to the Freedom of Information Law.

According to your letter and the materials attached to it, the Town of East Hampton hired Daniel L. Hillman Associates, a consulting firm, to prepare a management and efficiency study concerning Town departments. Although you contended that the study has been completed for more than month, the Town has refused to disclose it, claiming that it is "a draft."

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, documentation prepared for the Town by a consultant would constitute a "record" that falls within the framework of the Freedom of Information Law. Similarly, the characterization of a document as a "draft" does not remove it from the coverage of the law; it is 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.

The Court of Appeals, the state's highest court, has determined that records prepared by consultants for agencies should be treated as if they were prepared by agency staff and that, therefore, they consist of intra-agency materials that fall within §87(2)(g).

The 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 its discussion of the matter, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside

> consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld or must be disclosed based upon the same standards as in cases in which records are prepared by the staff of an agency. It is emphasized that the Court in Xerox specified that the contents of intra-agency materials determine the extent to which they may be available or withheld, for it was held that:

> "While the reports in principle may be exempt from disclosure, on this record - which contains only the barest description of them - we cannot determine whether the documents in fact fall wholly within the scope of FOIL's exemption for 'intra-agency materials,' as claimed by respondents. To the extent the reports contain 'statistical or factual tabulations or data' (Public Officers Law section 87[2][g][i], or other material subject to production, they should be redacted and made available to the appellant" (id. at 133).

Therefore, a record prepared by a consultant for an agency would be accessible or deniable, in whole or in part, depending on its contents.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Cynthia Shea

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1140

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 17, 1998

Mr. Omar Abreu
No. 39582-054 - Unit 5741-2
FCI Fort Dix East
P.O. Box 2000
Fort Dix, NJ 08640

Dear Mr. Abreu:

I have received your letter of November 6 in which you requested information pertaining to you.

In this regard, the Committee on Open Government is authorized to provide advice concerning public rights of access to government records in New York. The Committee is not a repository of records, and this office maintains no records pertaining to you.

In the future, it is suggested that requests be sent to the agency or agencies that you believe would have records pertaining to you. Further, I note that each agency is required to designate one or more persons as "records access officer." The records access officer has the duty of coordinating an agency's response to requests, and a request should ordinarily be directed to that person.

Lastly, I note that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when seeking records, a request should include sufficient detail to enable agency staff to locate and identify the records.

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-2986
FOIL-AO-11141

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 18, 1998

Mr. Theodore Kalkhuis
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kalkhuis:

I have received your undated letter, as well as the materials attached to it, which reached this office on October 22.

You described your unsuccessful efforts in obtaining records regarding what may be an inappropriate designation of a residence in West Haverstraw. In this regard, it is emphasized that the functions of the Committee on Open Government involve providing advice concerning the Freedom of Information and Open Meetings Laws. If an agency fails to comply with law by not maintaining certain records, that issue in my view would not involve the Freedom of Information Law. That statute deals with existing records and provides parameters concerning the extent to which they must be disclosed. Further, since you asked which state or federal agency might have the authority to investigate the matter, I know of none. The Village is independent, and the residents have the ability to choose its representatives who serve on the Board of Trustees.

Insofar as the issues that you raised involve the jurisdiction of this office, 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.

If a record exists indicating action taken following a finding of a violation of law, I believe that such a record would be accessible, for none of the grounds for denial would be pertinent. Similarly, the other records to which you referred, if they exist, would in my opinion be accessible. Nevertheless, as suggested earlier, the Freedom of Information Law pertains to existing records and

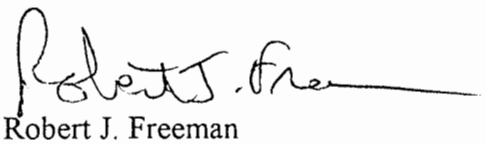
does not require that an agency create or prepare a record in response to a request. When an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, 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 referred to your search of the Rockland Journal News and found no reference to a meeting held by the Zoning Board of Appeals on January 8. I note that you also referred to a hearing. Here I point out that the requirements concerning notices of hearings and meetings differ. Frequently, there is a statutory requirement that notices of a hearing be published as a legal notice in a newspaper. Section 104 of the Open Meetings Law, however, specifies that notice of a meeting held under that statute does not require the publication of a legal notice. Rather, the Open Meetings Law requires that notice of the time and place of a meeting be given to the news media and posted prior to every meeting. Once in receipt of notice of a meeting, a news media organization may choose to publish a notice or report on a meeting, but there is no obligation to do so.

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-11,142

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. George Williams
98-A-3733
Marcy Correctional Facility
P.O. Box 5000
Marcy, NY 13403-5000

The staff of the Committee on Open 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 20. You have sought assistance in obtaining your medical records for Rikers Island.

In this regard, first, 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, and a request should ordinarily be directed to that person.

Since Rikers Island is operated by the New York City Department of Correction, it is suggested that you send a request to Mr. Thomas Antenen, Records Access Officer, 60 Hudson Street, 6th Floor, New York, NY 10013.

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 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 records access officer 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

cc: Thomas Antenen

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,143

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. Guiseppe D'Alessandro
93-A-3422/7-F-39 B
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. D'Alessandro:

I have received your letter of October 14, which reached this office on October 26. You have sought an advisory opinion relating to access records maintained by the Office of the New York County District Attorney concerning grand jury proceedings.

In this regard, 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 involving 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-11,144

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. Dale D'Amico
95-A-4203
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. D'Amico:

I have received your letter of October 8, which reached this office on October 26. You have asked whether you "should have access" to records that appear to be maintained by a court.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records, and that §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.

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-1115

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. John MacNary
96-R-7707 K-2, 21-B
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. MacNary:

I have received your letter of October 12, which reached this office on October 22.

You wrote that it is your understanding that the Committee on Open Government is "supplied with all records" and can determine the extent to which they must be disclosed. In short, that is not so. The Committee on Open Government is authorized to provide advice and opinions concerning the Freedom of Information Law. The Committee does not have the right or ability to obtain records or otherwise compel an the disclosure of records. Nevertheless, in an effort to provide guidance, I offer the following comments.

First, since some of your requests were made to a county clerk, I point out that the Freedom of Information is applicable to agency records, and §86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. Even though other statutes may deal with access to court records, the procedural provisions associated with the Freedom of Information Law (i.e., those involving the designation of a records access officer or the right to appeal a denial) would not ordinarily be applicable.

Further, as you may be aware, county clerks perform a variety of functions, some of which involve county records that are subject to the Freedom of Information Law, others of which may be held in the capacity as clerk of a court. An area in which the distinction between agency records and court records may be significant involves fees. Under the Freedom of Information Law, an agency may charge up to twenty-five cents per photocopy, "except when a different fee is otherwise prescribed by statute". In the case of fees that may be assessed by county clerks, §§8018 through 8021 of the Civil Practice Law and Rules require that county clerks charge certain fees in their capacities as clerks of court and other than as clerks of court. Since those fees are assessed pursuant to statutes other than the Freedom of Information Law, the fees may exceed those permitted by the Freedom of Information Law. Section 8019 of the Civil Practice Law and Rules provides in part that "The fees of a county clerk specified in this article shall supersede the fees allowed by any other statute for the same services...".

I note, too, that the Freedom of Information Law does not refer to the waiver of fees, and it has been held that an agency may charge its established fees, even if the person requesting records is an indigent inmate [see Whitehead v. Morgenthau, 518 NYS 2d 552 (1990)].

Second, a private hospital is not an "agency" and, therefore, is not subject to the Freedom of Information Law. To obtain 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

With regard to probation records, §243(2) of the Executive Law states in relevant part that the director of the Division of Probation and Correctional Alternatives has the authority to promulgate regulations and that "[s]uch rules and regulations shall be binding upon all counties and eligible programs...and when duly adopted shall have the force and effect of law". Section 348.1(b) of the Division's regulations states that:

> "(b) Cumulative case record is a single case file containing all information with respect to a case from its inception through its conclusion. All records developed and/or received by the probation

> department and which are related to the carrying out of authorized probation functions and services are considered probation records for the purpose of retention and destruction. Reports and other records material developed by the probation department and transmitted to the courts 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."

Lastly, access to pre-sentence reports is governed by §390.50 of the Criminal Procedure Law. In brief, that statute specifies that those and related records cannot be disclosed without authorization from the sentencing judge.

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: Hon. Joan A., Macchi

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,146

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Ms. Lea 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 Ms. Parker:

I have received your letter of October 21 in which you asked whether you have the right under the Freedom of Information Law "to know why" a case that you initiated was not prosecuted by the Office of the New York County District Attorney.

In this regard, it is emphasized that the title of the Freedom of Information Law may be somewhat misleading. That statute pertains to agency records, and it specifies that an agency is not required to create a record in response to a request for information [see §89(3)]. Similarly, while agency officials may provide information in response to questions, there is no legal obligation to do so. In short, the Freedom of Information Law requires an agency to disclose existing records in accordance with its provisions. In the context of your inquiry, if there is no record indicating the reason for a failure to prosecute, the Freedom of Information Law would not apply, and the Office of the District Attorney would not be obliged to prepare a new record reflective of the reason for its action or inaction, as the case may be.

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)].

Notwithstanding the foregoing, as you may be aware, the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency designate one or more 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.

Lastly, in view of your remarks, it is noted that the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Gary Galperin

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1147

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 20, 1998

Mr. Al Blake
92-A-9976
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

Dear Mr. Blake:

I have received your letter of November 13 in which you sought "a copy of the rule that compels the District Attorney to turn over grand jury minutes."

In this regard, the primary function of the Committee on Open Government involves providing advice concerning public rights of access to records under the Freedom of Information Law. I am unfamiliar with the rule to which you referred, and records relating to grand jury proceedings are not available under the Freedom of Information Law.

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, 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 attempt to obtain a copy of rule in question from a person with expertise in criminal law, such as your attorney or a representative of Prisoners' Legal Services.

I regret that I cannot be of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FPPL-AO-244
FOIL-AO-11,148

41 State Street, Albany, New York 12231
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November 20, 1998

Mr. Patrick Mitchell
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. Mitchell:

I have received your letter of October 21. You have sought guidance concerning an allegation that an employer of the Department of Correctional Services has disclosed "classified information" pertaining to you.

In this regard, two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Because of the language of those statutes, they must be construed together and in relation to one another.

By way of background, the Freedom of Information Law includes within its coverage all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of

exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

If you believe that personal information has been disclosed in a manner inconsistent with law, it is suggested that you contact the appropriate officials at the Department of Correctional Services.

Enclosed for your consideration is a copy of the Personal Privacy Protection Law.

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

OML-AO-2959
FOIL-AO-11,149

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November 20, 1998

Mr. Frank Giosi
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Giosi:

I have received your letter of October 15 in which you raised a series of questions relating to certain practices of the Mt. Sinai School District.

You asked initially whether the President of the Board of Education may "require" that those who attend meetings of the Board to provide their addresses and whether she may prohibit persons from speaking at meetings based on a refusal to give their addresses.

In this regard, as you suggested, I believe that she may request the addresses of those who attend meetings, but I do not believe that she can validly exclude a person from attending a meeting or treat a person different from those who provide their addresses in terms of their opportunity to participate at a meeting.

I point out 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 §103 of the Open Meetings Law provides that meetings of public bodies are open to the "general public." As such, any member of the public, whether a resident of the District or of another jurisdiction, would have the same right to attend. That being so, I do not believe that a member of the public can be required to identify himself or herself by name or by residence in order to attend a meeting of a public body. Further, since any person can attend, I do not believe that a public body could by rule limit the ability to speak to residents only. There are many instances in which people other than residents, such as those who may own commercial property or conduct business and who pay taxes within a given community, attend meetings and have a significant interest in the operation of a municipality or school district.

In short, it is my view that any member of the public has an equal opportunity to partake in an open meeting, and that an effort to distinguish among attendees by residence or any other qualifier would be inconsistent with the Open Meetings Law and, therefore, unreasonable.

In a related area, you wrote that the public has had the opportunity to ask questions, but that they have been prohibited from making statements or offering opinions. In my view, if there is a rule or policy of that nature and it is applied uniformly, it would be valid. Again, it is emphasized that members of the public do not have the right to speak at meetings; the ability to do so would be dependent on a public body's rules or policies.

The remaining area of inquiry pertains to a request for records that was denied, according to your letter, because of "potential litigation." As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 stated by the Court of Appeals in a case involving a request made under the Freedom of Information Law by a person involved in litigation against an agency: "Access to records of a government agency under the Freedom of Information Law (FOIL) (Public Officers Law, Article 6) is not affected by the fact that there is pending or potential litigation between the person making the request and the agency" [Farbman v. NYC Health and Hospitals Corporation, 62 NY 2d 75, 78 (1984)]. Similarly, in an earlier decision, the Court of Appeals determined that "the standing of one who seeks access to records under the Freedom of Information Law is as a member of the public, and is neither enhanced...nor restricted...because he is also a litigant or potential litigant" [Matter of John P. v. Whalen, 54 NY 2d 89, 99 (1980)]. Based upon the foregoing, the possibility of litigation would not, in my opinion, affect either the rights of the public or a potential litigant under the Freedom of Information Law.

Notwithstanding the foregoing, it appears that the issue may involve 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 District maintains its records. If it maintains all of the records sought 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 it maintains records falling within the scope of your request in a number of locations or units by means of different filing systems within those units. In short, it is questionable whether your request "reasonably described" the records as required by law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Education
Peter Paciolla, Superintendent

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

APPL-AO- 245
FOIL-AO-11,150

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November 20, 1998

Mr. Gary Fusfield
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Fusfield:

I have received your letter of October 26 in which you wrote as follows;

> "On 03/18/98, Compensation Claims Referee/Bloomfield made a public announcement that my 'business practices' were 'under investigation' and that my License to practice before the Workers' Compensation Board was in jeopardy."

You have sought an advisory opinion concerning "whether the above mentioned public announcement violated [your] rights under the New York State Personal Privacy Protection Law."

In this regard two statutes, the Freedom of Information Law and the Personal Privacy Protection Law (respectively Articles 6 and 6-A of the Public Officers Law), are pertinent to the matter. Because of the language of those statutes, they must be construed together and in relation to one another.

By way of background, the Freedom of Information Law includes within its coverage all agency records and is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The Personal Privacy Protection Law deals in part with the disclosure of records or personal information by state agencies concerning data subjects. A "data subject" is "any natural person about whom personal information has been collected by an agency" [Personal Privacy Protection Law, §92(3)]. "Personal information" is defined to mean "any information concerning a data subject which, because of name, number, symbol, mark or other identifier, can be used to identify that data subject" [§92(7)]. For purposes of that statute, the term "record" is defined to mean "any item, collection or

grouping of personal information about a data subject which is maintained and is retrievable by use of the name or other identifier of the data subject" [§92(9)].

With respect to disclosure, §96(1) of the Personal Privacy Protection Law states that "No agency may disclose any record or personal information", except in conjunction with a series of exceptions that follow. One of those exceptions involves a situation in which a record is "subject to article six of this chapter [the Freedom of Information Law], unless disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in paragraph (a) of subdivision two of section eighty-nine of this chapter." Section 89(2-a) of the Freedom of Information Law states that "Nothing in this article shall permit disclosure which constitutes an unwarranted invasion of personal privacy as defined in subdivision two of this section if such disclosure is prohibited under section ninety-six of this chapter." Therefore, if a state agency cannot disclose records pursuant to §96 of the Personal Protection Law, it is precluded from disclosing under the Freedom of Information Law.

There are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities and which indicate, that the records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights

conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

If the foregoing analysis is accurate, it does not appear that the Personal Privacy Protection Law would have prohibited disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Chaim Malks

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO- 246
FOIL-AO-11,151

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November 27, 1998

Mr. Geoffrey K. Bentz
Director, Legal Assessments
CEELI
740 15th Street, NW
Washington, DC 20005-1022

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Bentz:

I have received your letter of November 18 and the draft Access to Information Law pertaining to the Republic of Moldava.

In brief, I have served for more than twenty years as the director of the New York state agency responsible for oversight of the state's Freedom of Information and Personal Privacy Protection Laws. As indicated in the attached biography, I have spoken or provided consulting services throughout the United States, and in Canada, Japan and Hong Kong.

From my perspective, the general thrust of the draft is appropriate, for it is clear that there would be a presumption of access. However, there are elements of the proposal which, in my view, merit clarification, amplification, or reconsideration. In this regard, I offer the following comments.

First, while the translation may not be precise, a critical term in Article 1 should be more clearly defined. With the passage of time and the increasing use of information technology, the nature of materials covered by an access law should be broad and plainly understood. Although the federal Freedom of Information Act pertains to federal agency records, the Act has never defined the term "record." One of the drawbacks of the failure to include a definition involves the continual difficulty in ascertaining the scope of the Act. While a document may be in possession of a federal agency, questions continue to arise concerning the authorship, origin and function of the document, for those factors are pertinent in determining whether the document is an "agency record." Further, until recently, it had been contended by some federal agencies that the Act included only paper records within its coverage.

In New York, since 1978, the term "record" has been defined to mean:

> "any information kept, held, filed, produced or reproduced by, with or for any agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations and codes."

The breadth and flexibility of the language quoted above has insured that, irrespective of the medium in which it exists, information in any physical form maintained by or for an entity of government in New York falls within the framework of the Freedom of Information Law. The definition of "record" in my opinion has been most significant, particularly in an era of changing technology. It is suggested that a similar definition should be part of the access law of every jurisdiction.

Second, there are several references in the draft to situations in which records are improperly withheld, and the "authorities or officers" responsible would be subject to various kinds "punishment", including criminal sanctions. In my opinion, the capacity to punish should be limited to those circumstances in which a denial of access is the result of bad faith. Under the New York law, a criminal violation would occur only when a request for a records is made and the agency official lies about their existence or destroys the records to prevent the applicant from obtaining them. There are many situations, however, in which denials of access are made in good faith. For example, an exception in the New York statute, which is similar to the federal standard, involves the authority to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." The meaning of that phrase, as well as other grounds for denial in the law, is subject to conflicting interpretations. An agency may have a reasonable basis for believing that a record can be withheld, but a court might determine that its rationale is insufficient to justify a denial of access. In that kind of circumstance, "punishment", in my opinion, would be unduly harsh.

Third, the draft states that applicants must submit "written applications" for documents, but there is no standard relating to the degree of specificity required. Under both the federal and New York law, an applicant must "reasonably describe" the records sought. As such, an applicant must provide sufficient detail to enable agency staff to "locate and identify" the record. The state's highest court has also found that the extent to which a request "reasonably describes" records may be dependent on an agency's filing or recordkeeping system. By means of example, if a list is kept alphabetically by last name in a directory, it is easy to find all those persons named Bentz. However, if a request is made for every item regarding persons whose first name is Geoffrey, a search of every name in the directory would be required. In that kind of situation, despite the specificity of the request, it would not, according to our courts, reasonably describe the records, because the records would not be maintained in a way that would permit their retrieval without unreasonable effort. It is suggested that some sort of standard, such as that used in New York, be added to preclude the necessity of requiring that unreasonable and time consuming searches be made.

Article 7 of the draft pertains to fees, which "should not exceed the expenses for searching the document and its analysis" and which would include copying and duplication costs. The cost of searching for a record may be dependent upon the adequacy, or lack thereof, an agency's filing

system. If an efficient system permits a quick search, the fee may be minimal; on the other hand, if it is poor or chaotic, a search fee may be unnecessarily high and effectively penalize applicants for records based on an agency's inefficiency. Similarly, if an expert can analyze the contents of records and determine rights of access quickly, a fee for analysis may be low; contrarily, if there is little expertise or difficulty in reaching a decision, the fee may be high. In New York, fees can be charged only for duplicating records (a maximum of twenty-five cents per photocopy, or in the case of records that cannot be photocopied, such as computer tapes or disks, the actual cost of reproduction). In short, the provision in the draft would likely result in inequities.

The fee provision also includes language relating to the ability to waive the fee if disclosure "contributes to enhancing the level of transparency of the institution's activity and corresponds to the interests of society." While many access laws contain fee waiver provisions, my sense has been that they enable agencies to discriminate for any number of reasons. Our preference has been to charge minimal fees, but that they should be equally assessed.

Article 8 involves the time limits for responding to requests and related procedural matters. In my view, a requirement that records must be made available within five working days, or in unusual circumstances, five additional working days, is unrealistic. In many instances, an agency can readily comply within five working days, because the records are easily found and unquestionably public. In others, however, due to a variety of factors, five or even ten working days may be inadequate.

Under the New York law, 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. 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, the agency would be acting in compliance with law. 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, be considered to have been constructively denied. In such a circumstance, the denial may be appealed. The appeal is made to the head of the agency or staff person designated by the head of the agency to determine appeals. That person has ten business days to grant access to the records or fully explain the reasons for further denial in writing. It is suggested that some sort of administrative appeal process, which exists in the federal Act and many state access laws, be considered.

Article 11 relates to ability of the government to withhold records. From my perspective, an access law should be based on common sense and provide, in essence, that all records are available, except to the extent that disclosure would "hurt" either a person, a commercial entity, or a governmental process. While that is an oversimplification, I believe that the grounds for denial of

access should be based on a conclusion that disclosure would result in some sort of harm. For instance, our trade secret exception authorizes an agency to withhold records to the extent that disclosure would "cause substantial injury to the competitive position" of a commercial entity. Similarly, records relating to criminal investigations cannot be withheld interminably, but only to the extent that disclosure would interfere with the investigation, deprive a person of fair trial, identify a confidential source, etc.

The point is that the effects of disclosure determine the extent to which government may deny access, and that kind of consideration in my opinion should appear in the language of the exceptions.

It seems that there is no exception concerning "inter-agency or intra-agency materials." Typically, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like may be withheld. The purpose of the exception is to enable government officials to engage in an exchange of ideas and opinions during the deliberative process without a requirement of mandatory disclosure.

Lastly, there are several provisions that distinguish the "mass media" from others in terms of the use of and treatment under the proposed law. In New York, while members of the news media are heavy users of the Freedom of Information Law, they have no special rights. In short, our courts have held that when records are available under the Freedom of Information Law, they must be made equally available to any person, without regard to one's status or interest. Further, once it is determined that records are accessible to the public, a recipient may do with the records as he or she sees fit.

I hope that the foregoing will be useful to you and the government of the Republic of Moldava. If I can be of further assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1152

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November 30, 1998

Ms. Virginia Harris
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Harris:

I have received a variety of material from you relating to your efforts in obtaining the terms of a collective bargaining agreement, certain rules applicable to New York City employees, and answers to a variety of questions.

In the context of the issues raised in the materials, it is emphasized that the jurisdiction of the Committee on Open Government is limited to providing advice concerning rights of access conferred by the Freedom of Information Law. As such, the questions that you raised involving your rights as an employee holding a civil service title are beyond both the jurisdiction and expertise of the office.

As the materials relate to the Freedom of Information Law, I offer the following comments.

First, I point out that the Freedom of Information Law is applicable to agency records, and that §86(3) of that statute defines 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 Office of Labor Relations of the City of New York would clearly constitute an "agency" required to comply with the Freedom of Information Law. However, the other recipients of your requests, unions, are not governmental entities and, therefore, fall outside the coverage of that statute.

Second, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency need not create a record in response to a request. Further, while the Freedom of Information Law requires that agencies disclose existing records in accordance with its provisions, it does not require that agency officials provide information or explanations in response to questions.

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 opinion, the records that you identified, a portion of a collective bargaining agreement and a section of Personnel Rules, if they exist, would be available. In short, none of the grounds for denial would apply.

Lastly, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of Labor Relations

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1153

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 30, 1998

Mr. Fernando Leon
97-A-2199
Green Haven Correctional Facility
Route #216
Stormville, NY 12582

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Leon:

I have received your undated letter in which you asked for assistance in obtaining transcripts of your trial.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk of the court in which the proceeding was conducted.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1154

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 30, 1998

Mr. Jermaine Simpkins
96-a-3224
Gouverneur Correctional Facility
P.O. Box 480
Gouverneur, NY 13642-0370

Dear Mr. Simpkins:

I have received your letter of November 5, which reached this office on November 20. You have sought certain log books relating to a certain time and area in the Riverview Correctional Facility.

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 in question because this office does not possess them. Nevertheless, I offer the following comments.

First, according 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.

Second, while I am not familiar with the contents of the records in question, it is noted that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Lastly, since you asked that fees be waived or reduced, I point out that the New York Freedom of Information Law does not contain any provision pertaining to the waiver of fees. Further, 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

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1115

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 30, 1998

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.

Dear Mr. Smith:

I have received your letter of October 28, as well as the materials relating to it. You have sought an advisory opinion concerning the availability of records that you sought under the Freedom of Information Law from Rensselaer County.

By way of background, in a request dated June 5 for "surveys" of County residents relating to economic development issues, you were informed on July 7 that "The County does not have such survey." Nevertheless, in an article dated July 11, the County Executive indicated that the County "has a list of answers to a 'study' -- not a survey -- conducted by a private company." The article stated further that the County Executive said that "the study contained answers to questions posed to Schodak residents to gauge their support for a large economic development project and the benefits at could bring to their Town." In view of the content of the article, on July 11, you sent a second letter to the County seeking records based upon the County Executive's description of them as reported. You also sought records reflective of any payments made by the County relating to the preparation of any such records. Another request was made on September 2 for "A copy of the 'study', report, document, by whatever name prepared by the accounting firm of KPMG Peat Marwick and commissioned by Rensselaer County Department of Social Services regarding the Van Rensselaer Manor", as well as records indicating the costs associated with the preparation of the study. An Assistant County Attorney acknowledged the receipt of that request on September 10 or 17 ("10" is crossed out on the copy transmitted to this office) and you were informed that you would be notified of his findings "within the next 30 days." 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, 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, assuming that one or more of the studies that you requested exist, I believe that they would fall within the framework of the Freedom of Information Law. As you are aware, the Freedom of Information Law pertains to agency records, and §86(4) of that statute defines the term "record" expansively to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

In view of the language quoted above, if the County maintains the studies that you are seeking, or if studies prepared for the County remain in the possession of a consulting firm that prepared the documentation, I believe that any such materials would constitute agency records that fall within the coverage of the 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 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, 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). 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.).

From my perspective, it is likely that one of the grounds for denial is pertinent to an analysis of rights of access. While that provision potentially authorizes an agency to withhold records, as suggested above, due to its structure, it often requires 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 discussion of the issue of records prepared by consultants for agencies, the Court of Appeals has held 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.

The Court in Gould, supra, 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)" (id., 276-277)..
>
> "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).

Insofar as studies or other records prepared by consultants retained by the County include opinions or recommendations offered by the consultant, I believe that the records could be withheld. However, other portions of the documentation consisting of statistical or factual information or responses by members of the public must in my view be disclosed. As indicated by the State's highest court, the purpose of §87(2)(g) is to enable government officials and employees, or as in this case, a consultant, to offer opinions freely and without mandatory disclosure. Opinions offered by members of the public who are not government officers or employees or retained as consultants, would not fall within the exception. Those elements of the materials must in my view be disclosed, assuming that they do not include personally identifiable information. To the extent that the materials do include personally identifiable information relating to members of the public who responded to the surveys or studies, I believe that those details could be withheld as "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]; the substance of their responses, however, must in my view be disclosed.

Lastly, records reflective of payment of public monies to a consultant or other person or entity retained by an agency must, in my opinion, be disclosed. In short, none of the grounds for denial could be asserted to withhold that kind of records.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Henry Zwack, County Executive
Stephen J. Pechenick, Assistant County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1156

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

November 30, 1998

Mr. Edward Safoschnik
98-A-1465
Orleans Correctional Facility
3531 Gaines Basin Road
Albion, NY 14411-9199

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Safoschnik:

I have received your letter of October 26 in which you sought assistance in obtaining records from the Legal Aid Society under the Freedom of Information Law.

In this regard, the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, pertains to records maintained by agencies. Section 86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Therefore, in general, the Freedom of Information Law is applicable to entities of state and local government.

It is my understanding the there are a variety of entities within New York that use the name "Legal Aid Society". Some are a part of the federal Legal Services Corporation, some may be private not-for profit corporations, and some may be parts of units of local government. While legal aid societies which are agencies of local government may be subject to the Freedom of Information Law, most are not "agencies" as that term is defined in the Freedom of Information Law and, as such, are not subject to that statute.

I am not fully familiar with the specific status of the Legal Aid Society in question. However, I believe that it is a corporate entity separate and distinct from government, that it is not an "agency" subject to the Freedom of Information Law and that, therefore, the records in which you are interested are outside the scope of public rights of access.

In view of the foregoing, it is suggested that you discuss the matter with an attorney. I hope that I have been of some assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1157

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December 1, 1998

Mr. Joseph Wilson 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 October 26 in which you sought assistance in obtaining records from the Cortland County Sheriff and the County Attorney. Based on the contents of the letter and the materials attached to it, 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, one of the requests pertains to "copies of all [your] legal visits" during a certain period and medical 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.

If a visitor's log or similar documentation is kept in plain sight and can be viewed by any person, and if the staff at the facility have the ability to locate portions of the log of your interest, I believe that those portions of the log would be available. However, if a visitors log or similar documents are not kept in plain sight and cannot ordinarily be viewed, it is my opinion that those portions of the log pertaining to persons other than yourself could be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. In short, the identities of those with whom a person associates is, in my view, nobody's business.

A potential issue involves the requirement imposed by §89(3) of the Freedom of Information Law that an applicant "reasonably describe" the records sought. In considering that standard, the State's highest court has found that to meet the standard, the terms of a request must be adequate to enable the agency to locate the records, and that an agency must "establish that 'the descriptions were insufficient for purposes of locating and identifying the documents sought'...before denying a FOIL request for reasons of overbreadth" [Konigsberg v. Coughlin, 68 NY 2d 245, 249 (1986)].

Although it was found in the decision cited above that the agency could not reject the request due to its breadth, it was also stated that:

> "respondents have failed to supply any proof whatsoever as to the nature - or even the existence - of their indexing system: whether the Department's files were indexed in a manner that would enable the identification and location of documents in their possession (cf. National Cable Tel. Assn. v Federal Communications Commn., 479 F2d 183, 192 [Bazelon, J.] [plausible claim of nonidentifiability under Federal Freedom of Information Act, 5 USC section 552 (a) (3), may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden. It would have required a wholly new enterprise,

> potentially requiring a search of every file in the possession of the agency']" (id. at 250).

In my view, whether a request reasonably describes the records sought, as suggested by the Court of Appeals, may be dependent upon the terms of a request, as well as the nature of an agency's filing or record-keeping systems. In Konigsberg, it appears that the agency was able to locate the records on the basis of an inmate's name and identification number. In this instance, I am unaware of the means by which a visitor's log, if it exists, is kept or compiled. If an inmate's name or other identifier can be used to locate records or portions of records that would identify the inmate's visitors, it would likely be easy to retrieve that information, and the request would reasonably describe the records. On the other hand, if there are chronological logs of visitors and each page would have to be reviewed in an effort to identify visitors of a particular inmate, I do not believe that agency staff would be required to engage in such an extensive search.

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

The second request involves witness statements and the criminal history records of the witnesses. I note that 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).

Assuming that the statements in question have not been previously disclosed to you or your attorney, 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.

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, since you referred to a requirement that fees be waived under "the amended F.O.I.A.", I point out that the reference is to the federal Freedom of Information Act, which applies only to federal agencies. The applicable statute in this instance is the New York Freedom of Information Law, which contains no provision relating to the waiver of fees. Further, 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)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Duane Whiteman, Sheriff
John T. Ryan, Jr., County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 1, 1998

Mr. Roman Kevilly
97-A-0654
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kevilly:

I have received your undated letter, which reached this office on October 28. As its contents deal with access to records, it pertains to access to testimony and statements made before a grand jury.

In this regard, 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 concerning 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
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December 3, 1998

Mr. Anthony J. Vaccaro
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Vaccaro:

I have received your undated letter, which reached this office on November 2. You referred to your unsuccessful efforts in obtaining records from the Town of Niagara. A variety of records were requested, and in each assistance, the Town Attorney apparently denied access to the records sought in their entirety.

While it is possible that some elements of the records requested might justifiably have been withheld, based on judicial decisions, a blanket denial of access to the records sought is inconsistent with law. In this regard, I offer the following comments.

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, the State's highest court, reiterated its general view of the intent of the Freedom of Information Law in Gould v. New York City Police Department [87 NY2d 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 New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 request,the Town Attorney has engaged in a blanket denial of access 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).

One of the requests involved "Radar Detective Log Books", and the Town Attorney denied access, stating that those records "are prepared in the course of law enforcement activities, and may contain non-public information about individuals which amount to an unwarranted invasion of

> not ordinarily constitute a confidential communication and, thus, are not privileged in the usual case' (Ibid.). Indeed, '[a] communication concerning the fee to be paid has no direct relevance to the legal advice to be given', but rather "[i]s a collateral matter which, unlike communications which relate to the subject matter of the attorney's professional employment, is not privileged' Matter of Priest v. Hennessy, supra, 51 N.Y.2d at 69, 409 N.E.2d 983, 431 N.Y.S.2d 511.
>
> "Consequently, while billing statements which 'are detailed in showing services, conversations, and conferences between counsel and others' are protected by the attorney-client privilege (Licensing Corporation of America v. National Hockey League Players Association, 153 Misc.2d 126, 127-128, 580 N.Y.S.2d 128 [Sup. Ct. N.Y.Co. 1992]; see, De La Roche v. De La Roche, 209 A.D.2d 157, 158-159 [1st Dept. 1994]), no such privilege attaches to fee statements which do not provide 'detailed accounts' of the legal services provided by counsel..." (id., 602).

It was also contended that the records could be withheld on the ground that they constituted attorney work product or material prepared for litigation that are exempted from disclosure by statute [see CPLR, §3101(c) and (d)]. In dealing with that claim, it was stated by the court that:

> "Respondent's denial of the FOIL request cannot be upheld unless the descriptive material is uniquely the product of the professional skills of respondent's outside counsel. The preparation and submission of a bill for fees due and owing, not at all dependent on legal expertise, education or training, cannot be 'attribute[d]...to the unique skills of an attorney' (Brandman v. Cross & Brown Co., 125 Misc.2d 185, 188 479 N.Y.S.2d 435 [Sup. Ct. Kings Ct. 1984]). Therefore, the attorney work product privilege does not serve as an absolute bar to disclosure of the descriptive material. (See, id.).
>
> "Nevertheless, depending upon how much information is set forth in the descriptive material, a limited portion of that information may be protected from disclosure, either under the work product privilege, or the privilege for materials prepared for litigation, as codified in CPLR 3101(d)...
>
> "While the Court has not been presented with any of the billing records sought, the Court understands that they may contain specific references to: legal issues researched, which bears upon the law firm's theories of the landfill action; conferences with witnesses not yet identified and interviewed by respondent's adversary in that lawsuit; and other legal services which were provided as part of counsel's

> representation of respondent in that ongoing legal action...Certainly, any such references to interviews, conversations or correspondence with particular individuals, prospective pleadings or motions, legal theories, or similar matters, may be protected either as work product or material prepared for litigation, or both" (emphasis added by the court) (id., 604).

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, 389 N.Y.S.2d 423. Certainly, any information which merely reports an event or factual occurrence, such as a conference, telephone call, research, court appearance, or similar description of legal work, and which does not disclose opinions, recommendations or statements of legal strategy will not be barred from disclosure under this exemption. See, Ingram v. Axelrod, supra" (id., 605-606).

In short, although it was found that some aspects of the records in question might properly be withheld based on their specific contents, a blanket denial of access was clearly inconsistent with law, and substantial portions of the records were found to be accessible.

A third element of the request involves bids and contracts relating to the remodeling of Town Hall. From my perspective, there would be no basis for withholding any contract. With respect to other materials, the attorney alluded to the impairment of contract awards and trade secrets as a means of denying access.

As inferred in the response to your request, relevant is §87(2)(c), which enables agencies to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations." In my view, the key word in the quoted provision is "impair", and the question involves how disclosure would impair the process of awarding a contract.

Section 87(2)(c) often applies in situations in which agencies seek bids. In the traditional bidding process, so long as the bids meet the requisite specifications, an agency must accept the low bid and enter into a contract with the submitter of the low bid. When an agency solicits bids, but the deadline for their submission has not been reached, premature disclosure to another possible submitter might provide that person or firm with an unfair advantage *vis a vis* those who already submitted bids. Further, disclosure of the identities of bidders or the number of bidders might enable another potential bidder to tailor his bid in a manner that provides him with an unfair advantage in the bidding process. In such a situation, harm or "impairment" would likely be the result, and the records could justifiably be denied. However, when the deadline for submission of bids has been reached, all of the submitters are on an equal footing and, as suggested earlier, an agency is generally obliged to accept the lowest appropriate bid. In that situation, the bids would, in my opinion, be available, even before a contract has been signed.

I point out that it has been held that bids are available after a contract has been awarded, and that, in view of the requirements of the Freedom of Information Law, "the successful bidder had no reasonable expectation of not having its bid open to the public" [Contracting Plumbers Cooperative Restoration Corp. v. Ameruso, 105 Misc. 2D 951, 430 NYS 2D 196, 198 (1980)]. While the cited decision involved a request for the winning bid and related documents, I believe that it is implicit the other bids would be available, for disclosure would have no impact, i.e., "impairment", relative to this process.

With respect to the contention that the records constituted "trade secrets" or are "confidential business documents", I direct your attention to §87(2)(d), which permits an agency to withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, 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."

From my perspective, 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.

Lastly, you sought records indicating the number of arrests and tickets issued by a particular police officer during a certain time period. If there is a figure indicating the numbers, I believe that they must be disclosed, for none of the grounds for denial would apply. As indicated earlier, those kinds of statistics would constitute intra-agency materials consisting of statistical data that must be disclosed under §87(2)(g)(i). Moreover, the identities of those who have been ticketed are generally public. 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 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 (1984)].

In sum, I believe that various aspects of the records sought must be disclosed and that the blanket denial by the Town Attorney is inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Kevin M. Kearney, Town Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 3, 1998

Mr. Edwin Lopez
97-R-5470
Collins Correctional Facility
P.O. Box 340
Collins, NY 14034-0340

Dear Mr. Lopez:

I have received your letter of November 29 in which you appealed a denial of your request to listen to a tape recording of your Tier III hearing.

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 dealing with the right to appeal, §89(4)(a) of the Freedom of Information Law, states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person thereof designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

For your information, the person designated by the Department of Correctional Services to determine appeals is Counsel to the Department, Mr. Anthony J. Annucci.

It is also noted that while the Department would have the ability to assess a fee for the reproduction of a tape recording, I do not believe that it could charge you for listening to the tape.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 4, 1998

Ms. Linn Atkinson-Loveless
Attorney At Law
502 Carpenter Street
Greenport, NY 11944

The staff of the Committee on 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. Atkinson-Loveless:

I have received your letter of October 30 in which you questioned the propriety of a policy adopted by several towns in relation to the requirements of the Freedom of Information Law. Specifically, you wrote that the "policy of certain Assessors' offices limits the number of property card requests to four or five per person per day."

In this regard, I offer the following comments.

First, by way of background, §89(1)(b)(iii) of the Freedom of Information Law requires the Committee on Open Government to promulgate regulations concerning the procedural implementation of the Law (see 21 NYCRR Part 1401). In turn, §87(1) requires agencies to adopt rules and regulations consistent with the Law and the Committee's regulations.

Section 1401.2 of the regulations, provides in relevant part that:

> "(a) The governing body of a public corporation and the head of an executive agency or governing body of other agencies shall be responsible for insuring compliance with the regulations herein, and shall designate one or more persons as records access officer by name or by specific job title and business address, who shall have the duty of coordinating agency response to public requests for access to records. The designation of one or more records access officers shall not be construed to prohibit officials who have in the past been authorized to make records or information available to the public from continuing to do so..."

Section 1401.4 of the regulations, entitled "Hours for public inspection", states that:

> "(a) Each agency shall accept requests for public access to records and produce records during all hours they are regularly open for business.
>
> (b) In agencies which do not have daily regular business hours, a written procedure shall be established by which a person may arrange an appointment to inspect and copy records. Such procedure shall include the name, position, address and phone number of the party to be contacted for the purpose of making an appointment."

Relevant to your inquiry and the foregoing is a decision rendered by the Appellate Division, Second Department. Among the issues considered 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].

In short, based on the decision of the Appellate Division, an agency must permit the inspection of records during the entirety of its regular business hours.

Second, 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 or a limitation on the number of records inspected. 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 sum, unless there is a reasonable basis for limiting the number of cards made available at a given time, the policy that you described would, in my opinion, be inconsistent with the language of the Freedom of Information Law and its judicial interpretation.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 4, 1998

Mr. Joseph Gredder
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Gredder:

I have received your letter of October 26 in which you raised a series of questions relating primarily to the application of the Freedom of Information and Open Meetings Laws to school districts and boards of education.

Your first question is whether members of a board of education are "State Officers". In this regard, the advisory jurisdiction of the Committee on Open Government is limited to the statutes referenced above. Since that question does not involve those statutes, the matter is beyond the jurisdiction of this office.

The next series of questions deal with whether school districts or school boards are required to comply with various provisions of the Freedom of Information Law that you cited. That statute pertains to agencies, 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."

Based on the foregoing, it is clear that either a school district or a board of education would constitute an "agency" required to comply with the provisions of the Freedom of Information Law to which you referred. Further, in view of the breadth of definition of "record" appearing in §86(4) of the Law, it is equally clear in my opinion that materials reflective of a school district budget and its expenditures fall within the scope of rights of access.

In a somewhat different vein, you asked whether the Open Meetings Law requires "the Board of a public UFSD to record detailed minutes of the specific questions asked by the public and the answers provided by the Board." In short, there is no such requirement. The Open Meetings Law offers direction on the subject and provides what might be characterized as minimum requirements concerning the contents of minutes. Specifically, §106 of that statute states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

Based upon the foregoing, it is clear that minutes need not consist of a verbatim account of every comment that was made or refer to questions, answers or the details of deliberations and discussions. So long as minutes include the elements described in §106(1), a public body would be acting in compliance with that provision.

Lastly, you asked whether "the law allow[s] videotaping of such Board meetings." In this regard, it is noted that neither the Open Meetings Law nor any other statute of which I am aware deals with the use of audio or video recording devices at open meetings of public bodies. As you inferred, there is a recent judicial decision pertaining to the use of video equipment, and there are several concerning the use of audio tape recorders at open meetings. From my perspective, the decisions consistently apply certain principles. One is that a public body has the ability to adopt reasonable rules concerning its proceedings. The other involves whether the use of the equipment would be disruptive.

By way of background, until 1978, there had been but one judicial determination regarding the use of the tape recorders at meetings of public bodies, such as town boards. The only case on the subject was Davidson v. Common Council of the City of White Plains, 244 NYS 2d 385, which was decided in 1963. In short, the court in Davidson found that the presence of a tape recorder might detract from the deliberative process. Therefore, it was held that a public body could adopt rules generally prohibiting the use of tape recorders at open meetings.

Notwithstanding Davidson, however, the Committee advised that the use of tape recorders should not be prohibited in situations in which the devices are unobtrusive, for the presence of such devices would not detract from the deliberative process. In the Committee's view, a rule prohibiting the use of unobtrusive tape recording devices would not be reasonable if the presence of such devices would not detract from the deliberative process.

This contention was initially confirmed in a decision rendered in 1979. That decision arose when two individuals sought to bring their tape recorders at a meeting of a school board in Suffolk County. The school board refused permission and in fact complained to local law enforcement authorities who arrested the two individuals. In determining the issues, the court in People v. Ystueta, 418 NYS 2d 508, cited the Davidson decision, but found that the Davidson case:

> "was decided in 1963, some fifteen (15) years before the legislative passage of the 'Open Meetings Law', and before the widespread use of hand held cassette recorders which can be operated by individuals without interference with public proceedings or the legislative process. While this court has had the advantage of hindsight, it would have required great foresight on the part of the court in Davidson to foresee the opening of many legislative halls and courtrooms to television cameras and the news media, in general. Much has happened over the past two decades to alter the manner in which governments and their agencies conduct their public business. The need today appears to be truth in government and the restoration of public confidence and not 'to prevent star chamber proceedings'...In the wake of Watergate and its aftermath, the prevention of star chamber proceedings does not appear to be lofty enough an ideal for a legislative body; and the legislature seems to have recognized as much when it passed the Open Meetings Law, embodying principles which in 1963 was the dream of a few, and unthinkable by the majority."

More recently, the Appellate Division, Second Department, unanimously affirmed a decision of Supreme Court, Nassau County, which annulled a resolution adopted by a board of education prohibiting the use of tape recorders at its meetings and directed the board to permit the public to tape record public meetings of the board [Mitchell v. Board of Education of Garden City School District, 113 AD 2d 924 (1985)]. In so holding, the Court stated that:

> "While Education Law sec. 1709(1) authorizes a board of education to adopt by-laws and rules for its government and operations, this authority is not unbridled. Irrational and unreasonable rules will not be sanctioned. Moreover, Public Officers Law sec. 107(1) specifically provides that 'the court shall have the power, in its discretion, upon good cause shown, to declare any action *** taken in violation of [the Open Meetings Law], void in whole or in part.' Because we find that a prohibition against the use of unobtrusive recording goal of a fully informed citizenry, we accordingly affirm the

> judgement annulling the resolution of the respondent board of education" (id. at 925).

Further, I believe that the comments of members of the public, as well as public officials, may be recorded. As stated by the court in Mitchell.

> "[t]hose who attend such meetings, who decide to freely speak out and voice their opinions, fully realize that their comments and remarks are being made in a public forum. The argument that members of the public should be protected from the use of their words, and that they have some sort of privacy interest in their own comments, is therefore wholly specious" (id.).

In view of the judicial determination rendered by the Appellate Division, I believe that a member of the public may tape record open meetings of public bodies, so long as tape recording is carried out unobtrusively and in a manner that does not detract from the deliberative process.

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).

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

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December 4, 1998

Mr. William C. Rosen
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rosen:

I have received your letter of October 30 and the materials attached to it. According to your letter:

> "Cheryl Shiber was the Village Manager of the Village of Monticello for approximately 8 months until she was discharged at a public session of the Village Board in August 1998. A document denominated 'Notice of Claim' filed Shiber against the Village of Monticello. It is [your] understanding the complaint alleges sexual harassment and was apparently also filed with the Division of Human Rights."

In response to your request for the record in question, the Village Clerk indicated that the document is "a Verified Complaint filed with the New York State Division of Human Rights", and she denied access "pending the Human Rights Commission's determination whether there is probable cause for the Complaint." She added that "[d]isclosure at this time would constitute an unwarranted invasion of personal privacy."

You have sought my opinion concerning the propriety of the denial of access. In this regard, I offer the following comments.

As you are likely aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter is the provision to which the Clerk alluded, §87(2)(b), which authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." It is my understanding, based on §297(4)(a)(i) of the Executive Law, that if there is a finding of probable cause, notice must be given to the parties that a public hearing will be held "not less than five nor more than fifteen days" after service of notice. Consequently, when probable cause is found, the names of the parties become public.

Prior to that time, however, I believe that names or other personal details relating to parties who are natural persons may properly be withheld. I point out that §89(2)(b) contains five examples of unwarranted invasions of personal privacy, the last two of which include:

> "iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; or
>
> v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

In my view, what is relevant to the work of the agency is the substance of the complaint, i.e., whether or not the complaint has merit. The identity of the person who made the complaint is often irrelevant to the work of the agency, and in such circumstances, I believe that identifying details may be deleted. In the context of the work of the Division of Human Rights, during its investigation following the receipt of a complaint, what is relevant to the work of the agency is whether the complaint has merit. Consequently, I believe that disclosure of the identity of a complainant prior to a finding of probable cause would constitute an unwarranted invasion of personal privacy.

With respect to defendants, or "respondents", as they are characterized in the Executive Law, prior to a finding of probable cause, they are the subjects of allegations that may be found later to be meritorious or devoid of merit. Therefore, insofar as records identify people characterized as defendants or respondents prior to a finding of probable cause, they could, in my view, be withheld as an unwarranted invasion of personal privacy. I note that the Division of Human Rights has asserted that premature disclosure could involve "frivolous or scurrilous charges."

Viewing the matter from a somewhat different perspective, it has consistently been advised that a charge or allegation identifying an individual that has not been proven may generally be withheld. 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 judicial decisions, 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); Prisoners' Legal Services of New York v. NYS Department of Correctional Services, 73 NY 2d 26 (1988)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Board of Trustees
Edith Schop
Monis Brafman, Deputy Mayor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 4, 1998

Mr. Paul McDonald
President
Commuter Cleaners
29 North Main Street
Port Chester, NY 10573

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McDonald:

I have received your letter of October 27. You have sought an opinion concerning your right to obtain a list of those issued permits to park at a municipal lot so that you can use the list in your "direct marketing efforts."

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.

Pertinent to the issue is §87(2)(b), which permits an agency to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." Further, §89(2)(b) includes a series of examples of unwarranted invasions of personal privacy, 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..."

Based upon the foregoing, it is clear that an agency has the ability to withhold the list that you seek if you intend to use it for the purpose of engaging in direct marketing.

Notwithstanding the foregoing, I note that the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals, the State's highest court, has held that the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted

to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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December 7, 1998

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 October 30. You referred to an opinion addressed to you in which reference was made to §160.50 of the Criminal Procedure Law. In brief, under that statute, records relating to a situation in which charges against an accused are dismissed in that person's favor are sealed. You described a variety of factors which, in your view, merit the disclosure of criminal history records involving arrests that did not result in convictions.

In this regard, under the statute within the advisory jurisdiction of the Committee on Open Government, the Freedom of Information Law, it has been held that the status or interest of a person seeking records is irrelevant [M. Farbman & Sons v. New York City Health and 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)]. Therefore, if records have been sealed under §160.50 they would fall within the exception appearing in §87(2)(a) of the Freedom of Information Law, which pertains to records that " are specifically exempted from disclosure by state or federal statute." In short, the Freedom of Information Law would not provide a right of access if the records were sealed.

From my perspective, only a court order issued in accordance with §160.50 would enable you to obtain the records in question. It is suggested that you review the provisions of that statute and confer with your attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

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December 7, 1998

Ms. Renee Holmes
[redacted]

The staff of the Committee on Open 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:

I have received your letter of November 5 in which you indicated that your requests made under the Freedom of Information Law for records of the New York City Administration for Children's Services and Cardinal McCloskey Children and Family Services "have not been honored." I note that you referred to attachments, responses to requests, but that they were not included with your letter.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of that statute defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, while the New York City Administration for Children's Services is a government entity that is required to comply with the Freedom of Information Law, Cardinal McCloskey Children and Family Services is not part of the government and, therefore, falls beyond the requirements of the Freedom of Information Law. In short, if an entity is not governmental in nature, Freedom of Information Law would not apply.

Second, without additional information regarding the extent to which the Administration for Children's Services failed to honor your request, I cannot offer specific guidance. If you provide that information, perhaps I could offer direction. I note, however, that a person denied access to records

may appeal the denial pursuant to §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that :

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive or governing body of the entity, or the person therefor designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the records sought."

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
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December 7, 1998

Outreach Committee
Feedback Political
Consensus Tabulations
P.O. Box 55
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.

To whom it may concern:

I have received your letter of November 4. You have asked whether you may seek records under the Freedom of Information Law from the Amsterdam and Montgomery County Industrial Development Agencies ("the Agencies") for the purpose of seeking the "total amount of money" paid to an attorney by those agencies.

In this regard, I offer the following comments.

First, the Freedom of Information Law is applicable to agency records, and §86(3) of the Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Section 856 of the General Municipal Law deals generally with industrial development agencies, and subdivision (2) states in part that "[a]n agency shall be a corporate governmental agency, constituting a public benefit corporation". Section 66(1) of the General Construction Law states that a "public benefit corporation" is a "public corporation". Further, §890-i of the General Municipal Law specifically established the "City of Amsterdam Industrial Development Agency" as "a body corporate and politic" subject to the requirements of Article 18-A of the General Municipal Law; §895-d pertains to the Montgomery County Industrial Development Agency and contains essentially the same

language. Based on the foregoing, I believe that the entities in question are "agencies" required to comply with the Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing records, and §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if no record exists indicating a "total amount" paid to an attorney, the Agencies would not be required to prepare a new record containing a total on your behalf. However, I believe that the Freedom of Information Law grants access to records which, upon your review, would enable you to know of monies paid to an attorney and that you could prepare your own total.

Third, with respect to the actual records of payment, in my opinion, the physical possession by the Agencies of the records sought, or the absence thereof, is not necessarily determinative of rights of access. If the attorney for the Agencies maintains the records sought, it appears that those documents would be subject to rights conferred by the Freedom of Information Law.

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).

From my perspective, based upon its specific language, the definition of "record" includes not only documents that are physically maintained by an agency; it refers to documents are that are "kept, held, filed, produced or reproduced by, with or for an agency." If the attorney maintains records for, on behalf of, or in his capacity as attorney for the Agencies, it appears that they would fall within the coverage of the Freedom of Information Law.

Moreover, in a decision cited earlier, the Court of Appeals discussed the scope and intent of the Freedom of Information Law and found that:

> "Key is the Legislature's own unmistakably broad declaration that, '[as] state and local government services increase and public problems become more sophisticated and complex and therefore harder to solve, and with the resultant increase in revenues and expenditures, it is incumbent upon the state and its localities to extend public accountability *wherever and whenever* feasible' (emphasis added; Public Officers Law, section 84).
>
> "...For the successful implementation of the policies motivating the enactment of the Freedom of Information Law centers on goals as broad as the achievement of a more informed electorate and a more responsible and responsive officialdom. By their very nature such objectives cannot hope to be attained unless the measures taken to bring them about permeate the body politic to a point where they become the rule rather than the exception. The phrase 'public accountability wherever and whenever feasible' therefore merely punctuates with explicitness what in any event is implicit" [Westchester-Rockland Newspapers, supra, at 579].

To be consistent with the intent of the Freedom of Information Law and its broad interpretation by the state's highest court, I believe that the Agencies must give effect to the Law so as to "extend public accountability wherever and whenever feasible."

If the attorney in question maintains records for or on behalf of an Agency, the Agency should in my opinion direct him to release records to the extent required by the Freedom of Information Law, or, alternatively, the agency could obtain the records sought or copies thereof from the attorney for the purpose of reviewing them and determining the extent to which the Freedom of Information Law requires disclosure.

Lastly, with regard to rights of access, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

In my opinion, bills, vouchers, contracts, receipts and similar records reflective of expenses incurred by an agency or payments made to an agency's staff or agents are generally available, for none of the grounds for denial would be applicable. With specific respect to payments to attorneys, I point out that, while the communications between an attorney and client are often privileged, it has been established in case law that records of the monies paid and received by an attorney or a law firm for services rendered to a client are not privileged [see e.g., People v. Cook, 372 NYS 2d 10 (1975)]. If, however, portions of time sheets, bills or related records contain information that is confidential under the attorney-client privilege, those portions could in my view be deleted under §87(2)(a) of the Freedom of Information Law, which permits an agency to withhold records or portions thereof that are "specifically exempted from disclosure by state or federal statute" (see Civil Practice Law and Rules, §4503). Therefore, while some identifying details or descriptions of services rendered found in the records in question might justifiably be withheld, numbers indicating the amounts expended and other details to be discussed further are in my view accessible under the Freedom of Information Law.

It is also noted that decisions have been rendered under the Freedom of Information Law in which it was held that records indicating payment by a village to its attorney are available [see Minerva v. Village of Valley Stream, Sup. Ct., Nassau Cty., August 20, 1981; Young v. Virginia R. Smith, Mayor of the Village of Ticonderoga, Supreme Court, Essex County, Jan. 9, 1987]. In Minerva, supra, the issue involved a request for copies of both sides of cancelled checks made payable to a municipality's attorney. Although the court held that the front sides of the checks, those portions indicating the amount paid to the attorney, must be disclosed, it was found that the backs of the checks could be withheld, for disclosure might indicate how the attorney "spends his 'paychecks.'"

More recently, in Knapp v. Board of Education, Canisteo Central School District (Supreme Court, Steuben County, November 23, 1990), the applicant ("petitioner") sought billing statements for legal services provided to the Board ("respondents") by a law firm. Since the statements made available included "only the time period covered and the total amount owed for services and disbursements", petitioner contended that "she is entitled to that billing information which would detail the fee, the type of matter for which the legal services were rendered and the names of the parties to any current litigation". In its discussion of the issue, the court found that:

> "The difficulty of defining the limits of the attorney client privilege has been recognized by the New York State Court of Appeals. (Matter of Priest v. Hennessy, 51 NY2d 62, 68.) Nevertheless, the Court has ruled that this privilege is not limitless and generally does not extend to the fee arrangements between an attorney and client. (Matter of Priest v. Hennessy, supra.) As a communication regarding a fee has no direct relevance to the legal advice actually given, the fee arrangement is not privileged. (Matter of Priest v. Hennessy, supra. at 69.)

> "There appear to be no New York cases which specifically address how much of a fee arrangement must be revealed beyond the name of the client, the amount billed and the terms of the agreement. However, the United States Court of Appeals, in interpreting federal law, has found that questions pertaining to the date and general nature of legal services performed were not violative of client confidentiality. (Cotton v. United States, 306 F.2d 633.) In that Court's analysis such information did not involve the substance of the matters was not privileged...
>
> "...Respondents have not justified their refusal to obliterate any and all information which would reveal the date, general nature of service rendered and time spent. While the Court can understand that in a few limited instances the substance of a legal communication might be revealed in a billing statement, Respondents have failed to come forward with proof that such information is contained in each and every document so as to justify a blanket denial of disclosure. Conclusory characterizations are insufficient to support a claim of privilege. (Church of Scientology v. State of New York, 46 NY 2d 906, 908.)...Therefore, Petitioner's request for disclosure of the fee, type of matter and names of parties to pending litigation on each billing statement must be granted."

Based upon the foregoing and subject to the qualifications discussed above, I believe that the records involving payments to attorneys should be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: City of Amsterdam Industrial Development Agency
Montgomery County Industrial Development Agency

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 1998

Mr. Joseph Bojko, Jr.
97-B-1271
Marcy Correctional Facility
Old River Road
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. Bojko:

I have received your letter of November 3. You wrote that the City of Buffalo Police Department failed to respond to your request for 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 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, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 cannot offer unequivocal guidance. Nevertheless, the following paragraphs will review the provisions that may be significant in determining rights of access to the records sought.

Potentially relevant is a decision by the Court of Appeals concerning records prepared by police officers 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

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, a witness, or others interviewed in an investigation.

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, since you asked that fees be waved, I note that you referred to "the amended F.O.I.A." That statute pertains only to federal agencies. Further, it has been held that an agency subject to the New York Freedom of Information Law, which is applicable in this instance, may charge its established fees, even if 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:tt

cc: Lt. Katherine A. Plesac

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 1998

Ms. Vanessa M. Sheehan
Guercio & Guercio
77 Conklin Street
Farmingdale, NY 11735

The staff of the Committee on 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. Sheehan:

I have received your letter of November 2, as well as the correspondence attached to it. You have sought clarification of an opinion rendered approximately a year ago relating to the Sex Offender Registration Act ("the Act"), which is also known as "Megan's Law."

You wrote that "[a] discrepancy has arisen in [y]our office as to whether *sex offender registry* information received by a school district through a local police department as an intermediary is subject to the Freedom of Information Law (FOIL)." You added that it is your understanding that "only registry information obtained from a local police department is not subject to FOIL", and you asked that I "verify" your interpretation.

I am in general agreement with your position. Although the Act does not specifically define the term "registry", subdivision (1) of §168-b of the Correction Law states that:

> "The division shall establish and maintain a file of individuals required to register pursuant to the provisions of this article which shall include the following information of each registrant:
>
> (a) The sex offender's name, all aliases used, date of birth, sex, race, height, weight, eye color, driver's license number, home address and/or expected place of domicile.
>
> (b) A photograph and set of fingerprints.
>
> (c) A description of the offense for which the sex offender was convicted, the date of conviction and the sentence imposed.

(d) Any other information deemed pertinent by the division."

Further, the first and last sentences of subdivision (2) provide 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 require that no information included in the registry shall be made available except in the furtherance of the provisions of this article."

Based on the foregoing, it is clear in my view that the information described in paragraphs (a) through (d) of subdivision (1) comprises the content of and is the registry, and that information contained in the registry may be made available only in accordance with the provisions of the Act.

To reiterate a point offered in the earlier opinion, 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), a 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. Contrarily, if records are acquired by a school district from a source other than the registry, those records would, in my opinion, be subject to the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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FOIL-AO-1170

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December 7, 1998

Mr. John McAndrew
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. McAndrew:

I have received your letter of November 2 and the correspondence attached to it.

According to the materials, you have initiated several grievances against the Port Jervis School District. Although the contract between the District and the Teachers' Association states that "All hearings shall be and remain confidential", District officials have identified you as the subject of hearings at open meetings. You have asked whether the District is required to identify the subject of a hearing prior to entry into executive session or may be prohibited from naming you publicly as a grievant involved in a hearing.

In this regard, first, it has consistently been advised that a public body is not required to identify a person who may be the subject of a discussion in an executive session. In my view, a motion for entry into executive session must provide sufficient detail to enable the public to know whether an executive session will appropriately be conducted. For instance, if a motion indicates that the Board will discuss a "particular person" in conjunction with one or more of the topics described in §105(1)(f) of the Open Meetings Law, that would be sufficient to comply with law. Section 105(1)(f) 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..."

Second, however, neither the Freedom of Information Law nor the Open Meetings Law would prohibit the disclosure of your identity as a grievant during an open meeting. 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. The introductory language of §105(1), which prescribes a procedure that must be accomplished before an executive session may be held, 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, the Freedom of Information Law is permissive. Although an agency may withhold records in accordance with the grounds for denial appearing in §87(2), the Court of Appeals, the State's highest court, has held that the agency is not obliged to do so and may choose to disclose. As stated in that unanimous decision: "...while an agency is permitted to restrict access to those records falling within the statutory exemptions, the language of the exemption provision contains permissive rather than mandatory language, and it is within the agency's discretion to disclose such records, with or without identifying details, if it so chooses" [Capital Newspapers v. Burns, 67 NY2d 562, 567 (1986)].

Lastly, in many instances, I believe that outcome of a hearing, including the name of the public employee involved, must be disclosed under the Freedom of Information Law, and that 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 a different context, in Geneva Printing Co. and Donald C. Hadley v. Village of Lyons (Supreme Court, Wayne County, March 25, 1981), a public employee charged with misconduct and in the process of an arbitration hearing engaged in a settlement agreement with a municipality. One aspect of the settlement was an agreement to the effect that its terms would remain confidential. Notwithstanding the agreement of confidentiality, which apparently was based on an assertion that "the public interest is benefited by maintaining harmonious relationships between government and its employees", the court found that no ground for denial could justifiably be cited to withhold the agreement. 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 short, insofar as the terms of a collective bargaining agreement are inconsistent with the Freedom of Information Law, I believe that they would be unenforceable and void.

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

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December 7, 1998

Mr. Kurt T. Minersagen
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. Minersagen:

I have received your letters of November 4. In one, you asked that this office intervene on behalf of a representative of the Public Employees Federation (PEF) employed by the Division of Housing and Community Renewal (DHCR) relative to her unanswered requests for contracts for consulting services in certain areas. In the other, you appealed a denial of access to personnel reports identifying employees by name, title, status, grade, appointment type, location, encumbrances and bargaining unit." DHCR responded by indicating that information accessible under the Freedom of Information Law would be made available only with respect to PEF employees.

In this regard, I offer the following comments.

First, it appears that you misunderstand the role of the Committee on Open Government. The Committee is authorized to provide advice concerning the Freedom of Information Law; it is not empowered to compel an agency to grant or deny access to records or determine appeals. As such, the remarks herein should be considered advisory in nature.

Second, with respect to the first letter, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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, assuming that the contracts for consulting services can be located, I believe that they must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. In my view, none of the grounds for denial would be pertinent.

A potential 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 DHCR maintains contracts for consulting services. If the contracts can be located based on the terms of the request, I believe that the request would meet the requirement of reasonably describing the records.

With regard to the second letter, I note that it has been held that records accessible under the Freedom of Information law must be made equally available to any person, irrespective of one's status or interest [see M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 NY 2d 75 (1984) and Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Therefore, even though the request was made by a representative of PEF, her request in that capacity would not limit rights of access conferred by the Freedom of Information Law.

As I understand the requests, with one exception, the items sought should be disclosed. Pertinent to the matter is §87(2)(b), which states that an agency may withhold records to the extent that disclosure constitute "an unwarranted invasion of personal privacy" pursuant to §87(2)(b) of the Freedom of Information Law. Although subjective judgments must often of necessity be made when questions concerning privacy arise, the courts have provided substantial direction regarding the privacy of public employees. It is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. With regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee's official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

The last decision cited, Wool, dealt with a request for a record that identified public employees by name and salary, and the same record included a column indicating which among the

employees had deductions made for payment of union dues. The court held that salary information is clearly available, but that the column involving the payment of union dues could be withheld, stating that "[m]embership in the CSEA has no relevance to an employee's on the job performance or the functioning of his or her employer." In Wool, certain employees had the option of joining a union or not doing so. Consequently, it was held that the portion of the record indicating the payment or non-payment of union membership dues constituted an unwarranted invasion of personal privacy.

Again, it appears that the information sought must be disclosed, irrespective of the reason for the request, with the exception of the information relating to a bargaining unit.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Patrice Huss
Brian Lawlor
Gerald Burke

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 7, 1998

E-Mail

TO: Hon. Tim Rice, Clerk/Treasurer, Village of Plandome

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Rice:

I have received your letter of November 3 and appreciate your kind words. You referred to a draft prepared by engineers for the Village of Plandome and asked whether it is "an available record or can...be withheld because it is only a draft and has not been 'accepted' by the board."

In this regard, I offer the following comments.

First, the Freedom of Information Law pertains to agency records, and §86(4) of the Law defines the term "record" to mean:

> "any information kept, held, filed, produced, reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes."

Based on the foregoing, a draft, in my opinion, clearly would constitute a "record" subject to rights of access conferred by the Freedom of Information Law, irrespective of its characterization or absence of acceptance by the Board of Trustees.

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.

If the engineers were hired to carry out certain duties other than consulting services, it is doubtful in my view that any of the grounds for denial would be applicable. On the other hand if the engineers were retained as consultants, it is possible that portions of the report could be withheld.

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 record, in accordance with the direction offered by the Court of Appeals, would consist of statistical or factual information that must be disclosed, irrespective of its status as draft or non-final.

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

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December 7, 1998

Mr. Robert Hinton
97-B-0427
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. Hinton:

I have received your letter of November 5 in which you complained that you have been unable to obtain a "master index" from your facility.

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:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11174

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 7, 1998

Mr. Robert Hinton
97-B-0427
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. Hinton:

I have received your letter of November 5 in which you complained that you did not receive a response to a request for records that you requested from the Office of the Herkimer County District Attorney.

In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1175

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 3, 1998

Ms. Iwona Muszak
[redacted]

Dear Ms. Muszak:

I have received your letter of December 12 addressed to Janet Mercer.

In response to your questions, we recently completed preparing statistics for inclusion in our annual report to the Governor and the State Legislature, and this is to inform you that from November 1, 1997 through October 31, 1998, this office prepared 878 written advisory opinions in response to inquiries similar to yours. As such, this office prepares approximately 70 written advisory opinions per month. I note, too, that in the same period, we received more than 8,000 telephone inquiries.

The staff of the Committee consists of three employees, myself and two secretarial assistants. I prepared all of the written advisory opinions. For obvious reasons, there is a substantial backlog.

You also asked what remedies individuals have when an agency ignores a request made under the Freedom of Information Law. In this regard, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Again, I promise you that I will respond to your earlier inquiry as soon as possible and in the order of its receipt.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1176

41 State Street, Albany, New York 12231
(518) 474-2518
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 9, 1998

Mr. Daniel H. Hays
National Underwriter
43-47 Newark Street
Hoboken, NJ 07030

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hays:

As you are aware, I have received your letter of November 10, as well as a letter addressed to Mr. Sidney B. Glaser, Associate Counsel and Records Access Officer for the Department of Insurance, in which the Metropolitan Life Insurance Company ("MetLife") and the individual employee named in the record sought urged the Department to continue to deny access to documentation indicating that the employee was convicted of a "crime of dishonesty or breach of trust." In an advisory opinion dated October 6, it was advised, in brief, that intimate personal information might justifiably be withheld, but that the identity of the employee and the crime for which he or she was convicted must be disclosed.

I continue to believe that those aspects of the materials are accessible to the public.

First, a record indicating that an individual has been found to have engaged in a violation of law, in my opinion, would not, if disclosed constitute "an unwarranted invasion of personal privacy" [see Freedom of Information Law, §87(2)(b)]. Further, I believe that the United States Supreme Court decision repeatedly cited by the attorneys for MetLife has been misinterpreted and in this factual context would support disclosure.

U.S. Department of Justice v. Reporters Committee for Freedom of the Press [489 U.S. 749 (1989)] involved a request for "rap sheets", the criminal history records including reference to arrests and convictions, relating certain individuals. The records sought were located within a database maintained by the FBI. The Supreme Court acknowledged that some of the contents of rap sheets are frequently available, stating that: "Arrests, indictments, convictions, and sentence are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the elements of his or her rap sheet may be available upon request in that jurisdiction." Nevertheless, the Court also recognized that if those events did not

occur in a single jurisdiction, it may be difficult if not impossible to find records comprising the elements of one's criminal history, stating that "Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited." That being so, the Court sought to balance the privacy interest in maintaining the "practical obscurity" of the records against the public interest in disclosure, stating that

> "the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

In essence, it appears that the Supreme Court found that if the elements of a record are public but difficult to find, and if those elements are maintained in a computerized government "clearinghouse" of "compiled computerized information", the federal Freedom of Information Act authorizes a federal agency to withhold the data on the ground that disclosure would constitute an unwarranted invasion of personal privacy.

Notwithstanding my respect for the Supreme Court, it is difficult in my opinion to justify a conclusion that an item of public information available from one public source, such as a courthouse or police station would, if disclosed result in an unwarranted invasion of privacy if it is sought from another public source that can make the record readily available. From my perspective, it is the nature of the public information that should determine whether or the extent to which it must be disclosed under the New York Freedom of Information Law, not the ease or difficulty of obtaining it. While the attorney's for MetLife essentially dismissed the holding in *Capital Newspapers v. Poklemba* (Supreme Court, Albany County, April 6, 1989), it is the only state decision that focused in an any detail on the "practical obscurity" or "computerized clearinghouse" concepts referenced by the Supreme Court. To reiterate that aspect of the holding (which was rendered by Judge Kahn, who is now a U.S. District Court judge):

> "...petitioner is correct when it asserts that the transmittal of an otherwise publicly available document to a centralized facility for inclusion in a government computer bank does not *per se* render it immune from disclosure. However, the issue is not whether the records under the control of DCJS **should** be released, but rather whether the provisions of FOIL and the Executive Law, as presently constituted, mandate the result sought by petitioner.
>
> "Certainly, the Legislature has the authority to provide for public access from a centralized location. It is equally clear that, unless otherwise sealed, a conviction record is a public document. Much has been said about potential abuses, given the ease with which these

> records may be obtained if the petition is sustained. Such fears are not determinative however. To argue that a criminal conviction obtained in a public proceeding in an open court system suddenly should be clothed with secrecy merely because an individual doesn't have to struggle to obtain it, makes a mockery of the right of public access. To suggest that public disclosure of conviction records is available only when it is through a difficult and time-consuming search of individual courthouse files or in local police stations, when the exact same information might be freely available if housed within a centralized computer bank, would be to create an irrational burden. Resolution of the question should not be resolved by how hard it is to discover the information sought. However, as aforesaid, the issue is not whether the information should be available, but rather, whether the Division of Criminal Justice Services has been statutorily directed to guard against public disclosure, thereby exempting it from the provision of FOIL" (emphasis added by the court).

As such, the court determined the issue by finding that the records maintained by DCJS were exempted from disclosure by statute, not because disclosure would constitute an unwarranted invasion of personal privacy. Additionally, the court inferred that conviction records are generally available from the courts in which proceedings resulted in convictions were conducted "or in local police stations."

The Court of Appeals, the state's highest court, inferentially reached the same conclusion and recognized that not all elements of a rap sheet are accessible to the public. In New York and many other jurisdictions, 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, the records would be available from the courts in which the proceedings occurred. In this regard, the Court of Appeals 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 must be disclosed by an agency pursuant to the Freedom of Information Law, 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). In short, while identifying details pertaining to person whose charges were dismissed likely would not be accessible, the records indicating convictions were found to be a matter of public record.

Perhaps just as significant, the Court of Appeals has cited an aspect of the New York Freedom of Information Law that is not present in the federal Act: a strong statement of legislative intent. Section 84 of the New York statute states that "it is incumbent upon the state and its localities to extend public accountability *wherever and whenever feasible*", and the Court of Appeals has asserted that:

> "...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 my view, based on the language of the law and precedent, the principles involving the practical obscurity of information stored within a computerized clearinghouse announced by the Supreme Court have not and would not be adopted in New York.

Another facet of the *Reporters Committee* decision which would be irrelevant to the interpretation of the state statute but which represents a misinterpretation of law by MetLife's attorneys involves the Supreme Court's finding that the application of the federal Act's privacy exception "must turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny'." The Court added that:

> "Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case - and presumably in the typical case in which one private citizen is seeking information about another - the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official."

First, as stated by the Court of Appeals,

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose' while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request' [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)]."

Based on the foregoing, whether a record sheds light on an agency's activities is not pertinent in determining rights of access; the only question under the state law involves the extent, if any, to which a basis for denial appearing in §87(2) could justifiably be asserted.

Second and more importantly, disclosure of the record sought in this instance, in my opinion, *would clearly shed light* on the activities of the Insurance Department, a regulatory agency, and enhance its accountability to the public. As I understand the federal law that serves as the basis of your request, 18 USC §§1033 and 1034, individuals convicted of a "crime of dishonesty or breach of trust" cannot work in the insurance industry, unless they receive a signed consent to do so from a state insurance commissioner. Therefore, for a person so convicted to work in the insurance industry in New York, the Superintendent of Insurance must make a determination to grant or deny permission to so. Whether a Superintendent grants or denies permission to a convicted person to work in the insurance industry clearly relates to the performance of the official duties of a high government official and "sheds light" on the functioning and operation of the Insurance Department.

Third, this is not a situation in which an applicant such as yourself is asking an agency to retrieve information from a large database, information that happens to be stored, for whatever the reason, by an agency. On the contrary, the record is likely one of few maintained by the Department that deals with a request by a convicted person to work in the insurance industry in New York.

In short, I do not believe that MetLife's reliance on the *Reporters Committee* decision or the other decisions relating to the protection of the privacy of the person in question would justify a denial of access. If anything, the holding in that decision and the others that I have cited lead to the conclusion that the record, with the qualifications expressed earlier, must be disclosed.

With respect to the other argument, which relates to the "trade secret" exception appearing in §87(2)(d) of the Freedom of Information Law, in addition to the points offered in the opinion of October 6, in general, I believe that the exceptions in both the New York and the federal statutes pertain to what might be characterized as "commercial information". From my perspective, the record sought could hardly be considered to be commercial information as that phrase is generally and typically understood and used. Stated differently, I do not believe that a record indicating that an individual has been convicted of certain crimes constitutes what could reasonably be described as commercial information or a trade secret. Does that kind of record, by its nature, have any commercial value? Is it any way analogous to a book list or pricing information, detailed and current financial information, a company's business plans or strategy, a computer model, a process of manufacturing, a formula or a device?

Lastly, you enclosed copies of records obtained from the Insurance Department in which the Department gave consent to work in the insurance industry to persons who had been convicted of crimes. In those instances, it appears that the Department did not consider the records to be exempt from disclosure. Further, it also appears that the insurance companies that employ the individuals who have been convicted did not contend that the information falls within the scope of §87(2)(d), or that the Department rejected those contentions. As such, there is precedent for the Department disclosing the same kind of records that you are seeking or for suggesting that other insurance companies do not consider those records to be shielded from disclosure to the public.

In sum, for the reasons expressed above and in the earlier opinion, I believe that the information that you are seeking, which is contained in a record maintained by the Insurance Department, must be disclosed.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Sidney B. Glaser
Martin Frederic Evans

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1172

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 14, 1998

Ms. Jennifer Jordan
Associated Press
P.O. Box 11010
Albany, NY 12211

Dear Ms. Jordan:

I have received your letter of November 6 in which you referred to a request made under the Freedom of Information Law that was "ignored" by the Red Jacket/Manchester-Shortsville School District. Even though you are no longer employed by the Canandaigua *Daily Messenger*, on whose behalf the request was made, you wrote that a failure by the District to comply "hurts the public's right to know everywhere."

You focused on an appeal, and based on our last discussion of the matter, the appeal had not been answered, nor had a copy been sent to this office. In this regard, as you are aware, § 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 therefore designated by such head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial or provide access to the record sought. In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency and the ensuing determination thereon."

From my perspective, irrespective of whether you continued to be associated with your former employer, the District had an obligation to comply with law by determining your appeal within ten business days of its receipt and forwarding a copies of the appeal and its determination to this office.

In an effort to enhance compliance with and understanding of the matter, copies of this response will be forwarded to District officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

Cc: Board of Education
Phil Langton, Superintendent
Robert Matson, Executive Editor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1178

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 14, 1998

Mr. Darryl Wright
89-A-0971
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. Wright:

I have received your letter of November 9. You asked whether you can repeatedly request the same records from an agency under the Freedom of Information Law. You indicated that you requested certain records in 1996, and that both the initial request and the appeal were denied.

In this regard, in general, there is nothing in the Freedom of Information Law that would preclude an applicant from seeking records a second time. However, I point out that in Corbin v. Ward [160 AD2d 596 (1990)], it was found that an applicant could not initiate an Article 78 proceeding on the ground that it was time barred after he made a second request for records and there was no change in circumstances. If circumstances have changed, I believe that a new request would be appropriate. For instance, if records were properly withheld because disclosure would interfere with a law enforcement investigation, but the investigation has since ended, it is possible some of the records initially withheld could no longer justifiably be withheld. In that kind of situation, while there is no judicial decision on the subject, I believe that a new request would be proper.

I point out, too, that based on the decision rendered in Moore v. Santucci [151 AD2d 677 (1989)], if a record was previously 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).

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-1179

41 State Street, Albany, New York 12231
(518) 474-2518
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December 14, 1998

Mr. Michael B. Wood
98-A-4685
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. Wood:

I have received your letter of November 5. You have sought guidance in obtaining the records of cellular telephone calls made by certain detectives of the Hempstead Police Department without enabling the Police Department or the Office of the District Attorney to know of your request. You also asked how you might obtain the "activity sheets and time log book records" of those detectives.

In this regard, I know of no way of obtaining the records sought without the knowledge of the Police Department. My assumption is that the Department maintains the records in question and that its personnel would be involved in a review of the records to determine the extent to which they should be disclosed. Further, it is likely in my view that the cellular telephone usage records could be withheld insofar as they include reference to phone numbers called or received.

As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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, it is likely that three of the grounds for denial would be pertinent in determining rights of access.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." Although the standard concerning privacy 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.

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.

When phone numbers appear on a bill, those numbers do not necessarily indicate who in fact was called or who picked up the receiver in response to a call, and in many cases an indication of the phone number would disclose nothing regarding the nature of a conversation. Further, even though the numbers may be disclosed, nothing in the Freedom of Information Law would require an individual to indicate the nature of a conversation. This is not to suggest, however, that the numbers appearing on a phone bill must be disclosed in every instance. In the case of phone bills reflective of calls made by law enforcement officials, depending upon an official's function and how an official uses a phone, there may be grounds for withholding the numbers on a bill. If a phone is frequently or routinely used in connection with criminal investigations, disclosure of numbers called could permit an applicant for the bills to ascertain the course of an investigation, identify witnesses or even confidential informants. When that is so, I believe that appropriate deletions (i.e., the numbers called) could be made on the ground that disclosure would constitute an unwarranted invasion of personal privacy and/or endanger the lives or safety of law enforcement personnel and perhaps others who might be identified by means of a phone number appearing on a bill. In that latter situation involving the possibility of endangerment, §87(2)(f) of the Freedom of Information Law would serve as a basis for denial. Further, section 87(2)(e)(iii) authorizes an agency to withhold records when disclosure would identify a confidential source.

I am unaware of the contents of activity sheets or time log books. However, potentially relevant is a decision by the Court of Appeals concerning records prepared by police officers 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, it was determined that the agency could not claim that the 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. [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

For instance, of potential significance is §87(2)(b) which, again, 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 others interviewed in an investigation.

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 as indicated earlier 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:tt

Cc: Records Access Officer, Village of Hempstead Police Department

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1180

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 14, 1998

Mr. Edward J. Mosellie
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mosellie:

I have received your letter October 30, which reached this office on November 12. Your letter and the materials attached to it relate to your efforts in seeking a fair assessment of your real property by the Town of Taghkanic. It is your view that Town officials have failed to comply with law and have violated your rights. As such, you asked that I "hold them accountable."

In this regard, it is emphasized at the outset that the jurisdiction of the Committee on Open Government is limited to providing advice and opinions 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, and it performs no function directly relating to the propriety of an assessment.

As I understand the matter, you sought a "list of comparables" from the Town to enable you to file an appropriate grievance. As suggested by the attorney for the Town, the Town is not required to create a list on your behalf. I point out that the Freedom of Information Law pertains to existing records, and that §89(3) of that statute states in part that an agency is not required to prepare a record in response to a request. In short, if no list of comparables had been prepared by the Town, neither the Assessor nor any other Town official would have been required to develop such a list for you in response to your request.

From my perspective, it is clear that records that could be used to create a list of comparables would be accessible. In brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. The assessment records that would enable you to compare your assessment with that of similar properties would be accessible, for none of the grounds for denial would apply. While you would

have the right to review those records for the purpose of preparing your own list, again, I know of no law that would require Town officials to prepare such a list for you.

For future reference, I note that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) require that each agency must 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 ordinarily be made to that person. In the case of towns, in most instances, the town clerk is the designated records access officer.

Finally, as you may be aware, 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)].

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: Hon. Karen L. Graham, Town Clerk
Jonathan D. Nichols

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1181

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 14, 1998

Ms. Karen Jescavage Bernard
[redacted]

The staff of the Committee on 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. Bernard:

I have received your memorandum of November 13 in which you sought an advisory opinion concerning the propriety of a "proposed policy" being considered by the Village of Croton-on-Hudson.

According to your correspondence, the policy, if adopted, "would require the requestor to file an F.O.I., wait five business days, then go to the municipal offices where the requested records are on file, review the file, and tag the desired records." You added that "These records would then be photocopied by staff and either mailed or faxed to the requestor."

From my perspective, the proposed policy, as you have described it, would be inconsistent with the Freedom of Information Law. In this regard, I offer the following comments.

First, the policy appears to require applicants for records to wait for at least five days to view or obtain copies of records, irrespective of the nature of the records sought. As you may be aware, §89(3) of the Freedom of Information Law requires that an agency grant access to records, deny access in writing or acknowledge the receipt of a request in writing within five business days of its receipt of a request. 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 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 my opinion, if, as a matter of practice or policy, an agency indicates in every instance that it will "wait" for a certain period of time to grant of deny access, 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, in view of those factors, 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. By means of example, if an applicant requests minutes of last month's Village Board meeting, the request, in my opinion, should ordinarily be granted at the time that the request is received. Those records would unquestionably be available by law, and they would be readily retrievable. In that kind of circumstance, it would appear that a delay in disclosure of up to five days would be inconsistent with the thrust of the law.

Second, it appears that the proposed policy requires that applicants must view records at Village offices as a condition precedent to gaining access. In my view, if in an initial request, an applicant specifies that he or she wants copies of records and pays or offers to pay the requisite fee, an agency must prepare copies. 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 prepare copies of records if the requested fees are paid or respond to requests by mail.

In short, I do not believe that an agency can condition the right to have copies of records on a requirement that individuals inspect the records first.

Lastly, to be consistent with the requirement that agencies make records available "wherever and whenever feasible," if there is adequate staff and time, there may be no valid basis for a delay in preparing copies that have been inspected; in many instances, I would conjecture that it would not be a hardship to make copies available when the copies are requested.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
Cc: Richard Herbek

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1182

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 14, 1998

Mr. John J. Sheehan
Adjusters, Inc.
P.O. Box 604
Binghamton, NY 13902

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Sheehan:

I have received your letter of November 9 and the materials attached to it.

You wrote that a particular individual filed a complaint against a restaurant, and that you represent the restaurant's insurance carrier. Having requested records relating to a complaint of food poisoning, the Broome County Department of Health withheld the name of the complainant. You were informed that you could obtain records including the name only with a "medical authorization" given by the complainant. You have contended that no medical treatment was rendered by the Department and that its records contained no medical information.

In this regard, it appears that the denial of access to the name was appropriate. 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.

Relevant to the matter 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 turn, §89(2)(b) includes examples of unwarranted invasions of privacy, the first two of which make reference to medical information. Most pertinent in my view is a decision rendered by the State's highest court, Hanig v. Department of Motor Vehicles [79 NY2d 106 (1992)], in which it was found that records containing details in the nature of medical information could be withheld, even if they were not prepared by a health care provider or involved treatment. The records that you attached, although they do not involve treatment, indicate an individual's symptoms, infections and the like. From my perspective, those details coupled with a name would, if disclosed, result in an unwarranted invasion of privacy.

You suggested that if authorization is needed in this instance, the same would logically be required in relation to the disclosure of accident reports. The difference, in my view, is that accidents reports have long been accessible under §66-a of the Public Officers Law. Under that statute, the contents of accident reports are accessible, except to the extent that disclosure would interfere with a criminal investigation.

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: Joseph Peckham

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1183

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 15, 1998

Mr. Diallo Rafik Madison
94-A-7376
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. Madison:

I have received your letter of November 5, which reached this office on November 12. You have asked for guidance in obtaining information relating to a person who apparently had been employed at your facility, including the reason for leaving her position, the number of grievances initiated concerning the dental work that she performed, and how many lawsuits have been commenced based on her alleged negligence.

In this regard, it is emphasized at the outset 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. If there is no record indicating the number of grievances or complaints, for example, the agency would not be obligated to prepare a total or figure on your behalf.

Assuming that records containing the information sought exist, I point out that, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Pertinent to the matter would be §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].

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)].

If litigation has been commenced and litigation papers have been served upon a court, and if those records would be available from a court, I believe that copies maintained by the facility or the Department of Correctional Services would be also be accessible.

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-11184

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 15, 1998

Mr. Jim Tricoli
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Tricoli:

I have received your correspondence of November 16 in which you questioned the propriety of a fee assessed under the Freedom of Information Law by the Town of Amherst.

In response to a request for purchase orders and invoices that apparently consist of sixteen pages, you were charged twenty-five cents per photocopy, plus twenty-six dollars for one and a half hours of labor, for a total of thirty dollars. It appears that the fee is based on a resolution that authorizes the Town to charge up to twenty-five cents per photocopy or the actual cost of reproducing other records, as well as "clerical time."

In this regard, by way of background, §87(1)(b)(iii) of the Freedom of Information Law stated until October 15, 1982, that an agency could charge up to twenty-five cents per photocopy or the actual cost of reproduction unless a different fee was prescribed by "law". Chapter 73 of the Laws of 1982 replaced the word "law" with the term "statute". As described in the Committee's fourth annual report to the Governor and the Legislature of the Freedom of Information Law, which was submitted in December of 1981 and which recommended the amendment that is now law:

> "The problem is that the term 'law' may include regulations, local laws, or ordinances, for example. As such, state agencies by means of regulation or municipalities by means of local law may and in some instances have established fees in excess of twenty-five cents per photocopy, thereby resulting in constructive denials of access. To remove this problem, the word 'law' should be replaced by 'statute', thereby enabling an agency to charge more than twenty-five cents only in situations in which an act of the State Legislature, a statute, so specifies."

Therefore, prior to October 15, 1982, a local law, an ordinance, or a regulation for instance, establishing a fee for clerical time, 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 AD2d 339 (1996) and 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, an agency cannot charge for clerical or search time. Further, the 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 Town appears to be 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 Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Town Board
Hon. Susan K. Jaros, Town Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1185

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 16, 1998

Mr. Irving Serrano
93-R-2009
Marcy Correctional Facility
Box 5000
Marcy, NY 13403-5000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Serrano:

I have received your letter of October 9, which reached this office on November 13. You have asked how might find your mother's new address. You indicated that she does not read or write English and that she has always lived with a person who can translate for her.

In this regard, it is doubtful that you can use the Freedom of Information Law to locate your mother or that you have the ability to locate her without additional information.

One of the requirements imposed by the Freedom of Information Law is that an applicant must "reasonably describe" the records sought. As such, an applicant must provide sufficient detail to enable agency staff to locate and identify the records. The submission of a name alone as a means of acquiring additional information would not, in my view, meet the standard of reasonably describing the records.

Second, home addresses generally may be withheld by government agencies. Since you referred to welfare and S.S.I., I note that §136 of the Social Services Law provides that records identifiable to applicants for or recipients of public assistance are confidential. The only instances in which home addresses are routinely disclosed would involve voter registration lists and assessment rolls, both of which are accessible to the public. The former identifies registered voters and their residence addresses; the latter identifies owners of homes, buildings or land, including the location of those parcels. However, in order to seek those items, you would have to know the county in which a person is registered to vote or owns real property.

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-1186

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 16, 1998

Mr. Rasheed Williams
Dg 2056
1040 E. Roy Furman Hwy.
Waynesburg, PA 15370-8090

The staff of the Committee on Open 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 November 11. As I understand your commentary, you are interested in obtaining records from the New York City Police Department relating to a warrant for your arrest issued some time in January of 1996.

In this regard, each agency subject to the New York 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. To seek records from the agency pertinent to the matter, it is suggested that you write to the Records Access Officer, New York City Police Department, Room 110C, One Police Plaza, New York, NY 10038.

I point out that §89(3) of the Freedom of Information Law requires that an applicant "reasonably describe" the records sought. Therefore, when requesting records, it is suggested that you provide sufficient detail and background information to enable Department staff to locate and identify the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11187

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 16, 1998

Mr. Curtis Mosley
98-A-2275
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. Mosley:

I have received your letter of November 11. You asked how you might obtain an "itemized expense listing that [your] 18-B attorney submitted to the Court or State for the services he rendered in representing" you in court.

In this regard, as indicated in the earlier correspondence addressed to you, the Freedom of Information Law pertains to agency records. If the records in question are maintained by an agency, I believe that they would be available. In brief, none of the grounds for denial could be asserted, in my opinion, to withhold the records. However, it is unlikely in my view that an agency would maintain the records of your interest. I would conjecture that they would be maintained by a court or, because the services were rendered in New York City, by the Legal Aid Society, neither of which would be subject to the Freedom of Information Law. I am unaware of whether an attorney for the Legal Aid Society would be required to prepare an itemized accounting relating to services rendered.

Although court records fall beyond the coverage of the Freedom of Information Law, they are generally accessible pursuant to other statutes (see e.g., Judiciary Law, §255). As such, it is suggested that you seek the records in question, as well as the "orders to produce" to which you referred, from the clerk of the court in which the actions or proceedings occurred, citing an applicable statute 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-1188

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 16, 1998

E-Mail

TO: SATABER@webtv.net (SHIRLEY TABER)

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on 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. Taber:

I have received your letter of November 15. In brief, you have asked whether members of the Oswego County Legislature can be required to seek records from the County by submitting requests pursuant to the Freedom of Information Law.

In this regard, 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 county legislature rule or policy to the contrary, I believe that a member 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 county legislature, 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 legislature, has the same rights as those accorded to a member of the public. Absent a rule or policy conferring special rights of access, a member seeking records could presumably be treated in the same manner as the public generally.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Bruce Clark, County Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1189

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 16, 1998

Mr. Isaiah Brown
97-A-7589
Clinton Correctional Facility Annex
P.O. Box 2002
Dannemora, NY 12929

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Brown:

I have received your letter of November 10 in which you raised a variety of questions in relation to a request made under the Freedom of Information Law to the New York City Police Department.

You asked first whether "redactions [are] proper pursuant to POL 87 (2) (b) & (f) where all concerned have testified in open court, are well known to requester for many years, and requester is already in possession of all personal information which would be the subject of redaction pursuant to the aforesaid sections of FOIL." From my perspective, the answer is dependent on the facts and the specific contents of the records. While you may know those who testified for many years and contend that the information sought is in your possession, unless the records have already been disclosed to you, you cannot know the actual contents of the records. Although you may have general knowledge of their contents, there may be elements of the records unknown to you. In that event, it is possible that redactions could properly be made pursuant to the provisions that you cited.

Also of possible relevance is a decision that you cited, 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).

Next, in a case involving the New York City Police Department, it was held that an agency could require payment of fees for the duplication of records prior to providing copies (Sambucci v. McGuire, Supreme Court, New York County, November 4, 1982).

You asked whether a request taken "verbatim" from a category of records identified in a subject matter list can be "too broad". In my view, 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 Department, 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 a request, to that extent, the request would not in my opinion meet the standard of reasonably describing the records.

Lastly, you questioned whether "an unfavorable determination at a disciplinary proceeding against police personnel render[s] that decision unavailable under FOIL pursuant to Civil Rights Law 50-a". Based on 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]. 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.

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.

In sum, it has clearly been established by the courts that disclosure of determinations indicating that public employees have been found to have engaged in misconduct would not constitute an unwarranted invasion of personal privacy. Nevertheless, another ground for denial is critical to an analysis of the matter.

Section 87(2)(a) pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you are aware, 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)].

I note that recent decision rendered by the Appellate Division, Third Department, reversed a lower court decision in which it was held that the names of police officers who had been reprimanded and which were sought by newspapers were shielded by §50-a of the Civil Rights Law (Daily Gazette et al. v. City of Schenectady, ___ADd___, NYLJ, June 10, 1998). In rejecting the lower court's conclusion that police officers and others whose records are the subject of §50-a "are afforded an almost impenetrable cloak of secrecy", the Appellate Division reviewed the holdings of the Court of Appeals cited earlier and found that:

> "Clearly, the purpose of the information request in Prisoners' Legal Servs. was potentially adversarial or litigious in nature. However, the Court of Appeals was careful to contrast the scenario with one where, as here in Matter of Capital Newspapers Div. of Hearst Corp. v. Burns, (supra), the media is merely seeking the information to report as news and not with even a remote view toward any litigation. In making a key distinction between the request in Capital Newspapers and the FOIL request before it in Prisoners' Legal Services, the Court of Appeals, referring to its holding in Capital Newspapers, states:
>
> > * * * we by no means suggested that the application of (§50-a) was limited to an ongoing litigation. Rather, we simply recognized that the legislative intent in enacting the [correction officer] amendment to section 50-a was to prevent release of sensitive personnel records that could be used in litigation for the purpose of harassing or embarrassing correction officers * * * records having remote or no such potential use, like those sought in Capital Newspapers, fall outside the scope of the statute (Matter of Prisoners' Legal Servs. of N.Y. v. New York State Dept. Of Correctional Servs., supra, at 33 [citation omited]).
>
> "The use or potential use in litigation remains a critical factor in assessing Civil Rights Law § 50-a protection as evidenced in other cases ordering disclosure. For example, in a pre-Prisoners' Legal

> Servs. decision, this court permitted access to a disciplinary determination action against a police investigator, citing Capital Newspapers and stating that the protection afforded under Civil Rights Law § 50-a 'is only intended to prevent access to police personnel records * * * for purposes of harassment of the police on cross-examination or otherwise in the context of a civil or criminal action' (Matter of Scaccia v. New York State Div. of State Police, 138 AD2d 50, 54). Similarly, a post-Prisoners' Legal Servs. decision in Supreme Court, Oneida County, ordered disclosure of the final determination of a firefighter's suspension hearing to a local newspaper, citing Capital Newspapers and specifically rejecting the notion that Civil Rights Law § 50-a (1) prohibited its release concluding:
>
> > * * *the court finds that in this non-litigation context, [petitioner newspaper] is entitled to disclosure of the final determination in this fireman's suspension hearing, without disclosing all the supporting allegations, complaints or witness names (Matter of Rome Sentinel Co. v. City of Rome, 145 Misc 2d 183, 186)" (emphasis added by court).

At the end of the decision, the Court held that:

> "...Prisoners' Legal Servs. did not broaden the scope of the Civil Rights Law § 50-a exemption to include FOIL requests made in a context unrelated to litigation. Accordingly, respondents have failed to demonstrate that the information requested by petitioners comes squarely within the Civil Rights Law § 50-a FOIL exemption because they have not established, in any convincing way, that the information sought would be used in existing or potential litigation. The names of the police officers involved and the respective discipline imposed must be released to petitioners."

Based upon the recent holding quoted above, as well as the other judicial decisions cited previously, if the determinations are sought in relation to litigation, it appears that they could be withheld.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Susan Petito

STATE OF NEW YORK
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December 16, 1998

Mr. Vincent Pisacane
[redacted]

The staff of the Committee 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. Pisacane:

As you are aware, I have received your letter of November 17 and related materials. By way of background, your daughter, a student at Hunter College, sought a variety of records pertaining to her grade appeal. Although some of the records or portions thereof were initially withheld, it is my understanding that College officials have determined to permit your daughter to inspect the records sought in their entirety. You indicated by phone, however, that the College will not permit your daughter to obtain copies of the records, and you have questioned its ability to refuse her request for copies.

In this regard, I believe that two statutes are pertinent to the matter. The first is a federal statute, the Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). The second is the New York Freedom of Information Law.

In brief, FERPA is applicable to all educational agencies or institutions that participate in federal educational funding programs. As such, it applies to virtually all public educational institutions. In general, FERPA confers rights of access to "education records" pertaining to a student under the age of eighteen to the parents of the student or to an "eligible student." 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 CUNY. 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, your daughter is an "eligible student" who enjoys rights of access to the records at issue. For reasons that we have discussed, and which were discussed with attorneys for the College, FERPA grants rights of access to parents or eligible students that exceed those conferred by the Freedom of Information Law.

As suggested by College officials, while FERPA provides a right to inspect education records, it does not provide the right to obtain copies. Nevertheless, in my view, because the materials constitute agency records that fall within the scope of the Freedom of Information Law, the College is obliged to prepare copies of the records upon payment of the appropriate fees.

The City University of New York, including its component colleges, clearly constitutes an "agency" as that term is defined in §86(3) of the Freedom of Information Law. Additionally, §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 definition, the materials that your daughter requested constitute agency records. While they are "education records" subject only to inspection under FERPA, they are also "records" subject to the requirements of the Freedom of Information Law, which states that accessible records must be made available for inspection and copying [§87(2)] and that an agency is required to make copies of those records upon payment of a fee [§89(3)]. I note that §87(1)(b)(iii) of that statute states that an agency cannot charge in excess of twenty-five cents per photocopy. I point out, too, that the regulations promulgated by the Committee on Open Government, which have the force and effect of law, state in relevant part that "[a]ny conflicts among laws governing public access to records shall be construed in favor of the widest possible availability of public records" [21 NYCRR §1401.1(d)].

In sum, although FERPA does not confer a right to obtain copies of the records sought by your daughter, I believe that the Freedom of Information Law requires that copies be made available upon payment of the requisite fee.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Catherine Pisacane
Linda T. Chin
Tracy Flaum

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December 18, 1998

Mr. Neil Mosesson
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Mosesson:

I have received your letters of November 17 and November 19, as well as the correspondence relating to them. You have sought an advisory opinion concerning your requests for records directed to the Office of the New York County District Attorney.

By way of background, you requested a variety of records pertaining to an investigation that apparently resulted in a conviction. The receipt of your request was acknowledged by Maureen O'Connor, an assistant district attorney who had been designated as records access officer in connection with the request. She wrote that the records sought had to be ordered from the Closed Cases Unit, and that "[o]nce this information is reviewed, [she would] review it to determine your request." A second request, largely unrelated to the first, was made on September 11.

Having received no further response to the initial request and no response of any kind to the second, you appealed to Gary Galperin, the District Attorney's appeals officer, on October 5. Mr. Galperin responded on October 7, indicating that receipt of the second request had been acknowledged by means of a letter addressed to you on October 1 and that "[b]oth Records Access Officers informed you that they need to obtain any relevant files in order to determine your requests" and that "[t]heir search efforts are ongoing." He concluded by stating that "no relief is available to you on this appeal" and that you could "expect to receive determinations or at least updated reports from A.D.A O'Connor and A.D.A. Sittnick by November 6, 1998." The most recent communication that you received was sent to you by A.D.A. O'Connor on November 10, in which she wrote that "the closed cases unit is still making efforts to locate the file" and that upon her receipt of the file, she would review them to render a determination.

From my perspective, although the Office of the District Attorney acknowledged the receipt of your requests, it did not fully comply with the requirements of the Freedom of Information Law. In this regard, I offer the following comments.

As you are aware, §89(3) of the Freedom of Information Law provides in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the context of your correspondence, the acknowledgement of receipt of your first request did not include an approximate date indicating when access would be granted or denied. The second was not answered in a timely manner. Further, no determinations had been made as of the date of your letter to this office.

In a case that described an experience similar to yours, the court cited §89(3) of the Freedom of Information Law and wrote 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...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 Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the agency "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)."

Based on the foregoing, I believe that your requests have been constructively denied and that you may appeal the denials to Mr. Galperin 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 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 reason for further denial, or provide access to the record sought."

Alternatively, based on the holding in Bernstein, it appears that you could seek judicial review of the denials now. I suggest, however, that you appeal in an effort to avoid the time and cost of litigation.

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)].

Lastly, while I am unfamiliar with the contents of the records or the effects of their disclosure, it is noted as a general matter that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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, the State's highest court, expressed its general view of the intent of the Freedom of Information Law in a fairly 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). 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.).

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt
cc: Gary Galperin
Maureen O'Connor
Cynthia Sittnick

STATE OF NEW YORK
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December 21, 1998

Ms. Iwona Muszak
[redacted]

The staff of the Committee on 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. Muszak:

As you are aware, I have received your letter of November 15. You have sought assistance in obtaining records from the Commission on Judicial Conduct in relation to a complaint that you made concerning a certain town justice.

In this regard, in brief, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in this instance is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §45 of the Judiciary Law, which deals with records of the Commission on Judicial Conduct and is entitled "Confidentiality of records." Subdivision (1) of that statute provides that:

> "Except as hereinafter provided, 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 except pursuant to section forty-four of this article, the commission and its designated staff personnel shall have access to confidential material in the performance of their powers and duties. If the judge who is the subject of a complaint so requests in writing, copies of the complaint, the transcripts of hearings by the commission thereon, if any, and the dispositive action of the commission with respect to the complaint, such copies with any reference to the identity of any person who did not participate at any such hearing suitably deleted therefrom, except the subject judge or

> complainant, shall be made available for inspection and copying to the public, or to any person, agency or body designated by such judge."

The provision in §44 relating to public access to records states in relevant part that:

> "After a hearing, the commission may determine that a judge be admonished, censured, removed or retired. The commission shall transmit its written determination, together with its findings of fact and conclusions of law and the record of the proceedings upon which its determination is based, to the chief judge of the court of appeals who shall cause a copy thereof to be served either personally or by certified mail, return receipt requested, on the judge involved. Upon completion of service, the determination of the commission, its findings and conclusions and the records of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals."

Based on the foregoing, only after the completion of a proceeding and service upon a judge who is the subject of a proceeding in which it is determined that he or she should be "admonished, censured, removed or retired" would records of the Commission be accessible to the public. If no such determination has yet been reached, or if a complaint is dismissed, I believe that the records must remain 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:tt

cc: Albert B. Lawrence

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 21, 1998

Mr. Dennis M. Fitzgerald
Law Offices of Chadbourne, O'Neill,
Thomson, Whalen & Fitzgerald
49 Beekman Avenue, P.O. Box 701
Sleepy Hollow, NY 10591

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, unless otherwise indicated.

Dear Mr. Fitzgerald:

As you are aware, I have received your letter of October 29 and a variety of correspondence related to it. You have sought an advisory opinion in relation to a request for records of the Millwood Fire District. While some of the records were made available, others could not be found, and one was withheld.

In this regard, I offer the following comments.

First, since you addressed your letter to me as "the Appeals Officer with respect to matters that have been denied pursuant to Freedom of Information Law Requests", and as indicated to you by phone upon receipt of that letter, it is emphasized that neither myself nor the Committee on Open Government is empowered to determine appeals. 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 . In addition, each agency shall immediately forward to the committee on open government a copy of such appeal when received by the agency 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" (§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)].

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 appears that the record of primary interest that was withheld is a letter prepared by the architect retained by the District "detailing the reasons" why the Districts needs certain parcels

of property. It is your view that the architect is not an "agency" as that term is defined in §86(3) of the Freedom of Information Law and that a denial based on §87(2)(g) of that statute is inconsistent with law, irrespective of the extent to which contains opinions or recommendations.

In my opinion, whether §87(2)(g) can properly be asserted to deny access to the record in question is dependent on the nature of the relationship between the District and the architect. As you are aware, the cited provision pertains to "inter-agency or intra-agency materials", i.e., those communications between or among officials of state and local government. Typically, the communications between an agency, such as the District, and a private entity or person would not fall within that exception. However, as we discussed, when a consultant is retained by an agency, it has been held that the consultant serves essentially in the place of agency staff and that its work product constitutes "intra-agency" material that falls within the scope of §87(2)(g) [see Xerox Corp. v. Town of Webster, 65 NY2d 131 (1985)].

Having discussed the matter with Mr. Simeone, the District's attorney, he indicated that the architectural firm was hired to develop plans and to advise. I have not had the opportunity to view the contract between the District and the firm. If the contract does not contemplate or require the provision of advice, I would agree with your contention that §87(2)(g) would not serve as a basis for a denial of access. If that is so, I believe that the letter would be accessible, for none of the other grounds for denial appearing in §87(2) would appear to applicable.

On the other hand, if the contract does call for consulting services or advice, the letter would, in my view, fall within the exception. 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.

One of the contentions offered by the New York City Police Department in a recent decision rendered by the Court of Appeals 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 record 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) id., 276-277).]

In short, insofar as the record at issue consists of statistical or factual information, I believe that it must be disclosed, even if it can be characterized as intra-agency material.

You also contend that the letter may be considered as a "post decision" memorandum that sets forth the reasons for the District's actions, which would be available based on the holding in Miracle Mile Associates v. Yudelson [68 AD2d 176 (1979)]. In that case, the Appellate Division cited decisions rendered by the Supreme Court under the federal Freedom of Information Act that distinguished between "predecisional memoranda prepared to assist the agency decision-maker in arriving at his decision, which are exempt, and post decisional memoranda, setting forth reasons for agency decisions already made, which are not" (id., 182). Without knowledge of the content of the letter, I cannot offer unequivocal commentary. If indeed the letter includes the reasons for a decision already made, those portions of the letter must, based on Miracle Mile, be disclosed. On the other hand, insofar as the letter includes additional advice or recommendations concerning the matter under consideration, it would appear that those portions could be withheld.

Lastly, to the extent that the document in question has been disclosed at one or more open meetings or other public forums, I believe that it must be disclosed. If portions of the record have effectively been disclosed, such disclosure in my opinion would result in a waiver of the authority to deny access in accordance with §87(2)(g) of the Freedom of Information Law.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Board of Fire Commissioners
Frank T. Simeone

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1194

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December 21, 1998

Mr. Stephen Houston
93-A-6651
Green Haven Correctional Facility
665 State Route 216/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. Houston:

I have received your letter of November 11, which reached this office on November 19. You have sought assistance in relation to a request for records made to the Office of the Queens County District Attorney.

In the correspondence attached to your letter, you referred to a contention by Andrew L. Zwerling, Executive Assistant to the District Attorney, that your appeal was late. It is unclear whether the reference to an appeal involves an appeal relating to your conviction, or an appeal made under the Freedom of Information Law.

If the appeal relates to your conviction, I note that it has been held that a failure to respond in a timely manner to a request made under the Freedom of Information Law is irrelevant to the validity of a determination made in a separate proceeding [see Brusco v. NYS Division of Housing and Community Renewal, 170 AD2d 796, appeal dismissed, 77 NY2d 939 (1991)].

On the other hand, if your appeal relates to your Freedom of Information Law requests, as I understand the situation, you requested records from the Office of the District Attorney in 1996, at which time you were informed that a diligent search had been made for the records, but that they could not be found. A second request for the same records was made earlier this year, and you were informed on August 12 that a search was being made and that you would be informed of the status of the request within a month. On September 24, a second letter was sent to you indicating that a search for the records continued and that you would be informed of the result within thirty days. It was apparently then that you appealed and thereafter received Mr. Zwerling's response that the appeal was untimely.

If your original request resulted in a denial of access to records that had been found, pursuant to §89(4)(a) of the Freedom of Information Law, you would have had thirty days from the denial to appeal. However, since the request was neither granted nor denied, but rather involved an assertion that the records could not be found, I know of nothing in the Freedom of Information Law or judicial interpretation that would preclude you from seeking the records a second time in the hope that they might now be located.

If my conclusion is accurate, it appears that an appeal would have been appropriate. In a case that may be similar in some respects to your experience, it was found 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...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 Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the applicant could have appealed and was "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)."

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)].

From my perspective, the affirmation prepared by Assistant District Attorney Beder in relation to your initial request was fully consistent with the direction provided in the decisions cited above.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Andrew L. Zwerling
Brian S.B. Lee

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1195

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December 21, 1998

Mr. Matthew Lee
Inner City Press/Community
on the Move
1919 Washington Avenue
Bronx, NY 10457

The staff of the Committee 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. Lee:

I have received your letter of November 19, as well as related correspondence, including a determination of your appeal rendered by Sara Kelsey, the Banking Department's Deputy Superintendent and General Counsel.

You have sought an advisory opinion concerning what you characterized as the Department's "questionable implementation" of the Freedom of Information Law. Based on Ms. Kelsey's determination, it appears that the Department disclosed much of the material that you requested. Nevertheless, based on a review of the correspondence and information acquired from the Department following the receipt of your letter, 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) states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

Pursuant to the provision quoted above, the Department should have acknowledged the receipt of your second request in writing within five business days of its receipt, including an estimate of the date when your request would be granted or denied.

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, 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.

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 specific period, i.e., thirty days, 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 is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure for as much as thirty days. In a case with which you are familiar 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).

Second, as you may be aware, when a commercial enterprise is required to submit records to a state agency and contends that the records or portions thereof may be withheld under §87(2)(d), the so-called "trade secret" exception, it may ask that the records be kept confidential in accordance with the procedure described in §89(5). I was informed by Department staff that some of the records sought were subject to a request by the bank that is the subject of your inquiry to maintain its records in a confidential manner. From my perspective, in a circumstance in which records subject to the protection accorded by §89(5) are requested under the Freedom of Information Law, it would be appropriate for an agency to so indicate in its letter of acknowledgement of receipt of a request. Such an indication would inform the person seeking the records that the agency is obliged to withhold the records, at least for a time, and that there is a need to delay a determination to grant or deny access.

Third, I point out that in a different but perhaps somewhat analogous context, it was held that an agency's failure to disclose records in a timely manner sought under the Freedom of Information Law that related to an administrative proceeding was not relevant to that proceeding and would not

serve as a basis for overturning a determination [Brusco v. NYS Division of Housing and Community Renewal, 170 AD2d 184, appeal dismissed, 77 NY2d 939 (1991)].

Lastly, since I am not familiar with the banking industry, I questioned the denial of access to what is characterized in the determination of your appeal as "1998 HMDA Data." HMDA, I was told, is the Home Mortgage Disclosure Act. Under that state, it is my understanding that a federal agency publishes a variety of information relating to moneys loaned for home mortgages during a calendar year. However, the publication of the data involving 1998 will not be published until the summer of 1999. Based on a discussion of the matter, current information acquired by the Department and which has not yet been furnished to a federal agency under the HMDA is considered "proprietary". It was explained that although the data is eventually published, current data could, if disclosed, "cause substantial injury to the competitive position" of a bank, for moneys available under the Community Reinvestment Act are limited, and there is great competition among banks to participate in the program established by the Act. Premature disclosure could, in the words of a Department official, reveal a "marketing niche" which if disclosed to a competing bank would result in competitive harm.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Barbara Kent, Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO- 11,196
PPL-AO- 247

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December 21, 1998

Mr. Jim E. Farr
9I 31054
North Florida Reception Center
P.O. Box 628
Lake Butler, FL 32054

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Farr:

I have received your letter of December 13. Enclosed as you requested are the brochures that you identified. You indicated that you are interested in gaining access to foster care records pertaining to yourself from the Angel Guardian Home of Brooklyn.

In this regard, the statutes to which you referred, the Freedom of Information and Personal Privacy Protection Laws, pertain only to records maintained by governmental entities. By means of its name, I would conjecture that the Angel Guardian Home is not part of the government and that the statutes cited would not be applicable.

Even if the Angel Guardian Home is a governmental entity, the records in which you are interested are generally confidential. Specifically, §372 of the Social Services Law 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 foster care can be disclosed, unless authorization to disclose is conferred by a court or by the Office of Children and Family Services, which performs functions that had been carried out by what formerly was known as the Department of Social Services.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

encs.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 21, 1998

Mr. Joseph M. Norton
Hudson 403E
Dutchess Community College
Pendell Road
Poughkeepsie, NY 12601

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Norton:

I have received your letter of November 17, which relates to your efforts in obtaining records from Dutchess County Community College.

In this regard, having reviewed the opinion addressed to you on March 30, there is little that I can add to it in relation to the content of your recent correspondence. However, for purposes of clarity, I offer the following comments.

First, as suggested in the earlier response, it is suggested that you seek the retention schedule applicable to community colleges. That document will be up to date and more expansive than a subject matter list required to be maintained under the Freedom of Information Law.

Second, the Freedom of Information Law pertains to existing records, and §89(3) provides in part that an agency need not create a record in response to a request. I am unaware of whether records exist in relation to items 1 and 2 of your request of November 5. If the information sought does not exist in the form of a record or records, the College would not be required to prepare new records on your behalf containing the information sought.

Lastly, with respect to the duties of a records access officer, 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. 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."

Based on the foregoing, I believe that the records access officer has the duty of coordinating responses to requests.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Paul Higgins, Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 22, 1998

Ms. Margaret M. Nolan
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Ms. Nolan:

I have received your letter of November 18. I note that we do not have a tape recorder in this office, and I am returning the cassette to you. You have sought assistance in relation to efforts in obtaining records indicating payments made, including overtime, by the Utica Municipal Housing Authority to your former husband.

In this regard, first, the Freedom of Information Law provides direction concerning the time and manner in which an agency must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body,

> who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Second, I believe that records indicating the salaries and overtime payments of public employees must be disclosed. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Although the Freedom of Information Law generally does not require that agencies maintain or prepare records [see §89(3)], an exception involves payroll information. Specifically, §87(3) of the Law states in relevant part that:

> "Each agency shall maintain...
>
> (b) a record setting forth the name, public office address, title and salary of every officer or employee of the agency..."

While §87(2)(b) of the Freedom of Information Law authorizes an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy", the courts have provided substantial direction regarding the privacy of public employees. First, it is clear that public employees enjoy a lesser degree of privacy than others, for it has been found in various contexts that public employees are required to be more accountable than others. Second, with regard to records pertaining to public employees, the courts have found that, as a general rule, records that are relevant to the performance of a public employee' s official duties are available, for disclosure in such instances would result in a permissible rather than an unwarranted invasion of personal privacy [see e.g., Farrell v. Village Board of Trustees, 372 NYS 2d 905 (1975); Gannett Co. v. County of Monroe, 59 AD 2d 309 (1977), aff'd 45 NY 2d 954 (1978); Sinicropi v. County of Nassau, 76 AD 2d 838 (1980); Geneva Printing Co. and Donald C. Hadley v. Village of Lyons, Sup. Ct., Wayne Cty., March 25, 1981; Montes v. State, 406 NYS 2d 664 (Court of Claims, 1978); Steinmetz v. Board of Education, East Moriches, Sup. Ct., Suffolk Cty., NYLJ, Oct. 30, 1980); Capital Newspapers v. Burns, 67 NY 2d 562 (1986)]. Conversely, to the extent that records are irrelevant to the performance of one's official duties, it has been found that disclosure would indeed constitute an unwarranted invasion of personal privacy [see e.g., Matter of Wool, Sup. Ct., Nassau Cty., NYLJ, Nov. 22, 1977].

Based upon the foregoing, it is clear in my view that records reflective of salaries of public employees must be prepared and made available. It is noted that one of the decisions cited above, Capital Newspapers v. Burns, supra, involved a request for records reflective of the days and dates

of sick leave claimed by a particular municipal police officer. The Appellate Division found that those records must be disclosed, and the Court of Appeals affirmed. The decision indicates that the public has both economic and safety reasons for knowing whether public employees perform their duties when scheduled to do so. As such, attendance records, including those involving overtime work, are in my opinion clearly available, for they are relevant to the performance of public employees' official duties. Similarly, I believe that records reflective of payment of overtime must be disclosed, for the public has an economic interest in obtaining those records and because the records are relevant to the performance of public employees' official duties.

Lastly, when records are accessible under the Freedom of Information Law, it has been held that they should be made equally available to any person, regardless of one's status, interest or the intended use of the records [see Burke v. Yudelson, 368 NYS 2d 779, aff'd 51 AD 2d 673, 378 NYS 2d 165 (1976)]. Moreover, the Court of Appeals, the State's highest court, has held that:

> "FOIL does not require that the party requesting records make any showing of need, good faith or legitimate purpose; while its purpose may be to shed light on government decision-making, its ambit is not confined to records actually used in the decision-making process. (Matter of Westchester Rockland Newspapers v. Kimball, 50 NY 2d 575, 581.) Full disclosure by public agencies is, under FOIL, a public right and in the public interest, irrespective of the status or need of the person making the request" [Farbman v. New York City Health and Hospitals Corporation, 62 NY 2d 75, 80 (1984)].

In short, neither your identity nor your intended use of the records would affect your right to obtain the records in question, which, again, must in my opinion be disclosed.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, copies of this opinion will be forwarded to officials of the Authority.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Executive Director
Robert Calli

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1199

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December 22, 1998

Mr. Johon L. Thomas
97-b-0811
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. Thomas:

I have received your letter of November 12, which reached this office on November 23. You have asked that I advise the Office of the Monroe County District Attorney of its obligation to respond to a request for records in accordance with law.

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)].

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to the District Attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. Howard R. Relin, District Attorney

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1120

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 22, 1998

Councilman Peter J. Barton
Town of Beekman
4 Main Street
Poughquag, NY 12570-9601

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 Councilman Barton:

I have received your letter of November 20 and the correspondence relating to it. You wrote that the Town of Beekman has retained an environmental consulting firm to engage in studies and prepare reports concerning a hazardous waste site owned by the Town. When you requested records from the firm, it denied access and informed the Town Supervisor of your request, who also denied your request. You have raised a series of questions pertaining to the matter, and in this regard, I offer the following comments.

First, 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 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, in a similar vein, I do not believe that the Supervisor, acting unilaterally, has the authority to determine rights of access or the extent to which another Board member can view the records at issue. From my perspective, under §§63 and 64 of the Town Law, the Town Board, rather than a single member thereof, would have such authority. Section 63 states in part that a town board carries out its functions by means of a majority vote of its total membership; §64(3) provides a town board, as an entity, with "management, custody and control of town property."

Third, I believe that the records prepared by the consulting firm are Town property and that they fall within the coverage of the Freedom of Information Law. 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, 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, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises..

For instance, it has been 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 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 records are maintained for the Town, I believe that the Town would be required to direct the custodian of the records to disclose them in accordance with the Freedom of Information Law, or obtain them in order to disclose them to you to the extent required by law.

Lastly, it has been held by the the Court of Appeals that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff.

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. Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It

> would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld 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 would conjecture that substantial portions 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 not only to you, a member of the Town Board, but to any member of the public.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Town Supervisor

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,201

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December 22, 1998

Mr. Jeff Blocker
93 -A-0989
Morris County Correctional Facility
CN 900
Morristown, NJ 07963-0900

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. Blocker:

I have received your letter of November 9, which reached this office on November 23, as well as the "addendum" to that letter, which was delivered yesterday.

Your initial area of inquiry relates to the responsibilities of the Office of the Nassau County District Attorney concerning requests made under both state and federal freedom of information statutes.

In this regard, first, it is emphasized that the federal Freedom of Information Act pertains only to records maintained by federal agencies. The governing statute concerning the records of an office of a district attorney in New York is this state's Freedom of Information Law.

Second, the request involves communications or records of communications between the Nassau County District Attorney's office and prosecutorial authorities in Livingston County and those in three other states. As a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the 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 decision by the Court of Appeals concerning records prepared by police officers 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, it was determined that the agency could not claim that the 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 [Gould, Scott and DeFelice v. New York City Police Department, 89 NY2d 267 (1996)].

I point out that §86(3) of the Freedom of Information Law defines the term "agency" to mean:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, an " agency" is an entity of state or local government in New York. Both Nassau and Livingston Counties are "agencies", and communications between those entities would be "inter-agency" materials. However, governmental entities outside of New York are not "agencies" for purposes of the Freedom of Information Law, and §87(2)(g) would be inapplicable as a basis for a denial of access to communications between the Office of the District Attorney and officials outside of New York.

Notwithstanding the foregoing, 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 others interviewed in an investigation.

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.

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, assuming that the attorney that you identified is not an agency employee but rather a private practitioner, the Freedom of Information Law would not extend to records in his possession.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer, Office of the Nassau County
District Attorney
Tammy J. Smiley, Assistant District Attorney
John C. Putney, Esq.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1102

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December 22, 1998

Mr. Lawrence Betsch
98-B-0970
Livingston Correctional Facility
P.O. Box 1991
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. Betsch:

I have received your letter of November 17. You have sought assistance in attempting to obtain court records under the Freedom of Information Law.

In this regard, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that a request for court records be directed to the clerk

of the court in which the proceeding was conducted, citing an applicable provision of law as the basis for the request.

I hope that the foregoing serves to 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-1123

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 22, 1998

Ms. Luba Katz, CMM, CNP.
[redacted]

The staff of the Committee on 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. Katz:

I have received your letter of November 15, as well as a variety of related materials. You have sought an advisory opinion concerning the obligation of the Maimonides Medical Center (MMC) to disclose records under the Freedom of Information Law.

In this regard, based on a review of the materials, it appears that MMC is not subject to that statute. The Freedom of Information Law 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 of the state or any one or more municipalities thereof, except the judiciary or the state legislature."

Based on the foregoing, the Freedom of Information Law is applicable to records maintained by entities of state and local government.

The materials that you forwarded suggest that MMC is a private institution that is not governmental in nature. One of the documents describes MMC as a "voluntary not-for-profit" entity that is a "nonsectarian institution under Jewish auspices." The fact that an institution receives funds from federal, state or local governments, or that it is characterized as a "public charity", would not be determinative of its coverage under the Freedom of Information Law.

Again, the issue is whether the institution is part of the government. In this instance, that does not appear to be so. If my conclusion is accurate, the Freedom of Information Law would not be

applicable. Further, I know of no provision of law that generally grants individuals rights of access to records pertaining to them when the records are maintained by private organizations.

I hope that the foregoing serves to clarify your understanding of the matter and regret that I cannot be of greater assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1124

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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 22, 1998

Mr. Martus Granirer, President
West Branck Conservation Association
100 South Mountain Road
New City, NY 10956

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Granirer:

I have received your letter of November 24 in which you sought an opinion relating to the Freedom of Information Law. According to your letter, "[t]he Clarkstown Department of Planning has taken a position, backed by the Town Attorney, that submissions by developers and other applicants are not be [sic] available under Freedom of Information Law requests until Planning Board members and its Chairman have had an opportunity to review them."

From my perspective, once the documents to which you referred come into the possession of the Town, they fall within the coverage of the Freedom of Information Law. Further, when or whether Town officials review them is, in my view, largely irrelevant to public rights of access. 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, irrespective of their review or acceptance by Town officials, the documents in question clearly constitute "records" subject to rights of access conferred by the Freedom of Information Law.

Second, it is unlikely in my view that the records at issue 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.

In most instances, records submitted to planning boards by developers or applicants must be disclosed, for none of the grounds for denial would apply. I note that proposals, plans, recommendations prepared by municipal officials would fall within the exception concerning "inter-agency or intra-agency materials" [see §87(2)(g)]; however, developers and applicants are not agencies or "agency" employees [see definition of "agency", §86(3)]. Consequently, the records that are prepared by developers or applicants would not fall within that exception to 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 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 grant access only after review of the records by certain officials, such a practice or policy would be contrary to the thrust of the Freedom of Information Law. Again, if a record or report is clearly public and can be found easily, there would appear to be no rational basis for delaying disclosure.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Rudolph J. Yacyshyn
Murray Jacobson

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1125

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December 22, 1998

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 November 20 and the materials attached to it. Based on a review of the correspondence and in response to your questions, I offer the following comments.

First, it is emphasized that the Freedom of Information Law pertains to existing records. Section 89(3) of the Law states in part that an agency need not create a record in response to a request. That provision is pertinent in relation to your request for a "list" of alternate housing used by the Division of Parole for the placement of sex offenders. If the Division does not maintain or has not prepared a "list", it would have no obligation to prepare such a record on your behalf.

Second, in my view, the right to appeal a denial of access to records exists when an agency has determined to withhold records. If no record exists, which apparently was so in the situation in which you requested a "list", there was no denial of access to a record and, consequently, I do not believe that the Division would be required to inform you of the right to appeal.

Third, as indicated in my letter to you of September 29, an agency is required to certify in writing, on request, that it does not maintain a record or that the record cannot be found after diligent search. I will forward a copy of this response to Mr. Molik as means of reminding him of that duty. Alternatively, you could initiate an Article 78 proceeding in an effort to seek an order from a court to compel the Division to carry out a duty required to be performed by law.

Lastly, although the Committee on Open Government is not empowered to enforce the Freedom of Information Law, it is my hope that the opinions rendered by this office are educational and persuasive. I have been informed in many instances that our opinions have resolved disputes and

enhanced compliance with law. Enclosed is a copy of the Freedom of Information Law, which in §89(1) describes the composition of the Committee and its duties. I note that the members of the Committee receive no compensation, and that its staff, which is housed in the Department of State, consists of myself and two secretarial assistants.

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: David Molik
enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
41 STATE STREET
ALBANY, NY 12231-0001

FOIL-AO-11.2016

ALEXANDER F. TREADWELL
SECRETARY OF STATE

December 22, 1998

Mr. Bradshaw Samuels
[redacted]

Dear Mr. Samuels:

I have received your letter of December 15 in which you raised questions concerning the application of the Freedom of Information Law.

It is emphasized 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, the Freedom of Information Law includes records of entities of state and local government within its coverage. The records of a private company or a union would fall beyond the scope of that statute.

As it applies to agencies, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests and appeals. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Enclosed for your review is "Your Right to Know", which describes the Freedom of Information Law and includes a sample letter of request that may be useful to you.

I hope that I have been of assistance.

Sincerely,

Alexander F. Treadwell

Alexander F. Treadwell
Secretary of State

AFT:RJF:tt

Enc.

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1127

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 23, 1998

Mr. Abdul Shariff
90-A-2895
Drawer B
Stormville, NY 12582

Dear Mr. Shariff:

I have received your letter of November 22 and the correspondence attached to it.

As I understand the matter, in response to a request for records of the Office of the Queens County District Attorney, you were informed that the records were not in the possession of that agency. In this regard, when an agency indicates that it does not maintain or cannot locate a record, an applicant for the record may seek a certification to that effect. Section 89(3) of the Freedom of Information Law provides in part that, in such a situation, on request, an agency "shall certify that it does not have possession of such record or that such record cannot be found after diligent search." 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: Andrew L. Zwerling
Jennifer F. Friedman

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1128

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December 23, 1998

E-MAIL

TO: Hal Howarth<hhowarth@mum.neric.org>

FROM: Robert J. Freeman, Executive Director

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Howarth:

I have received your letter of November 25. You have requested an advisory opinion concerning "any potential legal implications" relating to the release of school attendance registers covering the period of 1931 to 1988 to a historical society.

From my perspective, it is likely that the records in question must be withheld either in part or in their entirety. In this regard, I offer the following comments.

First, the Freedom of Information Law, the statute that generally governs access to school district records, is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law. Relevant to your inquiry is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute, as you are aware, is the federal Family Educational Rights and Privacy Act ("FERPA"; 20 USC §1232g). In my view, that statute would govern the extent to which the records could be transferred, or essentially disclosed, to an other entity.

By way of background, 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 person 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 (§99.3) 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 to eligible students in order that they may essentially prohibit any or all of the items from being disclosed. Specifically, §99.37 of the regulations promulgated pursuant to FERPA state in relevant part that:

> "(a) An educational agency or institution may disclose directory information if it has given public notice to parents of students in attendance and eligible students in attendance at the agency or institution of --
>
> (1) The types of personally identifiable information that the agency or institution has designated as directory information;
>
> (2) A parent's or eligible student's right to refuse to let the agency or institution designate any or all of those types of information about the student as directory information; and
>
> (3) The period of time within which a parent or eligible student has to notify the agency or institution in writing that he or she does not want any or all of those types of information about the student designated as directory information."

If a school district adopted a policy on directory information, it would have the ability to disclose items comprising the directory. I note, however, that FERPA became effective in 1974. Consequently, there would have been no action taken in relation to directory information prior to the enactment of that statute.

Other than the disclosure of directory information, a district could disclose personally identifiable information concerning former students, in my opinion, only with the consent of a student or if is known that a student is deceased.

In an effort to gain an expert opinion on the same issue some time ago, I contacted the office within the United States Department of Education that oversees the FERPA. Although it was understood and appreciated that the records in question may at this juncture be of primarily historical value, it was confirmed that FERPA and the regulations promulgated thereunder preclude the transfer or public disclosure of the records, except under the conditions detailed earlier.

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-1209

41 State Street, Albany, New York 12231
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December 23, 1998

Mr. Allen Hodge
83-A-7660
135 State Street
Auburn, NY 13024-9000

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Hodge:

I have received your letter of November 24. You wrote that you were wrongly convicted of a crime you did not commit and that the "principal witness" against you "was carrying different identifications", such as a social security card allegedly belonging to a relative, food stamp cards in different names and the like. You asked how you can use the Freedom of Information Law to learn of the "true identity" of this person and perhaps others.

From my perspective, it is unlikely that use of the Freedom of Information Law would be of substantial aid. Although that statute provides broad rights of access, the kinds of information to which you referred would be either deniable or beyond the scope of statutes dealing with access to government records.

It is noted that some of the information at issue is likely maintained by federal agencies subject to the federal Freedom of Information Act. For instance, records relating to social security are maintained by the Social Security Administration. Its records identifiable to individuals in most instances may be withheld under a provision with a counterpart in the New York Freedom of Information Law. Both statutes enable agencies to withhold records when disclosure would constitute "an unwarranted invasion of personal privacy." I believe that records maintained by the Immigration and Naturalization Service pertaining to individuals may generally be withheld on the same basis. Under New York law, records identifiable to applicants for or recipients of public assistance are confidential (see Social Services Law, §136). Therefore, records relating to participants in a food stamp program would be beyond public rights of access.

You mentioned that the witness was allegedly a law student. If that person was admitted to the bar, his name and business address would be available from the Office of Court Administration.

If a person is registered to vote, his or name, residence address and other items are available under the Election Law from a county board of elections.

In short, I do not believe that freedom of information statutes would be greatly useful to you in attempting to establish a person's "true identity." It may be worthwhile to discuss the matter with a private detective.

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-1210

41 State Street, Albany, New York 12231
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December 23, 1998

Mr. Frank L. Bellezza, Jr.
97-A-4585
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. Bellezza:

I have received your letter of November 23. You have sought assistance in relation to a request made on September 23 to the Nassau County Juvenile Detention Center that had not been answered as of the date of your letter to this office.

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. While I believe that the person in receipt of your request should have either responded in accordance with law or forwarded your request to the appropriate person, it is suggested that you resubmit your request and address it 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 hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Records Access Officer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

OML-AO 2973
FOIL-AO-11211

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December 23, 1998

Ms. Francine Jakob
[redacted]

The staff of the Committee on 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. Jakob:

I have received your letter of November 30 and appreciate your kind words. You have raised issues relating to compliance with the Freedom of Information and Open Meetings Law by the Town of Tuscarora.

You wrote initially about difficulty in obtaining a tentative budget. In this regard, I believe that the tentative budget must be disclosed 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. Relevant is the provision to which you alluded, §87(2)(g), which deals with what might be characterized as internal documents. While that provision potentially serves as a basis for a denial of access, due to its structure, it often requires substantial disclosure. Specifically, §87(2)(g) permits am agency to withhold records that:

"are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations; or

iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those 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, to the extent that the tentative budget consists of "statistical or factual information," i.e., numbers, I believe that it must be disclosed. On the other hand, if it contains narrative expressions of opinion, recommendation or justification, for example, those portions may be withheld.

As you may be aware, following a review and alteration of the tentative budget by a town board, that document becomes the preliminary budget. I note, too, that §106(4) of the Town Law provides that "[t]he preliminary budget shall be filed in the office of the town clerk and the town clerk shall reproduce for public distribution as many copies as the town board may direct." In addition, the town board must hold a public hearing on the preliminary budget in accordance with §108 of the Town Law. That statute, in consideration of your inquiry, states in relevant part that:

> "Notice of such public hearing shall be published at least once in the official newspaper, or if no official newspaper has been designated, in any newspaper having general circulation in the town....The notice of hearing shall state the time when and the place where the public hearing will be held, the purpose thereof and that a copy of the preliminary budget is available at the office of the town clerk where it may be inspected by any interested person during office hours...The town clerk shall cause a copy of the notice to be posted on the signboard of the town, maintained pursuant to subdivision six of section thirty of this chapter, not later than five days before the day designated for such hearing...."

Section 87(2)(g) would also govern rights of access to a tentative amendment of a town law. If indeed a proposal is preliminary and has not yet been disclosed at or through discussions at one or more open meetings, I do not believe that the Town would be required to disclose the record in question. If, however, discussion of the matter in public has resulted in a disclosure of the proposal, I believe that the record containing the proposal would be accessible, for the Board would have effectively waived its ability to deny access. Further, if a proposed local law is the subject of a public hearing, the text of the proposed law must generally be disclosed prior to the hearing.

You also complained that records available from a court were made available by the Town only after certain portions of the records were deleted. From my perspective, if a record is available in its entirety from a court, a duplicate of the same record maintained by a municipality would be equally available.

Next, you indicated that minutes of meetings were not accurate or did not reflect what was said at a meeting. Here I direct your attention to the Open Meetings Law. Section 106 pertains to

minutes, and subdivision (1) provides what might be viewed as minimum requirements concerning the contents of minutes. Specifically, that provision 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 that minutes need not consist of a verbatim account of what is said at a meeting or that they include reference to each comment made during a meeting. So long as the minutes consist of "a record or summary" of the items required to be included in the minutes, the Board, in my opinion, would be complying with law.

Lastly, the Open Meetings Law clearly provides the public with the right "to observe the performance of public officials and attend and listen to the deliberations and decisions that go into the making of public policy" (see Open Meetings Law, §100). However, the Law is silent with respect to the issue of public participation. Consequently, by means of example, if a public body does not want to answer questions or permit the public to speak or otherwise participate at its meetings, I do not believe that it would be obliged to do so. On the other hand, a public body may choose to answer questions and permit public participation, and many do so. When a public body does permit the public to speak or otherwise authorize public participation, I believe that it should do so based upon reasonable rules that treat members of the public equally.

I hope that the foregoing serves to enhance your understanding of the matters that you raised and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Town Board
Hon. Garry Payne-Coykendall, Clerk

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1212

41 State Street, Albany, New York 12231
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December 23, 1998

Mr. Paul E. Cabo
94-A-1117
Green Have 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. Cabo:

I have received your letter of November 27 and the correspondence attached to it. You have sought assistance in relation to your requests for records of the Office of the Kings County Attorney.

In this regard, it is emphasized that the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee cannot enforce that statute or compel an agency to grant or deny access to records. Nevertheless, in an effort to offer 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. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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. However, 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 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.

Similarly, pre-sentence reports are confidential under §390.50 of the Criminal Procedure Law and may be obtained only at the direction of the court.

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: Chaim Sandler

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1123

41 State Street, Albany, New York 12231
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December 23, 1998

Mr. Omar Abreu
39582-054
Unit 5741-2
F.C.I Fort Dix East
P.O. Box 2000
Fort Dix, NJ 08640

Dear Mr. Abreu:

I have received your letter of November 23 in which you asked where you might write to seek records from the New York City Police Department.

In this regard, 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 should ordinarily be directed to that person.

To request the records of your interest, it is suggested that you write to the Records Access Officer, New York City Police Department, 1 Police Plaza, Room 110C, New York, NY 10038.

There is no list of agencies in New York that must respond to requests made under the Freedom of Information Law. In short, the Law includes all entities of state and local government within its coverage, i.e., state agencies, counties, cities, towns, villages, school districts, fire districts, public authorities, etc.

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-11,214

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 28, 1998

Mr. Jerry Brixner
[redacted]

Dear Mr. Brixner:

I have received your letter of November 24 concerning your views of Monroe County's implementation of the Freedom of Information Law.

It appears that your primary recommendation involves the designation of a "Freedom of Information Officer" who is not "under the direct responsibility of the County Executive's Office." In this regard, it is not unusual for a records access officer to be employed within the office of a county executive. However, I point out that the regulations promulgated by the Committee on Open Government (21 NYCRR Part 1401) permit the designation of "one or more persons as records access officer." In some instances, in Westchester County, for example, a records access officer is designated in each county agency. It is likely in my view that the designation of several records access officers enhances the process of responding to requests, for a person so designated at a given agency may have substantial familiarity with and the effects of disclosing the records maintained by his or her 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

FOIL-AO-11,215

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 28, 1998

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 November 27. Once again, you have sought aid in relation to delays in response to your requests directed to the Division of State Police under the Freedom of Information Law.

In this regard, the Committee on Open Government is authorized to provide advice concerning the Freedom of Information Law. The Committee is not empowered to enforce that statute or compel an agency to grant or deny access to records. Having reviewed my response to you of May 22, there is little of substance that I can add to it.

To reiterate points offered in that opinion, under §89(3) of the Freedom of Information Law, 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. As indicated previously, there is no precise time period within which an agency must grant or deny access to records. In my opinion, 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 acknowledgment of the receipt of a request is given within five business days, if the date indicated in the acknowledgment is unreasonable in view of the nature of the request, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have

been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Lt. Laurie Wagner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1216

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 28, 1998

Mr. Dominick LaRocco
97-A-6278
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. LaRocco

I have received your letter of November 29 in which you raised a variety of issues relating to access to records. Based on your remarks, I offer the following comments.

First, the Freedom of Information Law, the statute within the advisory jurisdiction of the Committee on Open Government, is applicable to agency records. Section 86(3) of that statute defines the term "agency" to include:

> "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature."

In turn, §86(1) defines the term "judiciary" to mean:

> "the courts of the state, including any municipal or district court, whether or not of record."

Based on the provisions quoted above, the courts and court records are not subject to the Freedom of Information Law. This is not to suggest that court records are not generally available to the public, for other provisions of law (see e.g., Judiciary Law, §255) may grant broad public access to those records. It is recommended that any request for court records be directed to the clerk of the court in which the proceeding was conducted, citing an applicable provision as the basis for the request.

Second, since you referred to Brady and Rosario, I point out that 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 NY2d 267 (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 "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 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" (id., 276-277).

Based on the foregoing, neither a police department nor an office of a district attorney can claim that internal 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 the kinds of records 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.

It is important to 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).

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)].

With respect to delays in response to requests, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person

> requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial of access under Article 78 of the Civil Practice Rules [Floyd v. McGuire, 87 AD 2d 388, appeal dismissed 57 NY 2d 774 (1982)].

Lastly, this office does not possess and cannot obtain rap sheets. 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]. 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

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,217

41 State Street, Albany, New York 12231
(518) 474-2518
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December 28, 1998

Mr. Angel Cardona
92-A-7354
Oneida Correctional Facility
P.O. Box 4580
Rome, NY 13442

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Cardona:

I have received your letter of November 30 in which you sought assistance in relation to your requests for records. Based on your remarks, I offer the following comments.

First and perhaps most importantly, it is emphasized that the Freedom of Information Law is applicable to agency records, and that §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.

Similarly, the records of a private attorney are not agency records and, therefore, are not subject to the Freedom of Information Law.

Second, 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).

Third, insofar as you are seeking agency records from a police department or the office of a district attorney that are not court records or were not previously disclosed to you or your attorney as described in the previous commentary, I believe that the Freedom of Information Law would apply. 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.

Pertinent 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 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.

Since you also requested a pre-sentence report, I note that §390.50 of the Criminal Procedure Law provides that pre-sentence reports and memoranda are generally confidential; they may be obtained only from the court in which the proceeding was conducted.

Also relevant may be §87(2)(b), which permits an agency to withhold records to the extent that disclosure would result in "an unwarranted invasion of personal privacy." Records relating to the victim might be withheld, perhaps in part based on that provision or §87(2)(f), which enables an agency to deny access to records when disclosure would "endanger the life or safety of any person."

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 matter and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the District Attorney
Records Access Officer, City of Yonkers Police Department
Mark Brenner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11218

41 State Street, Albany, New York 12231
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December 28, 1998

Mr. Joseph Wilson 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 November 30. You complained that the Cortland County Attorney has "defaulted" due to a failure to respond to your request for records in a timely manner. As such, you asked that this office "investigate" the matter and "see that [the] requirements [of law are] met."

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 resources to "investigate", and it is not empowered to enforce the law or compel an agency to grant or deny access to records. Nevertheless, I offer the following comments.

As you may be aware, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests 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: Martin Mack, County Attorney
Captain Stephen R. Harris

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,219

41 State Street, Albany, New York 12231
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December 28, 1998

Mr. Joseph Robinson
93-B-1093 D1-8
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. Robinson:

I have received your letter of November 30 in which you sought assistance concerning requests for records directed to the Oneida County District Attorney.

The requests, which had not been answered as of the date of your letter to this office, involve the "sentencing and plea minutes" of two prosecution witnesses who testified against you. Additionally, you requested "documentary evidence concerning quid pro quo deals, agreements, or 'understandings' between either of these witnesses and the Oneida County District Attorney's office."

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, it would appear that sentencing and plea minutes would be court records. While 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 seek those records from the clerk of the court in which the proceedings were conducted, citing an applicable provision of law as the basis for your request.

Lastly, with respect to the other records to which you referred, insofar as they exist, I believe that the Freedom of Information Law would govern rights of access. 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 records in question exist, it is likely that three of the grounds for denial would be relevant to an analysis of rights of access.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy"; §87(2)(e)(iii) authorizes an agency to withhold records compiled for law enforcement purposes when disclosure would reveal "confidential information relating to a criminal investigation"; and §87(2)(f) permits an agency to deny access to records to the extent that disclosure would "endanger the life or safety of any person." Depending on the contents of any such records and the effects of disclosure, each of the provisions cited may be pertinent in determining rights of access.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm
cc: Hon. Michael A. Arcuri

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1220

41 State Street, Albany, New York 12231
(518) 474-2518
Fax (518) 474-1927
Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 28, 1998

Mr. Declan C. Earls
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Earls:

I have received your letter of November 30 and the correspondence attached to it. You have sought assistance in obtaining information from the Office of the Nassau County Medical Examiner. Based on your remarks and a review of the materials, 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, although the Freedom of Information Law governs rights of access to most government records, in this instance, I believe that a different statute, §677 of the County Law, is directly pertinent to your request. That statute deals with autopsy reports and related records prepared by a coroner or medical examiner, and subdivision (3), paragraph (b) 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.

As the next of kin of the deceased, I believe that you have the right to gain access to the records of your interest.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Records Access Officer, Office of the Medical Examiner

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11221

41 State Street, Albany, New York 12231
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Website Address: http://www.dos.state.ny.us/coog/coogwww.html

December 28, 1998

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 correspondence of November 29. While it is not clear what question you raised or the nature of assistance that you seek, it appears that you may be mistaken with respect to your interpretation of the Freedom of Information Law.

In a letter of October 4 addressed to City of Buffalo Assistant Corporation Counsel Kathleen O'Hara, you wrote that the "provisions relating to trade secrets apply only to State Agencies." While there are some provisions in the Freedom of Information Law relating to trade secrets that apply only to state agencies, the primary provision concerning that subject applies to all agencies, including entities of local government.

Section 87(2) of the Freedom of Information Law, the focal point of that statute, pertains to all agencies, and paragraph (d) permits an agency, whether state or local, 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."

Section 89(5) pertains only to state agencies and includes a procedure whereby a commercial enterprise required to submit records to a state agency may ask, at the time of the submission of the records, to have certain portions of the records kept confidential based on its claim that §87(2)(d) would serve as a basis for a denial of access. That §89(5) is inapplicable to local governments has no bearing on the ability of those entities to deny access to records, when appropriate, pursuant to §87(2)(d).

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: Kathleen O'Hara

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-1122

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December 28, 1998

Mr. Carl Stewart
Construction Manager
Turner Construction Company
100 State Street
Albany, NY 12207

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Stewart:

I have received your letter of December 4 in which you raised questions concerning your responsibilities under the Freedom of Information Law when your company is retained by a government agency as a consultant.

From my perspective, while the records that your firm prepares in its capacity as a consultant for an agency fall within the coverage of the Freedom of Information Law, the responsibilities associated with requests for those records should be borne by the agency. In this regard, I offer the following comments.

First, the Freedom of Information 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, 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, the courts have held they constitute "agency records", even if they are maintained apart from an agency's premises.

For instance, it has been 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 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, I believe that records that your company prepares in its capacity as a consultant for an agency are agency records, even though they may be in your physical possession.

Second, §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."

Based on the foregoing, 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 my view, if your company receives a request for agency records, the request should immediately be forwarded to the agency's records access officer. I do not believe that you or your firm would have the responsibility of determining rights of access to the records. Again, since the records at issue are agency records, the agency has the duty to deal with a request in a manner consistent with law. Upon receipt of a request for agency records in possession of your company, the records access officer should either obtain the records for the purpose of reviewing them and determining rights of access or instruct your company to disclose the records as required by law.

Lastly, it has been held by the Court of Appeals, the state's highest court, that records prepared for an agency by a consultant are agency records that should be treated as if they were prepared by agency staff.

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. Records prepared by agency staff for internal agency use would constitute "intra-agency materials" that fall within the scope of §87(2)(g). That provision permits an agency to withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
>
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is noted that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld.

In a discussion of the issue of records prepared by consultants for agencies, the Court of Appeals stated that:

> "Opinions and recommendations prepared by agency personnel may be exempt from disclosure under FOIL as 'predecisional materials, prepared to assist an agency decision maker***in arriving at his decision' (McAulay v. Board of Educ., 61 AD 2d 1048, aff'd 48 NY

> 2d 659). Such material is exempt 'to protect the deliberative process of government by ensuring that persons in an advisory role would be able to express their opinions freely to agency decision makers (Matter of Sea Crest Const. Corp. v. Stubing, 82 AD 2d 546, 549).
>
> "In connection with their deliberative process, agencies may at times require opinions and recommendations from outside consultants. It would make little sense to protect the deliberative process when such reports are prepared by agency employees yet deny this protection when reports are prepared for the same purpose by outside consultants retained by agencies. Accordingly, we hold that records may be considered 'intra-agency material' even though prepared by an outside consultant at the behest of an agency as part of the agency's deliberative process (see, Matter of Sea Crest Constr. Corp. v. Stubing, 82 AD 2d 546, 549, supra; Matter of 124 Ferry St. Realty Corp. v. Hennessy, 82 AD 2d 981, 983)" [Xerox Corporation v. Town of Webster, 65 NY 2d 131, 132-133 (1985)].

Based upon the foregoing, records prepared by a consultant for an agency may be withheld 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.

As you requested, enclosed is a copy of "Your Right to Know", which describes the Freedom of Information Law and includes the Committee's website address. Additional detailed information may be acquired via the website.

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

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December 28, 1998

Mr. Dan Giblin
Dan Giblin Appraisal Service, Inc.
P.O. Box 132
Chenango Falls, 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 December 2. You described a series of difficulties and raised a variety of questions concerning your ability to gain access to records relating to the assessment of real property to by the Town of Owego.

In this regard, I offer the following comments.

First, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

I 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.

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, 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.

Second, the 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, the Freedom of Information Law provides direction concerning the time and manner in which agencies must respond to requests. Specifically, §89(3) of the Freedom of Information Law states in part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

If neither a response to a request nor an acknowledgement of the receipt of a request is given within five business days, or if an agency delays responding for an unreasonable time after it acknowledges that a request has been received, a request may, in my opinion, be considered to have been constructively denied. In such a circumstance, I believe that the denial may be appealed in accordance with §89(4)(a) of the Freedom of Information Law. That provision states in relevant part that:

> "...any person denied access to a record may within thirty days appeal in writing such denial to the head, chief executive, or governing body, who shall within ten business days of the receipt of such appeal fully explain in writing to the person requesting the record the reasons for further denial, or provide access to the record sought."

In addition, it has been held that when an appeal is made but a determination is not rendered within ten business days of the receipt of the appeal as required under §89(4)(a) of the Freedom of Information Law, the appellant has exhausted his or her administrative remedies and may initiate a challenge to a constructive denial 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 Town officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Hon. Carol B. Sweeney
Hon. Michael E. Zimmer

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

PPPL-AO-248
FOIL-AO-1224

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December 28, 1998

Mr. Brian Burkins
97-R-5598
Eastern NY 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. Burkins:

I have received your letter of December 7 in which you sought guidance in your efforts in obtaining certain records and information from the Department of Correctional Services.

You referred initially to a request for the report and recommendations of the temporary release committee and the Superintendent concerning approval of your participation in the work release program. Even though the records were claimed to be "evaluative", it is your contention that you have a right of access to them 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 short, the Personal Privacy Protection Law does not provide a right of access.

In my view, the Freedom of Information Law governs rights of access. 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. 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.

You also requested "a list of all inmates and crime of commitments currently on work release in New York State prisons." Further, you specified that names or other identifying details could be deleted. From my perspective, the issue in relation to this aspect of your inquiry involves whether such a list exists. It is emphasized that the Freedom of Information Law pertains to existing records; §89(3) of that statute provides in part that an agency is not required to create a record in response to a request. Therefore, if no list containing the information sought exists, the Department would not be obliged to prepare such a list on your behalf. If such a list does exist, it would appear to be available, for none of the grounds for denial would be pertinent.

Lastly, I note that in your request to the Department, you asked that fees be waived "due to [your] financial status." In this regard, there is nothing in the New York Freedom of Information Law dealing with fee waivers. Moreover, it has been held that an agency may charge its established

fees, even though a request is made by an indigent inmate [see Whitehead v. Morgenthau, 552 NYS2d 518 (1990)].

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Mark Shepard
Leslie Becher

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 28, 1998

Ms. Carol Perry
[redacted]

The staff of the Committee on 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. Perry:

I have received your letter of December 4 and the materials attached to it. You have sought an opinion relating to an appeal involving rights of access to a loan application submitted to the Malone Economic Development Corporation ("MEDCO"), MEDCO's two approval letters concerning the loan, a letter sent by MEDCO rescinding the first loan approval, and the minutes of meetings during which the actions relating to the loan were taken. MEDCO's attorney has contended that the "application contains private information which is confidential and proprietary." The loan was sought by the owner of a wine and liquor store.

In this regard, in our initial communication on the subject, reference was made to and reliance placed upon the decision rendered by the Court of Appeals in Buffalo News, Inc. v. Buffalo Enterprise Development Corp. [84 NY2d 488 (1994)]. While the members of the MEDCO are not at this juncture selected by government officials, MEDCO's actions, according to the regulations that you attached concerning the revolving fund that is the focal point of your request, MEDCO clearly carries out its duties for the Village of Malone. That being so, it is reiterated that MEDCO, in my view, is required to comply with the Freedom of Information Law.

Second, as I understand the matter, the records at issue have been withheld in their entirety. Here I point out that the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §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 Gould v. New York City Police Department, 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)" [87 NY2d 267, 275 (1996)].

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 New York City Police Department contended that complaint follow up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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 request, MEDCO has engaged in a blanket denial of access 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 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).

Third, with respect to the loan application, it appears that MEDCO's attorney alluded to two of the grounds for denial. One of them, §87(2)(b), permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." However, there are several judicial decisions, both New York State and federal, that pertain to records about individuals in their business or professional capacities and which indicate that those records are not of a "personal nature." For instance, one involved a request for the names and addresses of mink and ranch fox farmers from a state agency (ASPCA v. NYS Department of Agriculture and Markets, Supreme Court, Albany County, May 10, 1989). In granting access, the court relied in part and quoted from an opinion rendered by this office in which it was advised that "the provisions concerning privacy in the Freedom of Information Law are intended to be asserted only with respect to 'personal' information relating to natural persons". The court held that:

> "...the names and business addresses of individuals or entities engaged in animal farming for profit do not constitute information of a private nature, and this conclusion is not changed by the fact that a person's business address may also be the address of his or her residence. In interpreting the Federal Freedom of Information Law Act (5 USC 552), the Federal Courts have already drawn a distinction between information of a 'private' nature which may not be disclosed, and information of a 'business' nature which may be disclosed (see e.g., Cohen v. Environmental Protection Agency, 575 F Supp. 425 (D.C.D.C. 1983)."

In another decision, Newsday, Inc. v. New York State Department of Health (Supreme Court, Albany County, October 15, 1991)], data acquired by the State Department of Health concerning the performance of open heart surgery by hospitals and individual surgeons was requested. Although the Department provided statistics relating to surgeons, it withheld their identities. In response to a request for an advisory opinion, it was advised by this office, based upon the New York Freedom of Information Law and judicial interpretations of the federal Freedom of Information Act, that the names should be disclosed. The court agreed and cited the opinion rendered by this office.

Like the Freedom of Information Law, the federal Act includes an exception to rights of access designed to protect personal privacy. Specifically, 5 U.S.C. 552(b)(6) states that rights conferred by the Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In construing that provision, federal courts have held that the exception:

> "was intended by Congress to protect individuals from public disclosure of 'intimate details of their lives, whether the disclosure be

> of personnel files, medical files or other similar files'. Board of Trade of City of Chicago v. Commodity Futures Trading Com'n supra, 627 F.2d at 399, quoting Rural Housing Alliance v. U.S. Dep't of Agriculture, 498 F.2d 73, 77 (D.C. Cir. 1974); see Robles v. EOA, 484 F.2d 843, 845 (4th Cir. 1973). Although the opinion in Rural Housing stated that the exemption 'is phrased broadly to protect individuals from a wide range of embarrassing disclosures', 498 F.2d at 77, the context makes clear the court's recognition that the disclosures with which the statute is concerned are those involving matters of an intimate personal nature. Because of its intimate personal nature, information regarding 'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payment, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption 4. Id. By contrast, as Judge Robinson stated in the Chicago Board of Trade case, 627 F.2d at 399, the decisions of this court have established that information connected with professional relationships does not qualify for the exemption" [Sims v. Central Intelligence Agency, 642 F.2d 562, 573-573 (1980)].

In Cohen, the decision cited in ASPCA v. Department of Agriculture and Markets, supra, it was stated pointedly that: "The privacy exemption does not apply to information regarding professional or business activities...This information must be disclosed even if a professional reputation may be tarnished" (supra, 429). Similarly in a case involving disclosure of the identities of those whose grant proposals were rejected, it was held that:

> "The adverse effect of a rejection of a grant proposal, if it exists at all, is limited to the professional rather than personal qualities of the applicant. The district court spoke of the possibility of injury explicitly in terms of the applicants' 'professional reputation' and 'professional qualifications'. 'Professional' in such a context refers to the possible negative reflection of an applicant's performance in 'grantsmanship' - the professional competition among research scientists for grants; it obviously is not a reference to more serious 'professional' deficiencies such an unethical behavior. While protection of professional reputation, even in this strict sense, is not beyond the purview of exemption 6, it is not at its core" [Kurzon v. Department of Health and Human Services, 649 F.2d 65, 69 (1981)].

In this instance, although the information in question would be identifiable to a particular individual, it would pertain to his business capacity. Unlike an individual's social security number or medical records identifiable to patients, which would involve unique and personal details of people's lives, the records in question are not "personal" in my opinion; rather, again, they deal with functions carried out by an individual in a business capacity.

The other ground for denial of potential significance relates to the claim that the record contains "proprietary" information. Specifically, §87(2)(d) states that an agency may withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

In my view, the nature of records, the area of commerce in which a commercial entity is involved and the presence of the conditions described above that must be found to characterize records as trade secrets would be the factors used to determine the extent to which disclosure 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 the effect of disclosure upon the competitive position of the entity to which the records relate.

Pertinent is a decision rendered by the Court of Appeals 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).

Disclosure of the records sought would likely have no impact on "the government's ability to obtain necessary information", for seeking a loan is purely voluntary. Further, the extent to which disclosure would cause "substantial" injury to the competitive position of a liquor store is questionable. Even if portions of the application would, if disclosed, cause "substantial injury" to the competitive position of the enterprise, the remainder should nonetheless be disclosed.

The other records that have been withheld, the approval letters and the letter rescinding the loan, would appear to be accessible under the law. In short, none of the grounds for denial appear to be pertinent.

Lastly, I believe that MEDCO's board of directors constitutes a "public body" required to comply with the Open Meetings Law. Section 102(2) of that statute defines the phrase "public body" to mean:

> "...any entity for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an agency or department thereof, or for a public corporation as defined in section sixty-six of the general construction law, or committee or subcommittee or other similar body of such public body."

Based on the information that you have provided, MEDCO conducts public business and performs a governmental function for a public corporation, the Village of Malone.

Assuming that it is a public body, I note that the Open Meetings Law requires that minutes of meetings be prepared and made available in accordance with §106 of that statute. That section states that:

> "1. Minutes shall be taken at all open meetings of a public body which shall consist of a record or summary of all motions, proposals, resolutions and any other matter formally voted upon and the vote thereon.
>
> 2. Minutes shall be taken at executive sessions of any action that is taken by formal vote which shall consist of a record or summary of the final determination of such action, and the date and vote thereon; provided, however, that such summary need not include any matter which is not required to be made public by the freedom of information law as added by article six of this chapter.
>
> 3. Minutes of meetings of all public bodies shall be available to the public in accordance with the provisions of the freedom of information law within two weeks from the date of such meetings except that minutes taken pursuant to subdivision two hereof shall be available to the public within one week from the date of the executive session."

In view of the foregoing, I believe that minutes of open meetings must be prepared and made available within two weeks of the meetings to which they pertain.

I point out that there is nothing in the Open Meetings Law or any other statute of which I am aware that requires that minutes be approved. Nevertheless, as a matter of practice or policy, many public bodies approve minutes of their meetings. In the event that minutes have been approved, to comply with the Open Meetings Law, it has consistently been advised that minutes be prepared and made available within two weeks, and that if the minutes have not been approved, they may be marked "unapproved", "draft" or "non-final", for example. By so doing within the requisite time limitations, the public can generally know what transpired at a meeting; concurrently, the public is effectively notified that the minutes are subject to change. If minutes have been prepared within less than two weeks, I believe that those unapproved minutes would be available as soon as they exist, and that they may be marked in the manner described above.

If action is taken during an executive session, records reflective of the action taken must be prepared and made available, to the extent required by the Freedom of Information Law, within one week of the executive session during which the action was taken.

Further, as you suggested, when a final action is taken by a public body, §87(3)(a) of the Freedom of Information Law requires that a record be maintained that indicates the manner in which each member cast his or her vote.

In good faith, and in an effort to enhance compliance with and understanding of the statutes at issue, copies of this opinion will be forwarded to MEDCO's director and its attorney.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Boyce Sherwin
Brian S. Stewart

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

FOIL-AO-11,026

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December 28, 1998

Mr. Frank Giosi
[redacted]

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Giosi:

I have received your letter of December 8 in which you sought an opinion concerning two requests for records of the Mt. Sinai School District.

The first is an "index" involving the records maintained by the District. In this regard, it appears that you are seeking a "subject matter list." 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. It is suggested that you ask to review the retention schedule applicable to the District. Alternatively, you could request a copy of the schedule from the State Archives and Records Administration by calling (518)474-6926.

The second request pertains to the "Superintendent's Friday update to School Board members." While I am unfamiliar with the content of the updates, 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. In my opinion, the contents of the records in question serve as the factors relevant to an analysis of the extent to which the records may be withheld or must be disclosed, and several of the grounds for denial may be relevant to such an analysis in relation to the records in question..

Records prepared by the Superintendent and forwarded to members of the Board would constitute intra-agency materials that fall within the coverage of §87(2)(g) of the Freedom of Information Law. That provision states that an agency may withhold records that:

> "are inter-agency or intra-agency materials which are not:
>
> i. statistical or factual tabulations or data;
> ii. instructions to staff that affect the public;
>
> iii. final agency policy or determinations; or
>
> iv. external audits, including but not limited to audits performed by the comptroller and the federal government..."

It is emphasized that the language quoted above contains what in effect is a double negative. While inter-agency or intra-agency materials may be withheld, portions of such materials consisting of statistical or factual information, instructions to staff that affect the public, final agency policy or determinations or external audits must be made available, unless a different ground for denial could appropriately be asserted. Concurrently, those portions of inter-agency or intra-agency materials that are reflective of opinion, advice, recommendation and the like could in my view be withheld, even those that pertain to you.

Also relevant may be §87(2)(b), which enables an agency to withhold records or portions thereof which if disclosed would result in an unwarranted invasion of privacy. That provision might be applied with respect to a variety of matters relating to hiring, evaluation or discipline of staff, for example.

Section 87(2)(c) of the Freedom of Information Law permits an agency to withhold records to the extent that disclosure "would impair present or imminent contract awards or collective bargaining negotiations". Portions of an update might in some instances fall within that exception.

In short, it is likely in my view that portions of the "Friday updates" could justifiably be withheld.

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: Dr. Peter C. Paciolla

STATE OF NEW YORK
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December 28, 1998

Mr. Anthony Carty
92-A-9491
Green Haven 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. Carty:

I have received your letter of December 7. You have sought guidance concerning your ability to obtain a copy of the pre-sentence report of a witness who testified against you.

In this regard, as you may be aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

Relevant in the context of your inquiry is §87(2)(a), which pertains to records that "are specifically exempted from disclosure by state or federal statute." One such statute is §390.50 of the Criminal Procedure Law, which is entitled "Confidentiality of pre-sentence reports and memoranda." Subdivision (1) of that statute states in relevant part that:

> "Any pre-sentence report or memorandum submitted to the court pursuant to this article...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 this statute or upon specific authorization of the court."

Based on the foregoing, the Freedom of Information Law does not govern rights of access to pre-sentence reports. On the contrary, §390.50 of the Criminal Procedure Law states that those records are confidential and may be disclosed only with the specific authorization of court.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

STATE OF NEW YORK
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COMMITTEE ON OPEN GOVERNMENT

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December 28, 1998

Mr. Martin T. Reid
Director of Issue Management
State University of New York
State University Plaza
Albany, NY 12246

Dear Mr. Reid:

I appreciate receipt of a copy of your determination rendered in response to an appeal by J.R. Romanko under the Freedom of Information Law. While it is possible that some aspects of the records sought might justifiably have been withheld, it is my view that most should have been disclosed. In this regard, I offer the following comments.

By way of background, on July 2, Mr. Romanko sent a request to the State University at Stony Brook in which he sought "all materials" in the file pertaining to Dr. Michael Swango, records indicating the hospitals where he worked and the periods of his work, and records identifying "residents, other doctors, and nurses who worked at Stony Brook Hospital, the VA Hospital in Northport, or any other hospital at the same time as Swango..." Although Swango had apparently pleaded guilty to certain crimes, the request was initially denied "on the basis that...disclosure could negatively impact on pending law enforcement investigations (See Public Officers Law, Section 2(e) and (2)(f))." Following the appeal, you affirmed, stating that the records are being used in an ongoing investigation by the Office of the U.S. Attorney, and that you were advised by the U.S. Attorney that disclosure would "interfere with" that investigation in accordance with §87(2(e) of the Freedom of Information Law.

As you are aware, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

The provision that you cited as the basis for the denial, §87(2)(e), permits an agency to withhold records "compiled for law enforcement purposes" under certain circumstances, i.e., when disclosure would interfere with an investigation. Nevertheless, the records sought were prepared in the ordinary course of business, likely long before any investigation was commenced.

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.

The decision cited above, Capital Newspapers, supra, dealt with records analogous to those requested, and the Court of Appeals determined that documents indicating the days and dates of sick leave claimed by a particular employee must be disclosed. On the basis of that decision, it is clear in my view that records identifying certain public employees and their periods of employment at a public institution must be disclosed. Similarly, payroll information indicating the name, public office address, title and salary of every public employee must be maintained and made available pursuant to §87(3)(b) of the Freedom of Information Law. Consequently, those items pertaining to persons who worked with Dr. Swango at Stony Brook hospital would have been compiled in the ordinary course of business, not for a law enforcement purpose, and would have been available at the time of their employment or, in my view, any time thereafter. From my perspective, to comply with law, they should be made available now to Mr. Romanko.

In sum, notwithstanding the advice of the U.S. Attorney, I believe that reliance on §87(2)(e) of the Freedom of Information Law is misplaced and the records described above should be disclosed.

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: J.R. Romanko

STATE OF NEW YORK
DEPARTMENT OF STATE
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December 28, 1998

Ms. Carolyn Schurr
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 December 9, which relates to a request for records of the New York City Department of Investigation sought by *Newsday* reporter Paul Moses.

Mr. Moses' initial request was made on June 12, when he sought "records of any investigation concerning HANAC, the Hellenic American Neighborhood Action Committee." The receipt of his request was acknowledged on June 23, and he was informed that the Department is "conducting a search for the records you have requested and will contact you again within approximately one month." Virtually the same letter was sent to Mr. Moses in July, August, September and October. On November 23, the request was denied in its entirety on the basis of paragraphs (b), (e)(iii) and (g) of the Freedom of Information Law. In his appeal of December 8, Mr. Moses contended that "DOI again resorts to what the court referred to in Lewis v. Giuliani as the 'mantra-like invocation of the personal privacy exemption in an effort to have carte blanche to withhold any information it pleases."

I concur with Mr. Moses' contention. In this regard, I offer the following comments.

First, in addition to the "mantra-like invocation" of exceptions to rights of access, the Department engaged in a similarly repetitive series of communications reflective of delays in determining rights of access which, in my view, constituted a failure to comply with law. As you are aware, §89(3) of the Freedom of Information Law provides in relevant part that:

> "Each entity subject to the provisions of this article, within five business days of the receipt of a written request for a record

> reasonably described, shall make such record available to the person requesting it, deny such request in writing or furnish a written acknowledgement of the receipt of such request and a statement of the approximate date when such request will be granted or denied..."

It has been held that agency officials "did not conform to the mandates" of the provision quoted above "when they did not...furnish a written acknowledgement of the receipt of...requests *along with a statement of the approximate date when action would be taken*" [Newton v. Police Department, 585 NYS2d 5, 8, 183 AD2d 621 (1992), emphasis added]. In the correspondence with Mr. Moses, the Department never provided an approximate date when his request would be granted or denied; rather, it prepared five letters prior to a blanket denial of access, each of which stated that staff "will contact you again within approximately a month." In short, the request made in early June did not result in a determination until late November.

In a case that described an experience similar to Mr. Moses', the court cited §89(3) of the Freedom of Information Law and wrote 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...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 Department of Transportation" (Bernstein v. City of New York, Supreme Court, Supreme Court, New York County, November 7, 1990).

In Bernstein, the court determined that the applicant had the right to appeal and that the agency "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)." In my opinion, Mr. Moses' request was constructively denied, and he could have appealed under §89(4)(a) prior to the receipt of the written denial on November 23.

Second, from my perspective, the response to the request is inconsistent with the language and intent of the Freedom of the Freedom of Information Law and its judicial construction. Further, it appears to evince a refusal to follow or recognize the clear direction provided by the Court of Appeals in Gould v. New York City Police Department [89 NY2d 267 (1996)] and Lewis v. Giuliani (Supreme Court, New York County, NYLJ, May 1, 1997), which involved denials of access to a variety of records maintained by the Department of Investigation, including blanket denials of access to records based on the same provisions as those cited in response to Mr. Moses' request.

While much of the ensuing commentary has been offered to the Department in previous opinions, in view of the treatment of the request, it bears repeating. 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 complaint follow-up reports could be withheld in their entirety on the ground that they fall within the exception regarding intra-agency materials, §87(2)(g). 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.).

I am unfamiliar with the contents of the records at issue. Nevertheless, it is doubtful every aspect of every record falling within the scope of the request could justifiably be withheld.

The first ground for denial cited by the Department, §87(2)(b), permits an agency to withhold records insofar as disclosure would constitute "an unwarranted invasion of personal privacy." In many instances, names or other personally identifying details can be deleted from records otherwise available in whole or in part to protect personal privacy. In those instances, I believe that the Department was required by law to do so.

The same obligation exists in connection with the assertion of §87(2)(e)(iii), which authorizes an agency to withhold records compiled for law enforcement purposes which if disclosed would "identify a confidential source or disclose confidential information relating to a criminal investigation." It seems unlikely that every record relating to the investigation of a "neighborhood action committee" would involve a confidential source or "confidential" information relating to a criminal matter. Again, even if some elements of the records could properly be withheld under the cited provision, the remainder must be disclosed in accordance with the requirements of the Freedom of Information Law.

The remaining ground for denial cited by the Department, §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 that exception, the Court in Gould 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, the agency could not claim that the reports at issue could be withheld in their entirety on the ground that they constitute intra-agency materials. Insofar as the records sought consist of statistical or factual information, or any of the other items required to be disclosed pursuant to §87(2)(g) (i.e., final agency determinations), I believe that they must be disclosed, except to the extent that paragraphs (b) or (e)(iii) of §87(2) may justifiably be invoked.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, and to reduce the possibility of resort to litigation, copies of this response will be sent to Department officials.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Alain Bourgeois
Elyse G. Hirschorn
Paul Moses

STATE OF NEW YORK
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December 29, 1998

Robert N. Brower, Chair
Local Government Advisory Committee
NYSGIS Coordinating Body
Cayuga County Planning Board
County Office Building
160 Genesee Street
Auburn, NY 13021

Dear Mr. Brower:

I have received your thoughtful letter of December 12. In your capacity as a member of both the New York State GIS Coordinating Body and the GIS Local Government Advisory Committee, you described a series of opportunities and emerging issues associated with the development and proliferation of GIS technology. In an effort to facilitate the work of the entities that you represent, you have sought guidance concerning the relationship between GIS and the Freedom of Information Law.

In this regard, as you aware, legislation has been developed to overcome what some have characterized as impediments to the development of GIS presented by the Freedom of Information Law. If the legislation is enacted, I believe that the many of the problems expressed by the GIS community will be overcome. Nevertheless, it is emphasized that nothing in the legislation alters either rights of access to records or conversely, the ability to withhold records. To provide perspective with respect to the operation of the Freedom of Information Law, I offer the following comments.

First, as you are likely 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, all entities of state and local government in New York constitute "agencies" subject to the Freedom of Information Law.

Second, §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."

In view of 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 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. 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)].

Additionally, 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. I point out that there are numerous situations in which some aspects of a record are public, while others fall within an exception. In those instances, the agency is required to review the record in its entirety to identify those portions that may be withheld and to disclose the remainder.

Next, it is emphasized that the courts have consistently interpreted the Freedom of Information Law in a manner that fosters maximum access. As stated by the Court of Appeals, the State's highest court, nearly two decades ago:

> "To be sure, the balance is presumptively struck in favor of disclosure, but in eight specific, narrowly constructed instances where the governmental agency convincingly demonstrates its need, disclosure will not be ordered (Public Officers Law, section 87, subd 2). Thus, the agency does not have *carte blanche* to withhold any information it pleases. Rather, it is required to articulate particularized and specific justification and, if necessary, submit the requested materials to the courts for *in camera* inspection, to exempt its records from disclosure (see Church of Scientology of N.Y. v. State of New York, 46 NY 2d 906, 908). Only where the material requested falls squarely within the ambit of one of these statutory exemptions may disclosure be withheld" [Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)]."

In another decision rendered by the Court of Appeals, it was held that:

> "Exemptions are to be narrowly construed to provide maximum access, and the agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption by articulating a particularized and specific justification for denying access" [Capital Newspapers v. Burns, 67 NY 2d 562, 566 (1986); see also, Farbman & Sons v. New York City, 62 NY 2d 75, 80 (1984); and Fink v. Lefkowitz, 47 NY 2d 567, 571 (1979)].

In the same decision, in a statement regarding the intent and utility of the Freedom of Information Law, it was found that:

> "The Freedom of Information Law expresses this State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies (see, Matter of Farbman & Sons v New York City Health and Hosps. Corp., 62 NY 2d 75, 79). The statute, enacted in furtherance of the public's vested and inherent 'right to know', affords all citizens the means to obtain information concerning the day-to-day functioning of State and local government thus providing the electorate with sufficient information 'to make intelligent, informed choices with respect to both the direction and scope of governmental activities' and with an effective tool for exposing waste, negligence and abuse on the part of government officers" (id., 565-566).

In my view, several of the grounds for denial may be pertinent to agencies that maintain a GIS.

Section 87(2)(b) permits an agency to withhold records to the extent that disclosure would constitute "an unwarranted invasion of personal privacy." While that standard is flexible and subject to interpretation, it is clear that personal information of an intimate nature may be withheld. For instance, if a GIS includes medical or health related information, and if disclosure would make an individual's identity known or easily traceable, that kind of data, in my view, could justifiably be withheld. Similarly, in the context of public assistance or other programs in which there is an income qualification, if the data is such that individuals could be identified by income level, disclosure would likely result in an unwarranted invasion of personal privacy. In those kinds of situations, "layers" of data might justifiably be withheld.

Section 87(2)(d) states that an agency may withhold records or portions thereof that:

> "are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial

> enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise..."

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 the effect of disclosure upon the competitive position of the entity to which the records relate.

There are relatively few judicial decisions that have dealt with the application of §87(2)(d). Typically, the proper assertion of §87(2)(d) has pertained to information, i.e., computer models, that involved a significant amount of time and money on the part of a commercial entity to develop (see Belth v. Insurance Department, 406 NYS 2d 649, NYLJ, January 9, 1978) or other records that have commercial value to competitors. 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; see also 104 NY Jur 2d 234).

A GIS might include data acquired from a private entity, such as a power company or a telephone company, for example, that would fall within the "trade secret" exception.

That exception might also be significant in another context. If an agency has acquired software, for example, from a private entity, and the software is licensed or copyrighted, reproduction of the copyrighted material without the consent of the copyright holder would likely result in copyright infringement. Further, if reproduction of the software would defeat the purpose of the copyright and cause injury to enterprise that holds the copyright, it is likely in my view that §87(2)(d) of the Freedom of Information Law could validly be asserted.

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 relates 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 key aspect 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.).

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 may 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 software 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.

Next, §87(2)(f) permits an agency to withhold records to the extent that disclosure "would endanger the life or safety of any person." There are numerous situations potentially in which data stored in a GIS could be withheld to protect public safety or avoid interference with a law enforcement function.

Another provision of possible significance is §87(2)(i), which 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 believe that an access code could justifiably be withheld. On the other hand, if 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.

Lastly, it is becoming increasingly critical to consider the design of information systems used by government in order to provide maximum access to records, while concurrently protecting against disclosure of deniable information. In providing advice and guidance, there has been a need to emphasize that access and privacy, for instance, are not necessarily conflicting values. Rather, I believe that it should be government's goal to interpret the law in a manner that enhances both access and privacy.

There are a variety of instances in which forethought regarding the design of information systems can or could have served the interests of the public and government agencies. For instance, a situation arose in which a request was made for payroll information regarding a municipality's employees, and the information was maintained on a database that includes social security numbers. A social security number clearly may be withheld on the ground that disclosure would constitute an unwarranted invasion of personal privacy. The agency, based upon its existing computer program, contended that it could not reproduce a tape without social security numbers without engaging in reprogramming. If the program had been designed to enable the agency to segregate or delete social security numbers from the remaining aspects of the tape, all of which were public, the public would have been better served and the intent of the law would have been met.

Through the design of information systems that provide appropriate disclosure coupled with the protection of personal privacy, often an agency need only delete certain fields from a database. Once the fields containing protected information are deleted, the database becomes fully public.

In conjunction with the foregoing, the Committee on Open Government has recommended that a new §89(9) be added to the Freedom of Information Law as follows:

> "When records maintained electronically include items of information that would be available under this article, as well as items of information that may be withheld, an agency in designing its information retrieval methods, whenever practicable and reasonable, shall do so in a manner that permits the segregation and retrieval of available items in order to foster maximum public access."

Irrespective of whether the proposal is enacted, it is critical, in my opinion, that agencies consider the content of their electronic information systems with a view toward the Freedom of Information Law. With foresight, their systems can be designed in a manner that fosters maximum access and concurrently protects against disclosure of information that may justifiably be shielded.

I hope that the foregoing will be useful to you and your colleagues. If there are questions, or if you believe that I can be of assistance, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm

cc: Bruce Oswald

STATE OF NEW YORK
DEPARTMENT OF STATE
COMMITTEE ON OPEN GOVERNMENT

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December 29, 1998

Mr. Charles J. Kershner
Executive Editor
Courier Enterprises
P.O. Box 294, 4 Meadow Street
Clinton, NY 13323-0294

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Kershner:

I have received your letter of December 14 in which you requested an advisory opinion concerning the Freedom of Information Law.

According to your letter and a news article, William J. Keiser, III, the New Hartford Town Supervisor, discussed the 1999 Town budget and economic development before the New Hartford Chamber of Commerce on November 19. You wrote that it is your understanding that a full time Town employee served "as an official recording secretary for the Supervisor's remarks, and that those remarks were to be transcribed and made available on request." In response to a request for a record of his address, the Supervisor denied access and indicated that it involved "a non-municipal function for which we have no FOIL obligation."

You have asked whether records of the Supervisor's remarks, "in either rough note or final transcript form, are a matter of public record..." From my perspective, the materials falling within the scope of your request, irrespective of their physical form, are subject to the Freedom of Information Law. In this regard, I offer the following comments.

First and perhaps most importantly, the Freedom of Information Law is applicable 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."

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, irrespective of their origin or function, materials prepared by or for the Supervisor in his capacity as a Town official clearly, in my opinion, constitute "records" as defined by the Freedom of Information Law. That the records were used or prepared in connection with a function sponsored by an entity outside of government is of no significance; since they were prepared by or for an agency official brings them within the coverage of the Freedom of Information Law.

Second, as a general matter, the Freedom of Information Law is based upon a presumption of access. Stated differently, all records of an agency are available, except to the extent that records or portions thereof fall within one or more grounds for denial appearing in §87(2)(a) through (i) of the Law.

If a transcript of the Supervisor's remarks was prepared, I believe that such a document would be available. The content of the transcript was disclosed orally to members of the public and, consequently, none of the grounds for denial would be pertinent. If there is no transcript but rather notes of the Supervisor's remarks taken by the Town employee to whom reference was made earlier, I believe that they would be available for the same reason. I point out, however, that if notes are "rough" or unclear, despite the duty to disclose them, there would be no obligation to explain or add to their contents to clarify their meaning.

In an effort to enhance compliance with and understanding of the Freedom of Information Law, a copy of this response will be sent to Supervisor Keiser.

I hope that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:tt

cc: Hon. William J. Keiser, III, Supervisor